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CONFRONTING STRUCTURAL INEQUALITY IN STATE LABOR LAW

ANDREW ELMORE*

Low-wage workers face a structural problem in seeking to improve their work standards: While companies have substantial labor market power to impose work terms and conditions, workers require affirmative state support to collectively press their workplace demands. But their employers can mobilize private capital and property rights, often with judicial deference, to fend off state intrusions into the workplace. While the National Labor Relations Act aims to resolve this structural problem by protecting the rights of workers to join unions, strike, and collectively bargain, employers, backed by judicial support for managerial prerogatives and property rights, can often leverage NLRA weaknesses and limitations to its scope to prevail in labor contests.

To build union density and political power for low-wage workers who cannot effectively access federal labor rights, such as home health care workers, fast-food workers, and app-based drivers, unions and worker centers seeking to organize these workers have, increasingly, turned to state and local law, instead of or in addition to the NLRA. Groundbreaking state and local economic and racial justice campaigns have expanded labor rights and enabled these workers to participate in state and local labor policymaking to raise their workplace standards. But the turn to state and local government does not avoid the structural problem. Employers reproduce structural inequality in state law, often by dominating state initiatives and legislative processes, in order to limit, nullify, or coopt state and local labor law. The NLRA does not preempt these employer counterstrategies, and federal constitutional challenges to them typically fail because federal courts often view these labor contests as ordinary politics beyond constitutional scrutiny.

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Mapping the structural problem in state and local labor contests underscores the importance of state law to confront it, as shown in recent legal mobilization of state constitutions by unions and worker centers to reduce structural inequality and build countervailing power. Repositioning state labor law as a potential foundation for labor revitalization has practical and theoretical implications for the future of low-wage worker organizing. State labor constitutionalism, and legal and administrative designs that encourage direct worker participation in state sectoral standard-setting and in local labor policymaking, can protect state labor policymaking from employer cooptation and nullification. These prescriptions can contribute to the foundational NLRA purpose of reducing structural inequality by building countervailing power in the states.

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INTRODUCTION

While companies have substantial labor market power to unilaterally impose terms and conditions in the workplace, most individual workers require affirmative state support to collectively press their workplace demands.¹ But employers can often mobilize private capital and property, with judicial deference, to fend off government intrusions into the workplace.² This structural inequality is reproduced in labor law, especially in the deference that courts give to employers to fire employees at will and to exclude union organizers from the workplace.³

The New Deal architects of the National Labor Relations Act (“NLRA”) understood this structural problem as “inequality of bargaining power,” and sought to reduce it through economic democracy, by protecting the rights of workers to join unions, strike, and bargain collectively.⁴ As its New Deal champions understood, labor rights can also strengthen political democracy.⁵ But, despite historic, recent collective bargaining agreements in union-dense industries, the NLRA insufficiently protects collective efforts by low-wage

1. Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 655 (2021); Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, 90 U. CHI. L. REV. 437, 438 (2023).

2. Estlund, *supra* note 1, at 453–54; Hafiz, *supra* note 1, at 653; ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 147 (2015).

3. Julia Louise Tomassetti, *Managerial Prerogative, Property Rights, and Labor Control in Employment Status Disputes*, 24 THEORETICAL INQUIRIES L. 180, 181–82 (2023).

4. 29 U.S.C. § 151 (granting labor rights to reduce the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”); *see* Estlund, *supra* note 1, at 437–39 (using the term “labor market power” because the term “bargaining power” is often “misunderstood or misused”); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 762 (1994); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 287 (1978) (explaining that in the 1930s, “business took the Act’s rhetoric of industrial democracy seriously” as limiting managerial prerogatives).

5. Senator Wagner justified the Wagner Act in his public appearances in support of the law “not only to ensure worker economic freedom but [also] to protect our system of ‘democratic self-government.’” Luke Norris, *The Workers’ Constitution*, 87 FORDHAM L. REV. 1459, 1479 (2019).

workers to improve their workplace standards through unionism.⁶ Most workers in the United States report that they would join a union or similar form of organization if they could.⁷ But the NLRA is stunted by its weak enforcement powers, lengthy delays, inability to impose penalties, and other judicially-imposed weaknesses.⁸ The NLRA also excludes many low-wage workers, including agricultural and domestic workers and workers classified as independent contractors, from its protections.⁹ Despite recent, successful union organizing campaigns by low-wage employees in the workplaces of corporate titans like Amazon and Starbucks, few of these historic victories for organized labor have (so far) led to collective bargaining agreements.¹⁰ Meanwhile, private-sector union density in the United States remains at an historic low, and unions are virtually absent in many low-wage sectors.¹¹

6. See Michael Sainato, *US Labor Movement Faces Big Obstacles Despite Surge in Strikes and Union Wins*, GUARDIAN (Oct. 31, 2023), <https://www.theguardian.com/us-news/2023/oct/31/union-labor-win-strike-obstacles>. There is a large literature detailing the NLRA's inadequate protection of labor rights. See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2685–86 (2008) (observing that “most scholars believe that the NLRA is a failed regime”); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983) (concluding that federal labor law has become an “elegant tombstone for a dying institution”).

7. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 20–24 (1999). Current polling indicates that nearly two-thirds of workers in the United States “would support an increase in unionization at their company.” *Most Workers Say Their Salaries Are Lagging Behind Inflation*, CNBC (May 27, 2022, 9:57 AM), <https://www.cnbc.com/2022/05/27/most-workers-say-their-salaries-are-lagging-behind-inflation-cnbcmomentive-workforce-survey-.html>.

8. See Hafiz, *supra* note 1, at 655, 673; JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS* 1–16 (2016); Klare, *supra* note 4, at 265–339. The Supreme Court shortly after passage of the NLRA interpreted it in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), as permitting employers to hire permanent replacements for strikers so long as the strike was not provoked or prolonged by an unfair labor practice. *Id.* at 345–46. By 1941, the Court in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), held that NLRA remedies for unlawful employer discrimination against pro-union employees do not include penalties. *Id.* at 193–94; see Weiler, *supra* note 6, at 1789–93 (criticizing these limitations).

9. The NLRA excludes agricultural and domestic workers, 29 U.S.C. § 152, and by 1947, Congress substantially limited government encouragement of unions in the Taft-Hartley Act, including by extending the NLRA's exclusions to independent contractors and by prohibiting secondary boycotts. 29 U.S.C. § 152(3) (independent contractor exclusion); 29 U.S.C. § 158(b)(4) (secondary boycott restriction).

10. At writing, the national campaign to organize Starbucks workers since 2021 has so far resulted in successful union elections in nearly 400 stores, and an agreement to create a “foundational framework” for bargaining, but no collective bargaining agreements. Daniel Wiessner, *Starbucks Agrees to US Union Organizing 'Framework'*, REUTERS (Feb. 27, 2024, 6:05 PM), <https://www.reuters.com/business/retail-consumer/starbucks-us-union-agree-form-framework-organizing-bargaining-2024-02-27/>.

11. Andrew Elmore, *Labor's New Localism*, 95 S. CAL. L. REV. 253, 296–97 (2022); see LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, *ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS: HOW CORPORATE PRACTICES AND LEGAL CHANGES HAVE UNDERCUT THE ABILITY OF WORKERS TO ORGANIZE AND BARGAIN* 5–6 (2020).

Observers, instead, look for signs of labor renewal from below, exemplified by the Fight for \$15 legal mobilization¹² strategy of lifting wages and other working conditions through state and local labor lawmaking to build collective power for fast-food workers.¹³ These economic and racial justice campaigns seek to overcome weaknesses in federal labor law by leveraging state and local law, instead of or in addition to the NLRA, to build political power and extend the reach of these labor contests beyond the single-workplace campaigns contemplated by labor law.¹⁴

State and local legal mobilization by organized labor to build political and workplace power is not new.¹⁵ But the use of the direct democracy tools of state law—state grants of home rule authority to cities and state voter ballot initiatives in particular—has figured more prominently in recent efforts by organized labor to organize low-wage workers who cannot effectively access federal labor rights. The turn to state and local legal mobilization strategies has fueled important pro-worker policy innovations, such as state and local minimum wage laws and negotiated sectoral standard-setting, in which state and local agencies convene negotiations between worker and employer representatives for minimum work standards in a sector and adopt them as regulations. By diffusing and scaling up these innovations across political boundaries, unions and worker centers have enabled many low-wage workers, from home health care and fast-food workers to app-based drivers, to participate in labor policymaking notwithstanding NLRA weaknesses and exclusions.¹⁶

But this turn to state and local labor policymaking has not resolved the structural problem of successful employer mobilization of private capital and property to fend off government intrusions into the workplace. Instead, employer countermobilization reproduces structural inequality in state law in order to prevail in these labor contests, often by using the same state direct democracy tools as unions and worker centers, or by capturing administrative agencies or countermajoritarian state legislatures. States, to be sure, suffer from many of the same democratic deficits as the federal government, and vary in the extent to which state law and politics can reduce or reproduce structural inequality. But state politics are more polarized, and more

12. By legal mobilization, I mean the mobilization of law in order to achieve a social movement goal. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 13–14 (1994).

13. STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP 232–52 (2019).

14. Elmore, *supra* note 11, at 265–69; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 10 (2016).

15. Scott L. Cummings & Andrew Elmore, *Mobilizable Labor Law*, 99 IND. L.J. 127, 142–80 (2023) (describing emergence of labor localism in Los Angeles in the 1990s as an immigrant worker organizing strategy to build political power and union density in the retail sector).

16. Elmore, *supra* note 11, at 291–301.

vulnerable to capture by private interests, than previously understood. As federal legislative paralysis has shifted major policymaking to state and local governments, the national political parties and their constituent groups have shifted their resources to state and local policymaking.¹⁷ Political parties with minority voter support increasingly maintain majority control of state legislatures through partisan gerrymandering and voting restrictions.¹⁸ Countermajoritarian legislatures facilitate employer mobilization to advance anti-worker policies that lack popular support since these legislators are not electorally accountable for unpopular policymaking.¹⁹

These general trends have profound effects on state labor contests. Businesses can reproduce structural inequality by capturing state legislatures in order to nullify democratically enacted labor legislation sought by unions and worker centers.²⁰ Companies can also reproduce structural inequality by capturing the process of state voter ballot initiatives.²¹ Employers in many recent state labor contests have leveraged state law and politics to (1) dismantle the power of state-regulated unions in right-to-work legislation; (2) nullify democratically enacted labor lawmaking by misleading voters in state initiatives and through gerrymandered state legislatures; (3) establish company-dominated sectoral standard-setting administrative regimes; and (4) block worker access to local lawmaking through state-law preemption.²² These strategies share the common goal of dismantling affirmative state support for collective worker access to state and local labor policymaking. While these strategies are most common in politically conservative states, business interests can capture or coopt legislative and initiative processes in politically liberal states, while unions and worker centers have built considerable countervailing power²³ to engage in labor policymaking by state initiative despite politically conservative, countermajoritarian legislatures.

Mapping the structural skew in state labor law has important normative and theoretical payoffs. First, while I and others have shown the anti-worker

17. JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 8–9 (2022); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1082–83 (2014).

18. GRUMBACH, *supra* note 17, at 12–13.

19. *See id.* at 10–13.

20. *See* ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 1–14, 34–55 (2019) (tracing nullification of state-level workplace rights to policy diffusion of business groups and conservative movement activists).

21. Kate Andrias, *The Perils and Promise of Direct Democracy: Labour Ballot Initiatives in the United States*, 34 KING'S L.J. 260, 283 (2023).

22. *See infra* Part I.

23. I use the term “countervailing power” in the same sense as Andrias and Sachs, as “the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth.” Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551 (2021).

and anti-democratic effects of specific employer counterstrategies in state labor contests,²⁴ this project examines their common goal of reproducing structural inequality in state law. To be sure, not all employer opposition to unions and to pro-worker labor policymaking is anti-worker or anti-democratic. But employer countermobilization that dismantles state protection of collective worker participation in state and local labor policymaking can harm the economic interests and political voice of vulnerable workers and undermine state democratic processes and institutions. Nullifying popular workplace legislation by overwhelming public communication channels with misleading claims in the voter ballot initiative process,²⁵ and by capturing countermajoritarian state legislatures, harms the economic interests of low-wage workers and undermines majority rule.²⁶ State preemption of local labor lawmaking, likewise, subordinates the equality interests of many low-wage workers who are excluded from the NLRA, and of many residents of majority-minority cities, whose political equality hinges on local home rule power.²⁷ Right-to-work legislation

24. Labor law scholars have richly examined right-to-work legislative and constitutional attacks on public sector unions over the past decade and the more recent use of state preemption law to extinguish local labor policymaking. On state right-to-work lawmaking as antidemocratic behavior, see Richard Michael Fischl, “*Running the Government Like A Business*”: *Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 40 (2011). See also Ruben J. Garcia, *Right-to-Work Laws: Ideology and Impact*, 15 ANN. REV. L. & SOC. SCI. 509, 515–16 (2019); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. & EMP. L. 149, 154–64 (2012) (describing elements of right-to-work legislation). Most recently, scholarship about public sector unions has critiqued the Supreme Court’s decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), as an attack on labor rights in the service of corporate power and offered new proposals to address the collective action problem *Janus* creates for public sector unions. See Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821, 1860–75 (2019); Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 677–78 (2019); Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 25; Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1076 (2018). On state preemption law as undermining the democratic promise of local labor lawmaking, see Elmore, *supra* note 11, at 277–85; Olatunde C. A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 INDUS. & LAB. RELS. REV. 1179, 1196 (2021).

25. Veena B. Dubal, *Economic Security & the Regulation of Gig Work in California: From AB5 to Proposition 22*, 13 EUR. LAB. L.J. 51, 64 (2022) (criticizing Proposition 22 as anti-democratic).

26. Miriam Seifter critiques unpopular and unaccountable actions by countermajoritarian legislatures as anti-democratic behavior that undermines majority rule. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735, 1761–64 (2021) (characterizing state legislatures as “typically a state’s least majoritarian branch” because geographic and partisan sorting and gerrymandering often results in state legislatures controlled by minority parties, or in which slight-majority parties become a supermajority).

27. Elmore, *supra* note 11, at 276–91; Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 965–66 (2019). On the underrepresentation of the median voter in state government, see GRUMBACH, *supra* note 17, at 10–13. Urban voters packed in a small number of winner-take-all districts have less representation in state legislatures than rural voters spread out across a larger number of districts. JONATHAN RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 23 (2019).

undermines the capacity of unions to represent low-wage workers in workplaces and in politics,²⁸ just as employer domination of sectoral standard-setting stunts the participation of low-wage workers in democratic forms of labor policymaking.²⁹ Collectively, these countermobilization strategies can sap civil society of associational infrastructure necessary for participatory democracy, and foreclose access to these state and local sites for vulnerable workers.³⁰

Second, by revealing the limited constraints of federal law on employer reproduction of structural inequality in state labor policymaking, this Article underscores the importance of state law that can enable unions and worker centers to build countervailing power to resist it. Employers can nullify or coopt state labor policymaking without courting NLRA preemption.³¹ The overwhelming resource advantage of employer-backed groups in lobbying countermajoritarian legislatures and funding ballot initiatives is largely outside the scope of the First Amendment.³² Most courts dismiss first amendment and equal protection challenges to right-to-work legislation that disfavors unions as ordinary politics.³³ But *state* constitutional law is different in its protections of state democratic institutions, and of labor rights,

28. See Tom VanHeuvelen, *The Right to Work and American Inequality*, 88 AM. SOCIO. REV. 810, 816–18, 839 (2023); Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 25–26 (Princeton Univ. Indus. Rels. Section, Working Paper No. 503, 2005); James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* 11–16 (Nat'l Bureau Econ. Res., Working Paper No. 24259, 2018) (finding that right-to-work legislation reduces union resources to engage in political advocacy). For a discussion of the importance of the NLRA non-domination prohibition for workplace democracy, see Barenberg, *supra* note 4, at 762.

29. See *infra* Part III.B; WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 21 (2022); BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 7, 12–16 (2019); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 23 (2017) (arguing “that the modern regulatory state can serve as a critical vehicle for both expanding democratic agency and checking economic domination”).

30. Seifter, *supra* note 26, at 1735; Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1145 (2023) (“Under conditions of distributional inequality, [civil society associations] can provide the social infrastructure for the expression of preferences unlikely to be captured by campaign spending.”).

31. The NLRA permits states to enact right-to-work laws and to regulate the labor relations of workers excluded from the NLRA and does not preempt laws of general applicability such as state employment law and negotiated sectoral standard-setting regimes. See *infra* Part I.A; 29 U.S.C. § 164(b) (permitting states to enact right-to-work laws).

32. See *infra* Part II.B. As Laura Weinrib explains, the First Amendment accepts a state role for “promoting public debate and in ensuring that the channels of communication . . . remain open” while opposing “government meddling with the message—even when muting privileged voices or amplifying those of the disenfranchised promised to serve the interests of organized labor.” LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 8 (2016); see also *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (Roberts, C.J., concurring).

33. See *infra* Part II.A.

in many states.³⁴ In these states, unions and worker centers have successfully challenged employer countermeasures under state constitutional law on the grounds that they are harmful to vulnerable workers and to state democracy.³⁵ As shown in recent successful state constitutional litigation and a voter ballot initiative constitutionalizing labor rights in Illinois, state labor constitutionalism can require state legislatures to extend labor rights to workers excluded from the NLRA and protect their unions from right-to-work lawmaking.³⁶ State labor constitutionalism in these examples permits unions and worker centers to confront the reproduction of structural inequality in state law as both anti-worker and anti-democratic behavior by building countervailing power for low-wage workers in state law.

The necessity of countervailing power to reduce the threat of structural inequality in state labor law, moreover, has important practical implications for the future of low-wage worker organizing through state and local labor policymaking. Negotiated sectoral standard-setting enables democratic labor policymaking through state agencies, most recently for fast-food workers in California, and for home health care workers in Nevada.³⁷ But it lacks the internal democracy requirements of federal labor law and can be susceptible to employer domination, as transportation network companies have shown in their domination of worker representatives and proposals for company-dominated standard-setting administrative regimes. Embedding transparency and public participation by independent unions, worker centers, and their members in the administrative design of the standard-setting process, this Article urges, can confront employer domination of negotiated sectoral standard-setting through bottom-up accountability without eroding its democratic value.³⁸ Labor lawmaking in many cities, likewise, has been foreclosed by the proliferation of state preemption statutes, often in states with countermajoritarian legislatures. State voter initiatives to reduce partisan gerrymandering and limit state preemption, and integrating local policymaking as a design choice in state labor law, can enable unions and worker centers to rely on cities as a strategic battleground for labor policymaking, and to build political power for low-wage workers excluded from the NLRA.³⁹

34. While newly resurgent, this strategy is rooted in a Progressive Era reform tradition that seeks to protect vulnerable state residents from political domination and state democratic institutions from capture by elites. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 13–15, 109, 114 (2013).

35. See *infra* Part II.B.

36. See *infra* Part III.A.

37. See *infra* Part I.B.

38. See *infra* Part III.B.

39. See *infra* Part III.C.

This descriptive account and its practical and theoretical implications offer several contributions to scholarship about labor and employment law and its intersections with legal mobilization and state and local government literatures. In examining leading types of employer state countermeasures as reproducing structural inequality in state law, this Article bridges the traditional labor law concern about employer domination of the workplace and scholarship prescribing state constitutional law to counter anti-democratic behavior in the states.⁴⁰ It contributes to the burgeoning literature about legal mobilization of state employment statutes⁴¹ by showing how the success of these strategies may hinge on the institutional strength of unions made possible by state labor law reform.⁴² It builds upon law and social movement scholarship calling for law that enables countervailing power by examining recent efforts to build countervailing power as a state-level legal mobilization strategy to confront structural inequality.⁴³ Finally, it contributes to scholarship about the promise and limits of new state-level labor policy innovations by offering administrative designs that can protect negotiated sectoral standard-setting as a source of democratic labor policy formation,⁴⁴ and by proposing state constitutional constraints on, and the

40. See Barenberg, *supra* note 4, at 762; Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) (arguing that state constitutional democratic protections “can help counter antidemocratic behavior”).

41. Benjamin Sachs noted this trend over a decade ago, in which workers “rely[] on employment statutes, not only for the traditional purpose of securing the substantive rights provided by those laws, but also as the legal architecture that facilitates their organizational and collective activity—a legal architecture we conventionally call labor law.” Sachs, *supra* note 6, at 2687. Daniel Galvin argues that, since then, reform efforts by workers and their advocates reflect the “gradual shift from *labor law* to *employment law* as the primary ‘guardian’ of workers’ rights.” Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers’ Rights*, 33 STUD. AM. POL. DEV. 50, 52 (2019). Recent scholarship about the use of state employment law in labor revitalization efforts has focused on negotiated sectoral standard-setting. See Andrias, *supra* note 14, at 52–57; DAVID MADLAND, RE-UNION: HOW BOLD LABOR REFORMS CAN REPAIR, REVITALIZE, AND REUNITE THE UNITED STATES 19–24 (2021).

42. See Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7, 10 (2020).

43. See *infra* Part III; Andrias & Sachs, *supra* note 23, at 558–59.

44. Kate Andrias theorizes from Fight for \$15 experimentation with a New York wage board in 2015 a new form of labor law, “social bargaining,” which positions “unions as political actors representing workers generally,” in tripartite forms of bargaining between employer, worker, and state agency representatives for sector-wide or regional work standards, Andrias, *supra* note 14, at 10, and has also shown its origins in the early wage boards created by the Fair Labor Standards Act during the New Deal. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650–56 (2019). César F. Rosado Marzán observes that recent experiments with wage boards in the United States have delegated too little responsibility and authority to employer and worker representatives to constitute true tripartite workplace governance. César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States*, 90 U. CHI. L. REV. 703, 709 (2023). This Article offers evidence from a home care employment standards board in Nevada that even when a board’s power is only advisory, negotiated sectoral standard-setting can permit workers who are effectively

integration of local policymaking in state labor law notwithstanding, state preemption.⁴⁵

Two caveats are in order. First, while state labor law applies most frequently to *public*-sector employees, my primary focus is low-wage, *private*-sector employees who cannot effectively vindicate labor rights under the NLRA. Although public- and private-sector employees who seek to access state labor law face similar challenges (especially in state right-to-work laws and first amendment challenges to them, as discussed in Part II), the labor rights of public sector employees raise complex legal and political questions outside of the scope of this Article.⁴⁶ Second, this Article should not be taken as an unqualified defense of the democratic value of state processes and state-regulated unions,⁴⁷ or a claim that state labor law is superior to the NLRA. My claim, instead, is that mapping how state law and politics skew structural inequality in labor contests offers important lessons about whether low-wage private-sector workers excluded from the NLRA

excluded from federal labor law to participate in meaningful forms of democratic workplace governance. *See infra* Parts I.B, III.B.

45. These prescriptions contribute to state and local government scholarship critiquing abusive forms of state-law preemption and questioning its democratic legitimacy when enacted by gerrymandered state legislatures. *See* Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385, 1389–90, 1415–16 (2022); Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 346 (2020).

46. Most state collective bargaining laws forbid public sector employees from striking because of the perceived harm of strikes by public-sector employees to the state and disproportionate political power of public sector unions, justifications that, whatever their merit in public-sector workplaces, do not apply to private-sector employees. *See* Michael Finch & Trevor Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573, 1583–84 (1984) (criticizing this view). Many observers have criticized police unions, especially, for exerting great influence over state elections to silence criticism by policed communities of the routine use of violence by police officers. Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1388 (2020). Significant additional constitutional law protections apply to employees of state and local governments that do not extend to the private-sector workplace. *See, e.g.*, *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 109 (3d Cir. 2022) (affirming preliminary injunction of ban on Black Lives Matter messages on public employees' required face masks on first amendment grounds); Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 492–513 (2023) (discussing constitutional protections of academic freedom in public universities).

47. *See* K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, *CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS* 206 (2019) (criticizing democracy reform proposals focused on voter mobilization as “thin forms of civic engagement”); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2799 (2014). Union members can have economic interests that put them at odds with other, or even more, vulnerable groups. *See, e.g.*, Nicole Hong & Matthew Haag, *A Hotel Was Set to Become Affordable Housing. Then the Union Stepped In.*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/12/07/nyregion/new-york-hotel-workers-union.html>.

can improve workplace conditions and build political power through state and local labor policymaking.

This Article proceeds as follows. Part I offers a thick descriptive account of, first, union and worker center mobilization of state collective bargaining and negotiated sectoral standard-setting laws, and state voter initiatives, to build power for home health care workers, fast-food workers, and app-based drivers, and, second, the employer response of nullifying, coopting, or capturing these state institutions and processes. It concludes that the turn to state and local labor law, while advancing the economic interests of vulnerable workers outside of the NLRA, can enable businesses to prevail in these labor contests by reproducing structural inequality in state law. Part II assesses recent first amendment and equal protection challenges to right-to-work lawmaking and state constitutional protections of initiatives against misuse or legislative override. While most courts view these labor contests as ordinary politics and reject federal constitutional challenges on this ground, movement lawyers have fashioned from state constitutional protections of voter initiatives a legal tool to confront employer countermobilization as anti-democratic behavior that harms vulnerable workers. Part III extends this analysis of state legal mobilization to policymaking. First, it examines the protection of labor rights in state constitutions as an approach to confront structural inequality with countervailing power. Second, it explores the implications of this approach in negotiated sectoral standard-setting, which can confront structural inequality with transparency and direct worker, union, and worker center participation. Finally, it proposes reducing the threat of state preemption to labor localism through state constitutional reform, and by integrating localism in the legal design of state labor policymaking.

I. DEMOCRATIC LABOR POLICYMAKING AND STRUCTURAL INEQUALITY IN STATE LABOR LAW

Individual employees are “helpless in dealing with an employer,” because of their economic dependence, and cannot “resist arbitrary and unfair treatment” by the employer.⁴⁸ This quote, from Chief Justice Hughes’s opinion for the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁹ which upheld the constitutionality of the NLRA, is skeptical of the freedom of contract assumption of equal power between employers and employees.⁵⁰ It also links unequal power in the employment relationship to the ability of

48. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

49. 301 U.S. 1 (1937).

50. Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 428 (2020) (contrasting this view with more recent decisions by the Roberts Court, which assumes equality of bargaining power because employees can freely leave employment).

employers to exercise this power arbitrarily, to interfere with, or dominate, their employees.⁵¹ As Chief Justice Hughes reasoned in *Jones & Laughlin*, reducing structural inequality requires state protection of unions, which are “essential to give laborers opportunity to deal on an equality with their employer.”⁵²

But, while federal labor law recognizes unions and protects labor rights, structural inequality remains firmly embedded in federal labor and employment law. It is reproduced in the “presumption of deference” courts give to managerial prerogatives in employment,⁵³ especially in the assumption of employment at-will,⁵⁴ and in the exclusion from the employer’s NLRA duty to bargain of core business decisions outside of the employment contract.⁵⁵ It is also reflected in judicial protection of employer property, both in the course of worker protest⁵⁶ and in the near-absolute right of private employers not subject to a collective bargaining agreement to exclude union organizers from their property.⁵⁷ Employers backed by judicial

51. This concern is closely related to the protection of human freedom from domination in the civic republican sense. In civic republican theory, individuals are “dominated when their access to civic capabilities is dependent on the arbitrary power of others.” Tom O’Shea, *Are Workers Dominated?*, 16 J. ETHICS & SOC. PHIL. 1, 19 (2019); see also PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 110–15 (2012). While civic republican theory focuses on government interference with individual freedom, as philosopher Elizabeth Anderson explains, private-sector workplaces can be considered a “private government,” in which employers have the legal authority to regulate employees’ on- and off-duty conduct and fire them at will. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 38–41 (2017). Such a system is, for Anderson, a private dictatorship that has “arbitrary, unaccountable power over those it governs” in which “the governed are kept out of decision-making as well.” *Id.* at 45. For a discussion about nondomination as a normative basis for labor law, see Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 229 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018).

52. *Jones & Laughlin Steel Corp.*, 301 U.S. at 33 (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)).

53. Estlund, *supra* note 1, at 453–54; see also Tomassetti, *supra* note 3, at 181–82.

54. Hafiz, *supra* note 1, at 654; David Cooper & Lawrence Mishel, *America’s Vast Pay Inequality Is a Story of Unequal Power*, ABA HUM. RTS., Jan. 6, 2023, at 10.

55. Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1135–36 (2019) (arguing that excluding core business decisions out of collective bargaining leaves unions and workers “separated from the seat of true power within their companies”).

56. The Supreme Court recently held, for example, that the NLRA does not preempt employer tort claims against unions alleging a failure to take “reasonable precautions to mitigate” a risk of employer property damage during a strike. *Glacier Nw., Inc. v. Int’l Brotherhood of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1416 (2023).

57. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992) (concluding that employers may bar union organizers from non-union workplaces lacking “unique obstacles” frustrating employee access (quoting *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205–06 n.41 (1978))); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (holding that a state regulation permitting union organizers access to an agricultural employer’s property to solicit union support violates the Takings Clause because it abrogates the growers’ “right to exclude”); see Huq, *supra* note 30, at 1140 (criticizing *Cedar Point* for “assign[ing] real property

support for managerial prerogatives and property rights can often leverage private capital and property to fend off NLRA protections of employees seeking to join unions, strike, and collectively bargain.⁵⁸

The next Section will present the how this structural problem maps onto state and local labor policymaking by unions and worker centers. After explaining the importance of these campaigns for workers (such as home health care workers, fast-food workers, and app-based drivers) who are excluded or effectively excluded from the NLRA, I will detail how employer countermeasures to these campaigns reproduce structural inequality in state law by coopting and nullifying state and local labor policymaking.

A. *The Structural Problem for Workers Excluded or Effectively Excluded from the NLRA*

While NLRA weaknesses erode labor law's capacity to reduce structural inequality for all workers, this structural problem is greatest for the many low-wage workers who are excluded, or effectively excluded, from the NLRA. NLRA exclusions—including the exclusion of agricultural and domestic workers⁵⁹ and app-based workers classified as independent contractors—create vastly unequal terrains in labor contests for workers, particularly those at the bottom of the income scale.⁶⁰ Many millions of low-wage workers are, additionally, not expressly excluded from the NLRA but cannot effectively access its protections. Fast-food employees, for example, are not exempt under the NLRA, but work in a fissured industry in which the vast majority of employees are directly employed by franchisees of the franchisor.⁶¹ Franchise store employees cannot meaningfully bargain under the NLRA if the franchisor, which owns the fast-food brand and often determines all the key aspects of the work relationship, is not a joint employer

owners a constitutional option to bar speech and association by labor” and amplifying “the employer monopoly on political mobilization in physical workplaces”); Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 171–72 (2021) (arguing *Cedar Point* subordinates labor rights in order to preserve “property-based social hierarchies” and relies “on defenses that are themselves incompatible with political equality”).

58. The “dirty war” by Starbucks against organized labor offers a contemporary portrait of how corporate giants can marshal private capital and property to fend off union organizing by low-wage workers, and efforts by the National Labor Relations Board to enforce the NLRA. See Megan K. Stack, *Inside Starbucks’ Dirty War Against Organized Labor*, N.Y. TIMES (July 23, 2023), <https://www.nytimes.com/2023/07/21/opinion/starbucks-union-strikes-labor-movement.html>.

59. 29 U.S.C. § 152(3) (exempting agricultural workers and any individual employed “in the domestic service of any family or person at his home” from the definition of “employees”).

60. See HUM. RTS. WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 175–94 (2000), <https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

61. Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 939 (2018).

with the franchisee who owns the employee's store.⁶² Home health care workers are typically exempt from the NLRA and also work in a fissured occupation in which their work terms are set by the state and their clients or private staffing agencies. App-based drivers, who are classified as independent contractors (and therefore exempt from the NLRA) by Transportation Network Companies ("TNCs"), face a different structural inequality in antitrust law. Antitrust law permits a firm to coordinate its capital and employees to pursue the firm's interests, including opposing pro-worker labor policymaking.⁶³ But app-based drivers may not coordinate their labor activity (such as striking and collective bargaining) if they are appropriately classified as independent contractors under the NLRA, unless they meet "the 'statutory labor exemption' to antitrust liability—or . . . one of the other safe harbors from antitrust liability."⁶⁴

Unions and worker centers organizing workers who are formally or effectively excluded from the NLRA have increasingly sought to overcome these structural inequalities by mobilizing state and local lawmaking.⁶⁵ Fight for \$15, over the past decade, for example, has used local labor lawmaking as an organizing strategy to build local power. Since then, it has scaled up to state-level reform, often through state voter initiatives.⁶⁶ Its state minimum

62. *Id.*; DAVID WEIL, *THE FISSURED WORKPLACE* 131 (2014). Whether franchisors are joint employers under the NLRA is currently an open question. The Board recently rescinded and replaced a narrow Trump-era Board rule for determining joint employer status and reaffirmed that the NLRA considers forms of control in its joint employer test that franchisors often exert in franchise stores, such as reserved control embedded in franchise agreements and franchisor requirements of franchisees that indirectly set the work terms and conditions of franchise store employees. *See Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73946 (Oct. 27, 2023). A federal trial court has recently vacated this rule. *Chamber of Com. of the United States v. NLRB*, No. 6:23-CV-00553, 2024 WL 1161125, at *17 (E.D. Tex. Mar. 18, 2024). Notwithstanding this litigation, whether fast-food franchisors are joint employers is likely to remain unclear. *See Andrew Elmore & Kati L. Griffith, Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1346–55 (2021).

63. Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 583 (2023).

64. Cynthia Estlund & Wilma B. Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP. LAB. L. & POL'Y J. 371, 372 (2021). The Norris-LaGuardia Act exempts bona fide labor disputes from antitrust scrutiny and does not confine the definition of "labor dispute" to "the proximate relation of employer and employee." 29 U.S.C. § 113(c). The First Circuit has held that workers in a bona fide labor organization may engage in concerted activities notwithstanding their classification as independent contractors so long as the labor organization acts in the workers' self-interest and does not coordinate with nonlabor groups. *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 313–14 (1st Cir. 2022). For an argument that app-based drivers and other workers providing their own personal services without significant capital investment can join unions and collectively bargain despite their classification as independent contractors because they fall within the antitrust law labor exemption, see Samuel Estreicher & Jack Samuel, *Labor's Antitrust Immunity for Independent Contractor Workers*, 59 WAKE FOREST L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430183.

65. Andrias, *supra* note 44, at 644–46.

66. Elmore, *supra* note 11, at 303–04.

wage campaigns have lifted the wages of nearly sixteen million workers in the United States, in seven states to \$15 an hour, over twice the current federal \$7.25 minimum wage.⁶⁷ In recent years, unions and worker centers successfully extended state collective bargaining rights to private-sector workers excluded from the NLRA,⁶⁸ and participated in agency-led negotiations for improved work standards in low-wage sectors. In negotiated sectoral standard-setting, state law authorizes administrative agencies to convene negotiations between representatives of employers and employees in particular sectors for minimum sector-wide work standards, and to adopt agreed-to standards as regulations.⁶⁹ App-based drivers, organized in worker centers, have sought to establish a baseline of work standards through state legislation that would classify them as employees.⁷⁰ For these workers, who are exempt from or cannot effectively organize under the NLRA, it is *state law*, not federal, that primarily structures these labor contests.

67. NAT'L EMP. L. PROJECT, IMPACT OF THE FIGHT FOR \$15: \$68 BILLION IN RAISES, 22 MILLION WORKERS 4 (2018); Dominic Rushe, 'Hopefully it Makes History': Fight for \$15 Closes in on Mighty Win for U.S. Workers, GUARDIAN (Feb. 13, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights>.

68. See Hunter Knapp, *Essential, Not Expendable: Protecting the Economic Citizenship of Agricultural Workers*, 93 U. COLO. L. REV. 459, 468 (2022) (discussing state collective bargaining laws that cover agricultural workers in Arizona, California, Kansas, Louisiana, New York, Nebraska, New Jersey, Oregon, Washington, and Wisconsin).

69. The most recent example, Assembly Bill 1228 in California, authorizes the creation of an agency-convened board including fast-food franchisors, franchisees, and employees to negotiate for binding work standards across the fast food sector, subject to agency approval. A.B. 1228, 2023-2024 Reg. Sess. (Cal. 2023). As Cynthia Estlund explains, "sectoral bargaining" is a misleading term for A.B. 1228 and similar state laws because they do not authorize "bargaining" as understood in labor law. Cynthia L. Estlund, *Sectoral Solutions that Work: The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. 539, 544, 565 (forthcoming 2024); see also Sara Slinn, *Workers' Boards: Sectoral Bargaining and Standard-Setting Mechanisms for the New Gilded Age*, 26 EMP. RTS. & EMP. POL'Y J. 191, 193 (2023). In these regimes, representatives do not exclusively represent employers and employees and do not have a duty to bargain as they would in collective bargaining, and any standards representatives agree to are subject to agency approval. But as I explain in Parts I.B and III.B, this form of state policymaking nonetheless creates the possibility of negotiated agreements between employer and employee representatives for binding sector-wide work standards despite the sweeping scope of NLRA preemption. See Slinn, *supra*, at 193 (calling this approach "sectoral standard-setting" to distinguish it from sectoral bargaining). For this reason, I will use the term "negotiated sectoral standard-setting."

70. Whether app-based drivers are independent contractors or employees under the standard control-based test is an open question. Despite many years of litigation, federal courts have not answered whether app-based work, which shares features of independence and control, is appropriately classified as employment. See V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 744-48.

Despite the “unquestionably and remarkably broad” forms of NLRA preemption,⁷¹ state-level labor contestation mostly occurs outside federal labor law.⁷² The NLRA does not preempt state regulation of the collective bargaining of most workers excluded from NLRA protections,⁷³ and the *Parker* immunity doctrine permits states to regulate collective bargaining between companies and workers classified as independent contractors without violating antitrust law.⁷⁴ States, accordingly, can regulate the collective bargaining rights of agricultural and home health care workers, and even app-based drivers classified as independent contractors, despite the legal controversy of whether a collective refusal to work by independent contractors is a restraint of trade under antitrust law.⁷⁵ Unions have a first amendment right to petition government,⁷⁶ and unions and worker centers may lobby for baseline protections higher than federal law because of the savings clauses in these federal work law protections.⁷⁷ As laws of general applicability, these workplace protections do not implicate NLRA preemption.⁷⁸

But shifting the site of labor contests from federal to state labor law has not resolved the structural problem. Employer state countermobilization fends off government regulation by reproducing structural inequality in state law. This trend is not unique to labor law; many areas of public policymaking

71. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1164 (2011). The NLRA preempts state regulation of activities “arguably” protected or prohibited by the NLRA, *San Diego Bldg. Trades Council, Millmen’s Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 246 (1959), and state regulation of conduct intended by the NLRA to be left to private ordering by employers and unions. *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 155 (1976).

72. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 382 (2007) (observing that despite NLRA preemption, “state and local governments are responding to critiques of the NLRA regime and, within the bounds allowed by the federal law, offering emerging alternatives”).

73. *Id.* at 383–85.

74. *See* *Chamber of Com. of the United States v. Seattle*, 890 F.3d 769, 789 (9th Cir. 2018) (discussing *Parker v. Brown*, 317 U.S. 341 (1943), and affirming the power of states to regulate the collective bargaining of independent contractors in striking down municipal collective bargaining law for independent contractors for lack of state supervision).

75. *Id.* For a discussion about why state regulation of the right to collective bargaining for workers excluded from the NLRA is not preempted under *Garmon* or *Machinists*, see Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49, 65–71 (2017).

76. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137–38 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *see* Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 312 (2015).

77. *See, e.g.*, 29 U.S.C. § 218 (permitting higher subfederal minimum wages than the FLSA requires).

78. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754–55 (1985).

have shifted to state governments.⁷⁹ The increasing prominence of states in policy contests has made state governments more partisan, or reflective of national, rather than local, political party interests.⁸⁰ Partisanship also contributes to democratic decline in the states by encouraging political parties to entrench their power by gerrymandering and through voting and civil rights restrictions.⁸¹ Partisan gerrymandering and electoral bias, as Miriam Seifter details, “can lead to outright minority-party control of state legislatures . . . [or] exaggerate majority control, giving bare majorities an inflated margin.”⁸² Countermajoritarian state legislatures contribute to democratic decline by making legislators unaccountable for unpopular decision-making.⁸³

Political scientists studying the erosion of democratic norms in the states emphasize state legislative capture by business interests. The American Legislative Exchange Council (“ALEC”) and affiliated policy and grassroots organizations have developed sophisticated fifty-state strategies to fend off regulation nationally by capturing the state legislative process.⁸⁴ State legislators, who themselves are often part-time with limited staff, are particularly susceptible to capture.⁸⁵ Countermajoritarian legislatures can ignore popular opinion and enact unpopular pro-business legislation since these legislators are not electorally accountable for their policy positions. Companies can also advance their favored positions by capturing the state initiative process, often with state legislative support and an overwhelming resource advantage, without courting first amendment scrutiny.⁸⁶

Business interests have routinely, and often successfully, responded to groundbreaking state and local campaigns by unions and worker centers by reproducing structural inequality in state law. Often using the same direct democracy tools as unions and worker centers, employer-affiliated groups have enacted sweeping anti-worker changes to state labor law, for example:

- *Right-to-Work Lawmaking*: Twenty-six states have enacted right-to-work laws that reduce the power and revenue of private-sector, NLRA-regulated unions by banning “fair

79. GRUMBACH, *supra* note 17, at 38–69 (noting increase of state fiscal activity, federal devolution of public assistance to the states, and increase in overlapping regulation of abortion, civil rights, criminal justice, environment, guns, immigration, and labor, among other policy areas).

80. Bulman-Pozen, *supra* note 17, at 1080; GRUMBACH, *supra* note 17, at 48–54.

81. GRUMBACH, *supra* note 17, at 12–13.

82. Seifter, *supra* note 26, at 1762. Advancing national policy priorities through countermajoritarian state legislatures has become an important strategy of the Republican Party over the past two decades. GRUMBACH, *supra* note 17, at 12–13.

83. Seifter, *supra* note 26, at 1762.

84. HERTEL-FERNANDEZ, *supra* note 20, at 1–19.

85. *Id.* at 9–10.

86. See Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 418–19.

share” agreements requiring employees covered by collective bargaining agreements to reimburse unions for the costs of representation.⁸⁷ States also weaken state-regulated unions by limiting or prohibiting collective bargaining;⁸⁸

- *Company-Dominated Sectoral Standard-Setting*: TNCs have sought to create company-dominated sectoral standard-setting administrative regimes by narrowing the range of standards to set and requiring a supermajority of TNC representatives to approve them, dominating worker representatives and, as a condition of their participation, prohibiting app-based drivers from engaging in concerted protest;⁸⁹
- *State-Law Preemption*: Following Fight for \$15’s successful strategy of raising wage standards across fast-food franchisor brands through local minimum wage ordinances, fast-food franchisors and allies sought sweeping forms of state preemption laws.⁹⁰ State-law preemption now forecloses local minimum wage, sick-pay, and/or other employee benefit ordinances in over half the country;⁹¹ and
- *Legislative Nullification*: Companies have countered democratically enacted state labor and employment legislation by nullifying it, often through the state ballot initiative process. This is most prominently shown in Proposition 22, a \$200 million TNC initiative to exempt app-based drivers from a California law that would classify them as employees.⁹² It passed in 2020 and became a model for TNC legislation in other states.⁹³

87. *Right-To-Work Resources*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/labor-and-employment/right-to-work-resources> (last updated Dec. 19, 2023).

88. See Fischl, *supra* note 24, at 57–58; Malin, *supra* note 24, at 154–64; NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 286–89 (2013). As I will discuss further in Part II, a recent, prominent example is in North Carolina, which banned card-check recognition and dues checkoff agreements between the farmworker union and growers in the state. See N.C. GEN. STAT. § 95-79 (2017).

89. See *infra* Part I.B; see also Estlund & Liebman, *supra* note 64, at 392; Ben Penn & Keshia Clukey, *New York Gig Workers to Get Easy Unionizing Path in Draft Bill*, BLOOMBERG L. (May 21, 2021, 5:03 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X8PBRL8O000000?bna_news_filter=daily-labor-report#jcite; Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, 31 NEW LAB. F. 11 (2022).

90. HUNTER BLAIR ET AL., ECON. POL’Y INST., *PREEMPTING PROGRESS* (2020), <https://files.epi.org/pdf/206974.pdf>.

91. Davidson, *supra* note 27, at 965–66 (2019) (collecting statutes preempting local minimum wage, sick-pay, and other employee benefit ordinances).

92. See *infra* Part I.B, D.

93. Estlund & Liebman, *supra* note 64, at 385–86; Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say. Now, They’re Going National.*, WASH. POST (Nov. 17, 2020), <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/>.

This description of employer groups reproducing structural inequality in state law builds upon political science and law scholarship analyzing these trends in state government. Benjamin Sachs and Daryl Levinson examine right-to-work campaigns as part of a larger trend of political parties gaining electoral advantage by disabling the key constituents of the opposing party, which they call “functional entrenchment.”⁹⁴ Functional entrenchment, this Part will argue, also serves private-sector employer interests in reproducing structural inequality in state government. Catherine Fisk and Deborah Malamud have examined interference by state parties and political figures in local union elections as a violation of the NLRA.⁹⁵ While aligned with their expansive view of labor law and its relationship with democratic institutions and state politics, this Article’s focus is on the *private* capture of state institutions and processes by employer-affiliated groups. This focus also builds on the work of political scientist Alexander Hertel-Fernandez, who traces the growth of state lawmaking dismantling public sector unions and nullifying workplace protections to the alliance of business interests and movement conservatives in capturing the state legislative process.⁹⁶

For clarity, I will present these trends thematically, as (1) state labor laws that regulate unions for workers excluded from the NLRA, which employers have sought to weaken in right-to-work campaigns; (2) state and local negotiated sectoral standard-setting regimes to enable workers to participate in setting work standards across entire sectors through administrative agencies, which employers have sought to coopt by limiting and dominating the administrative standard-setting process; and (3) state voter initiatives and referenda to democratically lift and strengthen work standards, which employers have nullified in misleading initiative campaigns and through countermajoritarian legislative maneuvers.

94. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 403–04 (2015); see also HERTEL-FERNANDEZ, *supra* note 20, at 178–80.

95. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2022–27 (2009). In one high-profile example, threats by Tennessee state legislators that a Volkswagen plant would likely lose state subsidies if employees voted in favor of recognizing the United Auto Workers as their union likely played a role in the union’s election losses in 2019 and 2014. See Stephen J. Silvia, *The United Auto Workers Attempt to Organize Volkswagen Chattanooga*, ILR REV. 601, 605, 613 (2018); Lydia DePillis, *The Volkswagen Case Shows Why American Labor Law Is Broken*, WASH. POST (April 22, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/04/22/the-volkswagen-case-shows-why-american-labor-law-is-broken/> (reporting one state conditioning “a \$300 million incentive package” on the employees voting against union representation).

96. See HERTEL-FERNANDEZ, *supra* note 20, at 1–14, 34–55.

B. State Collective Bargaining Laws

States extend collective bargaining rights to many workers excluded from the NLRA.⁹⁷ The NLRA does not preempt extension of state collective bargaining rights to these workers since their exclusion demonstrates Congress's lack of intent to preempt it.⁹⁸ State collective bargaining laws are most closely associated with state and local government employees (who are excluded from the NLRA), because of the explosive growth of public sector union membership after the 1940s.⁹⁹ But many states extend labor rights to other workers excluded from the NLRA, including home health care, agricultural, and domestic workers.¹⁰⁰ Agricultural workers, who are exempt from the NLRA, for instance, have for decades been covered by state collective bargaining laws in California and a growing number of other states.¹⁰¹ Some states, additionally, extend these labor rights beyond what the NLRA requires, for example requiring voluntary (or card-check) recognition, or a requirement that employers recognize and bargain with a union after a demonstration of majority support through authorization cards.¹⁰²

But the shift from federal to state labor law has not avoided the structural problem. Instead, movement conservatives and business allies have stunted state collective bargaining rights for workers excluded from the NLRA, often through “right-to-work” legislative campaigns. Right-to-work laws typically ban “agency” or “fair share” fees, or requirements in collective bargaining agreements that nonmembers pay unions fees to compensate unions for their representational services, although “right-to-work” can describe any state

97. State collective bargaining laws now regulate roughly the same number of union members as the NLRA. See *Union Members Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 23, 2024), <https://www.bls.gov/news.release/union2.nr0.htm>.

98. See Sachs, *supra* note 72, at 383–85; *United Farm Workers of Am. v. Ariz. Agr. Emp. Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982); *Greene v. Dayton*, 81 F. Supp. 3d 747, 751 (D. Minn. 2015), *aff'd*, 806 F.3d 1146 (8th Cir. 2015). The only occupation that the NLRA intends to leave unregulated by federal or state labor law is supervisors. See *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 662 (1974).

99. The NLRA excludes “any State or political subdivision thereof” as an employer. 29 U.S.C. § 152(2). This “leaves States free to regulate their labor relationships with their public employees.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007); see Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1638–39 (2014) (noting public sector union membership grew tenfold between 1940 and 1970).

100. See Sachs, *supra* note 72, at 383–85.

101. *United Farm Workers of Am.*, 669 F.2d at 1256–57; *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977).

102. See Malin, *supra* note 24, at 152 & n.24 (describing how in the early 2000s, Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts mandated card-check recognition, although New Hampshire later repealed this provision). California now requires card-check recognition for agricultural workers. See A.B. 2183, 2021–2022 Reg. Sess. (Cal. 2022).

lawmaking that limits or nullifies labor rights.¹⁰³ Right-to-work laws have the immediate effect of lowering the proportion of workers who are union members in a state.¹⁰⁴ As sociologist Tom VanHeuvelen explains, the right-to-work movement also serves a longer-term goal of institutionalizing pro-business priorities in state law, which has “contributed to the decline of labor power and the rise of economic inequality” across all right-to-work states.¹⁰⁵

Right-to-work lawmaking began in private-sector workplaces after Congress in 1947 amended the NLRA to expressly permit states to prohibit “membership in a labor organization as a condition of employment” in the state.¹⁰⁶ Twenty-six states currently ban “fair share” fees in private-sector workplaces.¹⁰⁷ Movement conservatives and business allies then pivoted to disabling public sector unions, beginning with state labor law.¹⁰⁸ After Wisconsin sharply curtailed the collective bargaining rights of public sector workers in the state with Act 10 in 2010, by 2011 twelve states modified their labor laws to restrict public sector collective bargaining rights.¹⁰⁹ This strategy culminated in litigation establishing a ban on requiring public sector employees to pay for the costs of union representation, now constitutionalized as a first amendment right to refrain in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.¹¹⁰

As this Section will explain, states have extended collective bargaining rights to home health care workers since the 1990s, and more recently, to app-based drivers. But employer reproduction of structural inequality in state law undermines these efforts.

103. See Malin, *supra* note 24, at 154–64 (describing provisions of right-to-work legislation, e.g., repealing the right to bargain, limiting the scope of bargaining, curtailing interest arbitration, and permitting employers to reopen contracts for fiscal emergencies).

104. JANELLE JONES & HEIDI SHIERHOLZ, ECON. POL’Y INST., RIGHT-TO-WORK IS WRONG FOR MISSOURI 2 (2018) (“5.2 percent of private-sector workers in [right-to-work] states are union members . . . compared with 10.2 percent in non-[right-to-work] states.”).

105. VanHeuvelen, *supra* note 28, at 816–18, 839.

106. 29 U.S.C. § 164(b); see *Sweeney v. Pence*, 767 F.3d 654, 671 (7th Cir. 2014) (interpreting Section 14(b) to include agency fees paid by nonmembers); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 221–25 (2015) (discussing *Sweeney* dissent opinion that this holding requires stretching the term “membership” to include nonmember agency fees, and unions to provide representational services without compensation).

107. *Right-To-Work Resources*, *supra* note 87.

108. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 223–55 (2014).

109. LICHTENSTEIN, *supra* note 88, at 287–88.

110. 138 S. Ct. 2448 (2018). State right-to-work lawmaking supported this litigation strategy. Brushing aside concerns that a constitutional right to refrain would create a “free rider” problem, the U.S. Supreme Court majority in *Janus* assured the public that this was not a problem for the “millions of public employees in the” states that prohibit agency fees. *Id.* at 2466.

1. *Home Health Care Collective Bargaining Laws*

Home health care workers assist older adults and people with disabilities with basic medical and personal care needs in their homes. Home health care is overwhelmingly performed by women, especially Black women and Latinx women,¹¹¹ and is among the lowest-paid work in the United States.¹¹² Home health care workers often fall outside the NLRA definition of “employees” either under the NLRA exclusion of domestic workers or because of their classification as independent contractors by their clients.¹¹³ Most home health care work is publicly-funded, either through Medicare or, most often, through the state-administered Medicaid Home and Community Based Services (“HCBS”) waiver program.¹¹⁴ As in-home care became increasingly paid for by states in the 1990s, organized labor, spearheaded by the Service Employees International Union (“SEIU”), has successfully lobbied many states to permit home health care workers to collectively bargain for work standards through state law.¹¹⁵ Home health care worker union organizing since the 1990s has led to the union membership of nearly one quarter of, or roughly 800,000 of the 3.4 million, home health care workers in the United States.¹¹⁶

111. Ninety percent of home health care workers are women; roughly thirty percent of home health care workers are Black women and nearly one quarter are Latinx women, far greater than these groups’ representation in the labor force. Eileen Appelbaum et al., *Home Health Care: Latinx and Black Women are Overrepresented, but All Women Face Heightened Risk of Poverty*, CTR. FOR ECON. & POL’Y RSCH. (Oct. 27, 2021), <https://cepr.net/home-health-care-latinx-and-black-women-are-overrepresented-but-all-women-face-heightened-risk-of-poverty/>.

112. Home health care workers earn an average of \$14.15 per hour, and under \$9.00 per hour in many states. *Home Health and Personal Care Aides*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> (last visited Apr. 7, 2024).

113. See Sachs, *supra* note 72, at 383–84.

114. While state-funded home health care was a mandatory Medicaid benefit in 1970, only since 1981 could states provide HCBS for individuals who would otherwise require institutional care. Kezia Scales, *Meeting the Integration Mandate: The Implications of Olmstead for the Home Care Workforce*, 27 GEO. J. ON POVERTY L. & POL’Y 261, 267–68 (2020).

115. Sachs, *supra* note 72, at 385–87; Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 446–47 (2014). Medicaid paid for half of care work by the 1990s, and by the 2000s, “was the primary funding source for home health aide jobs.” EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* 10 (2012).

116. See Christopher Brown, *Medicaid Regains Power to Deduct from Home Health Workers’ Pay*, BLOOMBERG L. (May 12, 2022, 11:48 AM), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XALR5KPG000000?bna_news_filter=health-law-and-business#jcite; DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 226 (2004). Home health care worker union organizing in the 1990s built on a foundation of, and existed alongside, non-union domestic and care worker activism in worker centers and in community organizing and welfare rights groups, as well as public sector and health care unionism. BORIS & KLEIN, *supra* note 115, at 15–16, 123–51, 162–86, 192–209.

Opposition to home health care worker unions primarily came from conservative legal movement organizations. In 2012, conservative legal organizations successfully lobbied Michigan state legislators to enact right-to-work laws banning fair share agreements in, and exempting home health care workers from, Michigan’s collective bargaining law.¹¹⁷ Ohio’s Governor followed Michigan in 2015 and rescinded a previous state executive order permitting home health care workers to join state-regulated unions.¹¹⁸ Nationally, the National Right to Work Foundation (“NRWF”) saw in home health care workers’ inclusion in state collective bargaining laws an opportunity to revisit whether required public-sector employee agency fees upheld by the Supreme Court in 1977 in *Abood v. Detroit Board of Education*¹¹⁹ violated the First Amendment.¹²⁰ In *Harris v. Quinn*,¹²¹ the Supreme Court struck down required agency fees for unions representing home health care workers on the ground that *Abood* only applies to “full-fledged public employees,” not to home health care workers primarily controlled by clients who have no bargaining relationship with the union.¹²² *Harris*, because it found *Abood* not to apply, was a temporary setback in the NRWF’s overall litigation strategy. The NRWF and other conservative legal organizations had to wait for *Janus* to overrule *Abood* in 2018. For home health care workers seeking to build collective power, these counterstrategies have had lasting, harmful effects: State collective bargaining law exemptions foreclose state labor law as a source of countervailing power, and *Harris* deprives their unions of needed revenue to organize and represent members.

2. App-Based Driver Collective Bargaining Laws

Current estimates suggest that at least one million workers in the United States perform work as app-based drivers, and that app-based drivers are

117. See MICH. COMP. LAWS § 423.201 (2024) (excluding from state collective bargaining law any employee of “a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in the individual’s private employment”). The Mackinac Center for Public Policy, “a conservative think tank that supports right-to-work legislation and litigation,” Fisk & Malin, *supra* note 24, at 1841, led the 2012 Michigan campaign to exclude home health care workers from state collective bargaining law. See STEPHEN DELIE, MACKINAC CTR. FOR PUB. POL’Y, MEDICAID PAYMENTS SHOULD GO TO CAREGIVERS, NOT TO UNIONS 2 (2022), <https://www.mackinac.org/29689> (describing its role in 2012).

118. Jim Siegel, *No Unions for Workers in Home Health*, COLUMBUS DISPATCH (May 23, 2015, 9:59 AM), <https://www.dispatch.com/story/news/politics/2015/05/23/no-unions-for-workers-in/23681269007/>.

119. 431 U.S. 209 (1977).

120. *Id.* at 221–22; Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 95 WASH. U. L. REV. 1291, 1292–93 (2018).

121. 573 U.S. 616 (2014).

122. *Id.* at 645–47.

disproportionately Black and low-income.¹²³ Uber, Lyft, and other TNCs have sought to protect their classification of their app-based drivers as independent contractors. This would exempt TNCs from most employment law liabilities and employer tax obligations. But if app-based drivers are appropriately classified as independent contractors, states can regulate collective bargaining between TNCs and app-based drivers without courting NLRA preemption or, under *Parker* state immunity, antitrust law scrutiny.¹²⁴ Local experimentation began in Seattle in 2015, which enacted a collective bargaining ordinance for app-based drivers modeled on the NLRA.¹²⁵ The Ninth Circuit found that the ordinance lacked the necessary supervision by the state, since Washington did not expressly permit local collective bargaining laws.¹²⁶ But this ruling left open the possibility of state-supervised collective bargaining laws for app-based drivers.

In states where legislatures would not support an exemption from employment law, TNCs have sought to establish app-based driving as a “third category” of work, through lawmaking that codifies the independent contractor status of app-based drivers while affording them some minimum work standards and permitting them to join a union-affiliated organization for limited representation purposes.¹²⁷ Some local unions have agreed to participate, entering into relationships with Uber that would be prohibited as employer-dominated under the NLRA.¹²⁸ After Seattle established a “Fare Share Plan,” requiring minimum compensation for and limits on deactivation of app-based drivers by TNCs,¹²⁹ the Teamsters local union that supported this ordinance, along with Uber and Lyft, successfully lobbied for these rights

123. Uber and Lyft estimate that in 2020 between one and two million people worked as app-based drivers for them. Berry Campbell, *How Many Uber Drivers Are There?*, RIDESHARE GUY (March 17, 2023), <https://therideshareguy.com/how-many-uber-drivers-are-there/>. The Bureau of Labor Statistics (“BLS”) does not collect data about app-based drivers but did publish data in 2018 about “in-person electronically mediated workers,” which include app-based drivers. *Labor Force Statistics from the Current Population Survey: Electronically Mediated Employment*, U.S. BUREAU OF LAB. STAT. (Sept. 28, 2018), <https://www.bls.gov/cps/electronically-mediated-employment.htm>. BLS reports that, in 2018, Black workers accounted for twenty-three percent of in-person electronically mediated workers, nearly double their share of overall employment of twelve percent. *Id.* According to one estimate, after accounting for the costs of self-employment and TNC fees, app-based drivers earn on average \$9.21 an hour, less than the minimum wage in many states. See LAWRENCE MISHEL, ECON. POL’Y INST., *UBER AND THE LABOR MARKET 2* (2018).

124. Estlund & Liebman, *supra* note 64, at 385.

125. *Id.* at 390–91.

126. Chamber of Com. of the United States v. City of Seattle, 890 F.3d 769, 789 (9th Cir. 2018).

127. Estlund & Liebman, *supra* note 64, at 405–06.

128. 29 U.S.C. § 158(a)(2) (prohibiting employers from “dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribute financial or other support to it”); see E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 88 (1993); Electromation, Inc., 309 N.L.R.B. 990 (1992).

129. Estlund & Liebman, *supra* note 64, at 403–04.

in Washington in 2022. In return for independent contractor status and preemption of local laws regulating app-based drivers, the Washington law provides limited rate guarantees and nonprofit “[d]river resource center” representation of drivers whose accounts are deactivated, funded by the TNCs.¹³⁰ In precluding collective bargaining by app-based drivers for terms higher than those already set by state law and limiting the union’s role to representation of individual, deactivated drivers, the Washington law has effectively whittled the concept of unionism to individual—not collective—representation.

Right-to-work lawmaking and the TNC legislative response of replacing collective with individual driver representation by unions are important examples of employer countermobilization that seeks to prevail in labor contests by replicating structural inequality in state law. Workers excluded from the NLRA have built power through state law despite this trend, at times by successfully protecting state and local labor law,¹³¹ and at others by mobilizing employment law to secure card-check recognition from employers as a settlement term,¹³² and by building power outside of unions through other state and local lawmaking, including negotiated sectoral standard-setting.¹³³ But this legal mobilization occurs in a backdrop in which companies can diminish workers’ collective power in state law without a baseline of NLRA labor rights to check employers’ superior labor market power.

130. H.B. 2076 § 1(k), 67th Leg., 2022 Reg. Sess. (Wash. 2022).

131. The current trend is toward state collective bargaining, and away from right-to-work, lawmaking. In March 2023, Michigan repealed its right-to-work law; in 2021, public sector unions defeated right-to-work bills in Montana and New Hampshire; in 2020, Virginia reversed its ban on public sector collective bargaining; and in 2019, Nevada enacted collective bargaining for state employees. *Right-To-Work Resources*, *supra* note 87; Matthew Cunningham-Cook, *How Unions Defeated a “Right-to-Work” Bill in Deep-Red Montana*, INTERCEPT (March 12, 2021, 6:00 AM), <https://theintercept.com/2021/03/12/union-right-to-work-montana/>; John DiStaso, *NH House Rejects, Buries Right-to-Work Bill on Key Roll Call of 199–175*, WMUR (June 3, 2021, 6:30 PM), <https://www.wmur.com/article/nh-house-rejects-buries-right-to-work-bill-on-key-roll-call-of-199-175/36623777>; S.B. 135, 80th Leg., 2019 Reg. Sess. (Nev. 2019); VA. CODE ANN. §§ 40.1–57.2.

132. Even in right-to-work states that do not extend collective bargaining rights by statute, agricultural workers have gained union representation through employment law litigation by making the employer’s voluntary recognition of the union a settlement term. *See, e.g.*, *Farm Lab. Org. Comm. v. Stein*, 56 F.4th 339, 345 (4th Cir. 2022). Mobilizing employment law claims to organize low-wage workers and obtain voluntary (or card-check) recognition agreements from employers is a familiar strategy for unions seeking to avoid employer anti-union hostility and discrimination during an election for a union seeking recognition as a bargaining representative. *See* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 212 (2007); Sachs, *supra* note 6, at 2706.

133. Elmore, *supra* note 11, at 292–93.

C. *Negotiated Sectoral Standard-Setting*

Unions and worker centers, recognizing the structural inequality in the NLRA's framework for enterprise-based collective bargaining at the individual firm level, have recently sought to establish state-created boards within administrative agencies, through which they can negotiate with employer representatives for sectoral, state-level work standards. State laws authorizing negotiated sectoral standard-setting, unlike collective bargaining laws, are laws of general applicability that do not implicate NLRA preemption because the standards are sector-wide, not employer-specific.¹³⁴ Since 2015, after its first, recent, high-profile use by Fight for \$15 in New York, negotiated sectoral standard-setting has primarily grown in tentative steps through cities.¹³⁵ But through successive, larger, and more ambitious experiments, it has taken root for home health care in Nevada and, beginning this year, fast food in California. While currently limited to a handful of states, it appears to be gaining momentum as a state-level policy choice.¹³⁶ At the same time, TNCs have sought to establish company-dominated forms of sectoral standard-setting in New York and Connecticut, as part of a "third category" legislative compromise to classify app-based drivers as independent contractors in return for limited forms of representation by organizations that are dependent on TNCs for their existence.

1. *Nevada Home Care Employment Standards Board*

State-level negotiated sectoral standard-setting has emerged as one plausible approach to reduce structural inequality in the home health care system. Propelled by a level of political power in Nevada that is unusual for a right-to-work state,¹³⁷ organized labor in 2021 successfully lobbied for the

134. Andrias, *supra* note 14, at 89–92 (explaining that administrative regimes that permit employer and worker representatives to negotiate for sectoral work standards, subject to agency approval, like other laws of general applicability, do not "enter[] [into] the field of bargaining" preempted by the NLRA).

135. *Id.* at 63–68 (discussing 2015 New York wage board); SEATTLE, WASH., MUN. CODE § 14.23.030(B) (2018) (creating domestic worker standards board); PHILA., PA., CODE § 9.4500 (2020) (establishing Workers Standards and Implementation Task Force).

136. Aside from these sectors, in the past two years, after enacting agricultural collective bargaining laws, New York and Colorado developed negotiated sectoral standard-setting approaches to establish work standards for agricultural workers, and the Governor of Michigan used a negotiated sectoral standard-setting approach to regulate nursing homes. *See* COLO. REV. STAT. § 8-13.5-205 (2021) (directing establishment of Agricultural Work Advisory Committee); Mich. Exec. Order No. 2021-15 (Dec. 14, 2021) (creating Nursing Home Workforce Stabilization Council); N.Y. LAB. LAW § 674-a (McKinney 2021) (requiring state labor agency to convene New York Farm Laborers Wage Board).

137. *See* Garcia, *supra* note 24, at 515–16. The political power of public-sector unions in Nevada is also shown by passage of S.B. 135, 80th Leg., 2019 Reg. Sess. (Nev. 2019), which, in addition to codifying collective bargaining public sector employees in the state, also responds to *Janus* by

creation of a Home Care Employment Standards Board to negotiate for recommended minimum wage and reimbursement rates, as well as other work standards.¹³⁸ The Board is appointed by the Director of the Department of Health and Human Services (“DHHS Director”), with equal apportionment of three seats each for representatives of employees, employers, and home care recipients, with an additional vote for the state labor commissioner.¹³⁹ The Board, either at the direction of the DHHS Director or a petition by fifty or more home care workers, must investigate and submit a report of its findings and recommendations to the DHHS Director within one year.¹⁴⁰

A review of the meeting minutes of the year-long Board established in 2022 reflects a promising role for negotiated sectoral standard-setting to permit home health care workers to collectively advance their economic interests in state law. While the Board itself is appointed by DHHS and provides recommendations to the agency, representatives of home care workers, clients, and staffing agencies set the agenda items, which roughly tracked what would be considered mandatory issues in collective bargaining (though on a sectoral, rather than enterprise-specific, basis), including pay, required training, safety, and staffing levels.¹⁴¹ Representatives discussed how to spend one-time pandemic-related supplemental reimbursements, who pays for required training, and the appropriate staffing levels for patients with greater safety needs.¹⁴² Because the Board sought to recommend reimbursement and minimum wage rates for approval by the state legislature, employer and employee representatives’ interests were mostly aligned.¹⁴³

requiring direct state reimbursement of unions for the costs of collective bargaining. NEV. REV. STAT. §§ 608.500–608.690 (2021).

138. NEV. REV. STAT. §§ 608.500–608.690 (2021).

139. *Id.* § 608.610(2)(b).

140. *Id.* §§ 608.610–608.640.

141. Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Minutes 10 (Jan. 27, 2022) [hereinafter HCES January 2022 Board Minutes], https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%20Meeting%20Minutes%201-27-2022_approved.pdf (“Action item[s]” include training, funding for multiple home care providers for some consumers, and cultural competency trainings); see *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349–50 (1958); *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 409 (1952).

142. Several 2022 Board members included home care providers for disabled family members and, in one case, a disabled child of a parent who is the home care provider. HCES January 2022 Board Minutes, *supra* note 141, at 1, 4, 5.

143. As one employee representative stated at a meeting to discuss proposed wage and reimbursement rates, “agencies and workers probably need to work together” to obtain adequate funding levels from the state to support wage increases. Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Minutes 13 (June 28, 2022) [hereinafter HCES June 2022 Board Minutes], [https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%206.28.22%20Meeting%20Minutes\(1\).pdf](https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%206.28.22%20Meeting%20Minutes(1).pdf).

The Board ultimately recommended an increase in the Medicaid reimbursement rate for employers in return for the first minimum wage increase for Nevada home care workers in a decade,¹⁴⁴ which the Nevada Governor adopted on October 13, 2022, and included in the state budget.¹⁴⁵ The SEIU local representing home health care workers in Nevada next pressed state legislators to support a minimum wage increase from \$11 to \$16 an hour in the final state budget, which state legislators enacted in June 2023.¹⁴⁶

2. *California Fast Food Council*

Fight for \$15 has also sought negotiated sectoral standard-setting for fast food workers, beginning with the New York Wage Board in 2015, which recommended (and the state adopted) a \$15 minimum wage for fast food workers.¹⁴⁷ In 2022, Fight for \$15 successfully lobbied the California legislature to enact the Fast Food Accountability and Standards Recovery Act (“FAST Act”).¹⁴⁸ The FAST Act (and the current law, California Assembly Bill 1228,¹⁴⁹ which replaced it) has authorized a Fast Food Council, composed of state-appointed representatives: two representatives of the fast food industry, two fast food franchisee representatives, two fast food employee representatives, and two representatives of “advocates for fast food” employees, among others.¹⁵⁰ The Fast Food Council, once formed, conducts a “full review of the adequacy of the minimum fast food restaurant health, safety, and employment standards at least once every three years.”¹⁵¹ The FAST Act was unique among negotiated sectoral standard-setting

144. *Id.* at 12–15; Letter from Cody Phinney, Chair, Home Care Emp. Standards Bd., Nev. Dep’t Health & Hum. Servs., to Richard Whiteley, Director, Nev. Dep’t Health & Hum. Servs. (June 29, 2022) [hereinafter Phinney June 2022 Letter], <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/Recommendation%20to%20Director%20Rates%20and%20Wages.pdf>.

145. Kevin Sheridan, *Nevada Announces New Home Care Funding; Minimum Wage Increase for Field*, ABC 8 KOLO-TV (Oct. 13, 2022, 2:19 PM), <https://www.kolotv.com/2022/10/13/nevada-announces-new-home-care-funding-minimum-wage-increase-field/>.

146. Grace Da Rocha, *Home Care Workers’ Struggle to Ease as Nevada Raises Their Minimum Wage to \$16 an Hour*, LAS VEGAS SUN (June 11, 2023, 2:00 AM), <https://lasvegassun.com/news/2023/jun/11/home-care-workers-struggle-to-ease-as-nevada-raise/>.

147. Andrias, *supra* note 14, at 52–57; N.Y. LAB. LAW § 655(1) (McKinney 1992).

148. A.B. 257, 2021–2022 Reg. Sess. (Cal. 2022).

149. A.B. 1228, 2023–2024 Reg. Sess. (Cal. 2023) (codified at CAL. LAB. CODE §§ 1474–1476 (2024)).

150. CAL. LAB. CODE 1475(a)(1) (2024). The current law additionally appoints two state representatives as non-voting members and an “unaffiliated member of the public” as a voting member. *Id.* § 1475(a). The Assembly Speaker and Senate Committee on Rules now appoint the fast-food employee advocates, and all others are appointed by the Governor. *Id.* § 1475(a)(3).

151. *Id.* § 1475(g).

approaches in authorizing the Fast Food Council to directly regulate the workplace conditions of fast-food stores in the state, without the need for agency approval, and in permitting local councils to recommend local standards for the Council to adopt in state labor law.¹⁵²

However, even after legislative approval, the future of the Fast Food Council remained in doubt when fast-food franchisors announced a campaign to nullify the FAST Act by referendum. This was eventually resolved by a legislative compromise, California Assembly Bill 1228.¹⁵³ Enacted in September 2023, Assembly Bill 1228 establishes a state \$20 minimum wage for fast-food workers and permits the state to convene a Fast Food Council, in return for appointing an additional “unaffiliated member of the public,” removing local councils, conditioning its regulatory authority on the state workforce agency finding that the proposed standard is consistent with its mandate, and rescinding a separate requirement making franchisors joint employers under state law.¹⁵⁴ But the Council’s broad mandate survived, to develop minimum standards for “wages, conditions affecting fast food restaurant employees’ health and safety, security in the workplace, the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace.”¹⁵⁵ The Fast Food Council convened its first meeting in March 2024.¹⁵⁶

3. *Employer-Dominated Sectoral Standard-Setting Proposals by Transportation Network Companies (“TNCs”)*

TNCs have sought to codify the independent contractor status of their drivers in return for employer-dominated forms of sectoral standard-setting legislation in New York and Connecticut, but at writing only Connecticut has introduced a bill seeking this arrangement.¹⁵⁷ It would direct the State Board of Labor Relations to create an “industry council” of TNCs and app-based

152. *Id.* § 1471(d)(1)(a) (authorizing Fast Food Council to “promulgate minimum fast food restaurant employment standards”); *id.* § 1471(i) (permitting cities and counties to “establish a Local Fast Food Council”).

153. Shortly after enactment, franchisors obtained sufficient voter signatures to qualify a referendum to nullify the FAST Act in 2024. Kurtis Lee, *California Voters to Decide on Regulating Fast-Food Industry*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/business/economy/california-fast-food-workers.html>.

154. CAL. LAB. CODE § 1475 (2024); Mathew Miranda, *California Lawmakers Pass Bill to Create Fast Food Council and Raise Minimum Wage to \$20*, SACRAMENTO BEE, <https://www.sacbee.com/news/politics-government/capitol-alert/article279266414.html> (Sept. 15, 2023, 2:46 PM).

155. CAL. LAB. CODE § 1474(h) (2024); *see id.* § 1475(b).

156. Cal. Dep’t of Indus. Rels., AB 1228—Fast Food Council Meeting Recording (March 15, 2024), <https://videobookcase.org/ca-dir/fast-food-council/2024-03-15/>.

157. S.B. 1000, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021), <https://www.cga.ct.gov/2021/TOB/S/PDF/2021SB-01000-R00-SB.PDF>.

driver representatives, which the bill calls “unions,” and to certify these “unions” as the exclusive representative of app-based drivers in negotiated sectoral standard-setting based on proof of interest by a threshold of ten percent of app-based drivers and subsequent election by a majority of app-based drivers.¹⁵⁸ Industry council members would make “collectively negotiated recommendations” for approval by the Board.¹⁵⁹ New York’s 2021 proposal, which was never introduced, would have largely tracked the Connecticut bill, with a more limited scope and a prohibition on concerted protest by workers during industry council bargaining.¹⁶⁰

These proposals failed, however, because of internal disagreement within organized labor.¹⁶¹ For organized labor, a concession of independent contractor status would derail efforts to classify app-based drivers as employees and could pave the way for other businesses looking to lower labor costs to categorize their workers as independent contractors excluded from the protections of labor and employment laws. And practically, administrative regimes that permit employers to dominate sectoral standard-setting can codify a weak, top-down form of company unionism.¹⁶² Perhaps for these reasons, national unions have opposed these TNCs’ efforts at legislative compromise. As discussed in the next Section, TNCs as a result have increasingly turned to state voter ballot initiatives to bypass state legislatures and codify their drivers’ independent contractor status by popular vote.

The turn to state and local negotiated sectoral standard-setting to reduce structural inequality, as with the Home Care Employment Standards Board in Nevada and the Fast Food Council in California, has shown promise in enabling low-wage workers to participate in policymaking for sector-wide improvements to workplace conditions. But the failed TNC proposals complicate this picture. As in the TNC campaigns, employers eager to fend off government intrusion in the workplace can instead coopt sectoral standard-setting, which is “unconstrained by the NLRA model,” by dominating the process.¹⁶³

158. *Id.* §§ 1(7), 1(12), 2(c)–(e).

159. *Id.* § 3(a); see Estlund & Liebman, *supra* note 64, at 396 (discussing the Connecticut bill).

160. See Penn & Clukey, *supra* note 89.

161. Estlund & Liebman, *supra* note 64, at 397–98.

162. As Kate Andrias, Mike Firestone, and Benjamin Sachs observed at the time, “this is not a process meant to allow workers to build real collective power by organizing a democratic and autonomous union.” Kate Andrias, Mike Firestone & Benjamin Sachs, *Lawmakers Should Oppose New York’s Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism*, ONLABOR (May 26, 2021), <https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/>.

163. Estlund & Liebman, *supra* note 64, at 392–93, 395. I will return to this theme *infra* Part III.B.

D. State Voter Referenda and Initiatives

Roughly half of state constitutions provide that voters may initiate legislation or constitutional amendments, either by legislative approval or directly by majority vote.¹⁶⁴ Voter-approved referenda and initiatives are intended “as a popular withholding of power from the legislature,” and often require a legislative supermajority to override and are not subject to gubernatorial veto.¹⁶⁵

Use of state ballot initiatives to codify workplace protections in state law became a second-generation strategy of Fight for \$15 after its first, successful strategy beginning in 2012 of raising work standards through local lawmaking in cities. After dozens of successful city-level campaigns for higher local minimum wages, state legislatures enacted model preemption statutes advanced by fast-food franchisors and allies that extinguished local authority to enact minimum wage ordinances in fourteen states and paid leave ordinances in twenty states.¹⁶⁶

In response, unions and worker centers have sought to overcome state preemption statutes with direct appeals to voters (while avoiding direct confrontations with individual employers) to enact politically popular minimum workplace standards.¹⁶⁷ This is especially the case in states that permit amendment to state constitutions by popular ballot initiative. In 2020 Fight for \$15 demonstrated the strategic use of initiatives to overcome state preemption in Florida with Amendment 2, which established a \$15 minimum wage in the Florida Constitution.¹⁶⁸ Fight for \$15 state-level campaigns have raised the minimum wage in eight states to \$15 or more in all or part of the state, over twice the current federal \$7.25 minimum wage.¹⁶⁹

164. Bulman-Pozen & Seifter, *supra* note 40, at 876.

165. *Id.* at 877; *see also* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1350 (1985); SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 982–84 (5th ed. 2016) (explaining that initiatives can counterbalance the anti-participatory nature of the state legislative process).

166. *See Workers’ Rights Preemption in the U.S.*, ECON. POL’Y INST., <https://www.epi.org/preemption-map/> (last updated Feb. 2024). I will return to the future of labor localism in an era of widespread state-law preemption in Part III.C.

167. Elmore, *supra* note 11, at 303–04. Most Americans support lawmaking requiring a \$15 minimum wage and paid parental, family, and medical leave, for example. *See* Amina Dunn, *Most Americans Support a \$15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/short-reads/2021/04/22/most-americans-support-a-15-federal-minimum-wage/>; Eleanor Mueller & Olivia Olander, *Paid Leave Support Up Ahead of ’24*, POLITICO (Nov. 27, 2023, 10:00 AM), <https://www.politico.com/newsletters/weekly-shift/2023/11/27/support-for-paid-leave-hits-historic-high-00128648> (reporting that “[e]ighty-five percent of voters in battleground states favor paid parental, family and medical leave”).

168. Elmore, *supra* note 11, at 282–83.

169. California, Connecticut, Maryland, Massachusetts, and Washington now have a state minimum hourly wage of at least \$15; Oregon and New York established a \$15 or higher minimum wage in urban areas of the state; and Florida implemented a schedule to raise the minimum wage to

But employer countermobilization also uses initiatives and referenda to reproduce structural inequality by nullifying democratically enacted labor legislation. Proposition 22, sponsored by TNCs in California, is a prominent example. Unions and worker centers in California in 2019 succeeded in persuading the state legislature to enact Assembly Bill 5, which established (in an “ABC test”) a presumption that workers like app-based drivers, who do not operate an independent business separate from their employer, are employees.¹⁷⁰ In 2020, TNCs responded by spending over \$200 million in a state voter initiative, Proposition 22, to nullify their inclusion in Assembly Bill 5 and codify their classification of app-based drivers as independent contractors under state law.¹⁷¹ To garner voter support, TNCs saturated the state with media messages that supporting Proposition 22 would “grant drivers guaranteed earnings and health-care benefits,” while if Proposition 22 failed, “up to 90 percent of gig-work driving jobs could disappear.”¹⁷² This is a misleading claim.¹⁷³ An independent study by economist Michael Reich concluded that inclusion in Assembly Bill 5 would increase app-based driver wages by one-third without causing job losses.¹⁷⁴ App-based drivers mobilized a ‘No’ campaign to “debunk the platform companies’ arguments about flexibility,” and emphasize their exemption from state labor and employment laws in, and the racial justice stakes of, Proposition 22.¹⁷⁵ But the TNC’s’ overwhelming resource advantage dominated the public debate:

\$15 an hour by 2026. Wage & Hour Div., *State Minimum Wage Laws*, U.S. DEP’T OF LAB. (Jan. 1, 2024), <https://www.dol.gov/agencies/whd/minimum-wage/state>; see also Rushe, *supra* note 67.

170. A.B. 5, 2019–2020 Reg. Sess. (Cal. 2019); see *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 315 (Cal. Ct. App. 2020) (concluding that “we have little doubt the Legislature contemplated that those who drive for Uber and Lyft would be treated as employees under the ABC test”), *modified on denial of reh’g* (Nov. 20, 2020).

171. Estlund & Liebman, *supra* note 64, at 385–86; Dubal, *supra* note 25, at 51–65; Siddiqui & Tiku, *supra* note 93. Proposition 22 also requires a *seven-eighths* legislative majority to amend the law or grant future, related protections to app-based drivers. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative (last visited Apr. 8, 2024).

172. Siddiqui & Tiku, *supra* note 93.

173. As Veena Dubal details, while providing for a wage floor during time spent transporting customers and a modest health insurance subsidy, Proposition 22 “legally sanctioned the workers’ independent contractor status, [and] stripped workers of protections owed to them by law,” including a state minimum wage (importantly, requiring reimbursement for driving expenses), overtime, paid sick leave, and workers’ compensation and unemployment insurance benefits. Dubal, *supra* note 25, at 56.

174. Michael Reich, *Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers* 11–16 (Inst. for Rsch. on Lab. & Emp., Working Paper No. 107-20, 2020), <https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf>. While TNCs have offered industry-funded studies that report more negative effects, Reich’s analysis is consistent with other independent studies of the compensation and disemployment effects of classifying app-based drivers as employees. *Id.* at 6–7 (discussing literature review).

175. Andrias, *supra* note 21, at 267.

“40% of those who voted yes on Proposition 22 said their vote was ensuring drivers get a livable wage.”¹⁷⁶ Proposition 22 passed in 2020, spurring TNCs to pursue similar campaigns in other states, notably in Massachusetts.¹⁷⁷ While the Massachusetts Supreme Judicial Court struck down the TNC’s’ first state petition in 2022 for violating state constitutional requirements,¹⁷⁸ that state’s attorney general recently certified a new petition by TNCs, modeled on Proposition 22, for which TNCs have gathered sufficient voter support for the November 2024 ballot.¹⁷⁹

Companies have also sought to fend off union- and worker center-backed initiatives by leveraging countermajoritarian state legislatures. Michigan, for instance, had among the most gerrymandered state legislatures in the nation until an independent commission (created by voter initiative) redrew the state’s political maps in 2021.¹⁸⁰ Before this, the Michigan legislature nullified two 2018 voter petitions that sought to raise the state minimum wage and create a paid sick leave requirement with an “adopt-and-amend” strategy.¹⁸¹ In it, the Michigan legislature accepted the petitions shortly after the election cycle, only to immediately amend them by lowering the wage standards and carving out exceptions for tipped employees and smaller establishments.¹⁸² By nullifying substantive requirements through an unaccountable procedural maneuver, the state legislature successfully

176. Suhauna Hussain et al., *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020, 6:00 AM), <https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-door-dash-won-proposition-22>; see also Dubal, *supra* note 25, at 64 (reporting that “58% of California voters who voted in favour of the proposition may have been misled or misunderstood what they were voting for”).

177. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>.

178. El Koussa v. Att’y Gen., 188 N.E.3d 510, 516–17 (Mass. 2022); see *infra* Part II.B.

179. Nate Raymond, *Dueling Massachusetts Gig Worker Ballot Measures Clear Key Hurdle*, REUTERS (Sept. 6, 2023, 3:31 PM), <https://www.reuters.com/legal/government/dueling-massachusetts-gig-worker-ballot-measures-clear-key-hurdle-2023-09-06/>; Jackie Davalos & Josh Eidelson, *Uber-Backed Group Plots Massachusetts Gig Work Ballot Measure*, BLOOMBERG L. (July 31, 2023, 3:45 PM), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X3M82894000000?bna_news_filter=daily-labor-report#jcite.

180. Nick Corasaniti, *Ungerrymandered: Michigan’s Maps, Independently Drawn, Set Up Fair Fight*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/29/us/politics/michigan-congressional-maps.html>.

181. Colin Jackson, *Michigan Supreme Court to Hear Arguments on ‘Adopt-and-Amend’*, NPR (Dec. 7, 2023, 5:00 AM), <https://www.npr.org/2023/12/07/1217712561/michigan-supreme-court-oral-arguments-adopt-and-amend-minimum-wage>.

182. See *id.* In Michigan, voters may petition the legislature to adopt or reject approved petitions, provided that if the legislature rejects a petition it must submit the proposed law for a popular vote. MICH. CONST. art. 2, § 9. Popular approval in Michigan insulates initiatives from a gubernatorial veto and requires a three-fourths legislative majority to amend. *Id.*

undermined the union's and worker center's legal mobilization strategy of scaling up local policy innovations through state voter initiatives.

E. The Importance of Countervailing Power in State Labor Contests

The turn to legal mobilization of state law by unions and worker centers to build collective power for low-wage workers excluded from the NLRA cannot avoid the structural problem: These workers require affirmative state support to press workplace demands, but their employers can fend off state and local intrusions in the workplace by capturing the state legislative and initiative process in order to nullify and coopt democratic labor policymaking. Employer reproduction of structural inequality in state law, moreover, is not confined to politically conservative states. As detailed in this Part, employers have sought to capture legislative, administrative, and initiative processes in states with many left-leaning voters.

The effectiveness of employer countermobilization by replicating structural inequality in state law underscores the importance of countervailing power to resist it. The home health care union's experiments with state collective bargaining and negotiated sectoral standard-setting in Nevada is instructive in this regard. That union successfully confronted the limitations to state collective bargaining imposed by *Harris* and the fissured nature of the home care employment relationship through negotiated sectoral standard-setting as a means to raise the wages of home health care workers throughout the state. As in state voter ballot initiatives to overcome state preemption of local labor lawmaking, negotiated sectoral standard-setting in Nevada enabled home health care workers to build countervailing power to resist employer strategies to reproduce structural inequality in state law.

Part II will next turn to litigation as a legal mobilization strategy by unions and worker centers to challenge employer reproduction of structural inequality in state law. It will examine federal and state constitutional challenges by unions and worker centers to right-to-work legislation, employer capture of the state initiative process, and legislative nullification of state initiatives. Part III will then turn to state policymaking.

II. FEDERAL AND STATE CONSTITUTIONAL CLAIMS IN STATE LABOR CONTESTS

Unions and worker centers have challenged state lawmaking to dismantle the capacity of unions to represent their members and to nullify and coopt democratic labor lawmaking on federal and state constitutional grounds. The use of state law to restrict employees' ability to join unions and collectively bargain implicates the constitutional guarantees of freedom of

speech and association,¹⁸³ and of equal protection.¹⁸⁴ Many state constitutions, additionally, protect against voter confusion in voter ballot initiatives by limiting initiatives to a single issue,¹⁸⁵ and by prohibiting legislatures from overriding initiatives by adding or removing substantive obligations.¹⁸⁶

This Part assesses these claims as legal mobilization strategies. It concludes that the current mode of first amendment and equal protection analysis used by federal courts discounts most employer counterstrategies as ordinary politics beyond constitutional scrutiny. State constitutional claims, in contrast, can offer an effective platform to challenge employer capture of the state initiative process as anti-democratic behavior that harms vulnerable workers. These claims, to be sure, do not insulate pro-worker state policymaking from employer litigation strategies to entrench structural inequality in constitutional law. But they can offer unions and worker centers a pro-worker, pro-democracy frame to break through employer domination of public communication about state initiatives and build popular support for worker-protective policymaking.

A. *Federal Constitutional Claims*

Federal first amendment and equal protection claims only weakly constrain employer anti-democratic behavior in current state labor contests, despite the historic role of first amendment litigation in protecting labor and civil rights groups from state suppression of picketing and boycotts.¹⁸⁷ Since

183. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Supreme Court found that peaceful picketing during a strike is a matter of public concern protected by the First Amendment. *Id.* at 102; see JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 443–44 (2022) (explaining that the Court in *Thornhill* recognized that union organizing and collective bargaining are “public and political,” rather than merely economic and private).

184. State targeting of vulnerable workers can violate equal protection guarantees in constitutions that apply “heightened scrutiny to laws that single out politically powerless and marginalized groups for differential treatment with respect to important rights.” *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164, 175 (Wash. 2020) (González, J., concurring) (concluding that state overtime agricultural exemption violates state equal protection clause because it “denies an important right to a vulnerable class, and defendants have not demonstrated it serves important governmental objectives”).

185. See, e.g., FLA. CONST. art. XI, § 3 (providing for voter constitutional initiatives, limited to “one subject and matter directly connected therewith”).

186. See Bulman-Pozen & Seifter, *supra* note 40, at 925 (discussing MICH. COMP. LAWS § 168.477 (2018)); see, e.g., *League of Women Voters of Mich. v. Sec’y of State*, 975 N.W.2d 840, 849 (Mich. 2022) (finding that Michigan in 2018 impermissibly imposed a new requirement for ballots that “no more than 15% of the signatures required to invoke direct democracy can be gathered from one congressional district”). State legislatures, however, may limit initiatives in their implementation role. See, e.g. MICH. CONST. art. 2, § 9 (requiring that the state legislature “shall implement” voter initiatives and referenda).

187. Civil liberties activists in the interwar years advanced a constitutional right to picket, boycott, and unionize as free speech rights. WEINRIB, *supra* note 32, at 1–2, 4, 270–328, and

labor rights are not fundamental and union membership is not a suspect class in the U.S. Constitution, most federal courts dismiss first amendment and equal protection challenges to right-to-work legislation as ordinary politics in a rational basis review.

Most first amendment challenges to employer counterstrategies deal with right-to-work lawmaking prohibiting an employer from agreeing with a union to deduct union dues from its payroll. The Seventh Circuit's rejection, in *Wisconsin Educational Association Council v. Walker*,¹⁸⁸ of organized labor's first amendment challenge to Wisconsin's right-to-work legislation, Act 10, displays the limited constraint of the First Amendment on states in disfavoring unions that they oppose. In *Walker*, plaintiff unions sought to show that Act 10's ban on automatic payroll deductions for all public sector employees except for firefighters and police officers unconstitutionally punished these unions because of their viewpoints and endorsements.¹⁸⁹ They offered evidence that state Republican legislators sought to limit the ability of these unions to support Democratic candidates.¹⁹⁰ But, reversing a trial court decision that struck down the ban as viewpoint discrimination, the Seventh Circuit found that a payroll system is a state subsidy, not a speech restriction, and is merely subject to rational basis review.¹⁹¹ Finding that use of the state payroll system has no "inherent connection to a particular viewpoint," it rejected evidence of an intent to harm unions that endorsed the opposing party's presidential candidate as insufficient to show viewpoint discrimination.¹⁹² Courts considering similar challenges have followed *Walker*, finding that unless a union can show that it is a proxy for viewpoint discrimination, offering a state subsidy to some unions but not others is subject to rational basis review.¹⁹³

The Farm Labor Organizing Committee ("FLOC"), a farmworker union in North Carolina, recently found that this deferential mode of analysis also applies to right-to-work legislation targeting private-sector workers. FLOC

boycotts by civil rights groups can be afforded first amendment protection as political speech. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982). But the Supreme Court has since then embraced a value-neutral free speech principle in first amendment jurisprudence, *WEINRIB*, *supra* note 32, at 293, and minimized union-called boycotts as unprotected economic speech even if they raise matters of public concern. *Elmore*, *supra* note 11, at 143–44.

188. 705 F.3d 640 (7th Cir. 2013).

189. *Id.* at 642–43.

190. *Id.* at 645.

191. *Id.*; *see also* S.C. Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257 (4th Cir. 1989); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009) (finding in a free speech analysis that declining to permit use of a payroll deduction system "does not restrict political speech, but rather declines to promote" speech).

192. *Walker*, 705 F.3d at 649–53.

193. *See, e.g., In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015); *Okla. Corrs. Pro. Ass'n v. Doerflinger*, 521 F. App'x 674, 679 (10th Cir. 2013).

challenged a North Carolina statute prohibiting growers from entering into agreements with unions that require the employer to accept card-check recognition or a union dues checkoff for union members.¹⁹⁴ FLOC argued that the state law burdened the freedom of association of itself and its members by impairing timely payment of dues, which is necessary “to organize collectively to achieve safe working environments, fair wages, and meaningful workplace grievance procedures.”¹⁹⁵ But the Fourth Circuit in *FLOC v. Stein*¹⁹⁶ tracked the analysis of *Walker* in rejecting FLOC’s argument that the state singled its members out for discriminatory treatment. While the Court conceded that FLOC is the only farmworker union in the state, the law “treats all farmworker unions and agricultural producers alike.”¹⁹⁷ Noting that loss of payroll deductions might “economically burden” FLOC, the Fourth Circuit nonetheless minimized the constitutional significance of the prohibition because it did not “prevent the union or its members from engaging in speech and therefore was not subject to strict scrutiny review.”¹⁹⁸

Because of this constitutional mode of analysis, equality-based challenges in these cases have failed on similar grounds. The Seventh Circuit in *Walker* rejected the unions’ equal protection challenge to the state’s political favoritism of unions that support Republican legislators because Act 10 did not burden a fundamental right or draw suspect lines, and so withstood rational basis review.¹⁹⁹ While a finding of intentional discrimination based on race can support an equal protection challenge,²⁰⁰ lacking evidence of overt racial animus, courts are reluctant to infer a suspect motive in a state’s past history of discrimination and in the legislative history.²⁰¹ The Fourth Circuit in *FLOC*, using this mode of analysis, found that rational basis review applied to the farmworker union’s equal protection challenge of the North Carolina farmworker right-to-work law, despite, as plaintiffs explained, the starkly segregated hierarchy of the agricultural industry in the state, the fact that nearly all of FLOC’s members and many North Carolina farmworkers cannot vote, the history of racialized

194. *FLOC v. Stein*, 56 F.4th 339, 344–50 (4th Cir. 2022).

195. *Id.* at 345.

196. 56 F.4th 339 (4th Cir. 2022).

197. *Id.* at 350.

198. *Id.* at 350–51.

199. *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 653–67 (7th Cir. 2013).

200. *See, e.g., Lewis v. Governor*, 896 F.3d 1282, 1295–96 (11th Cir. 2018) (finding that allegations in equal protection claim that white state legislators sought to deprive residents of a majority-Black city of “full and equal participation in the social, economic, and political life of the state,” by preempting a local minimum wage ordinance sufficed to allege a discriminatory motive (quoting *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1360 (M.D. Ala. 1986))), *rev’d in part on other grounds on reh’g en banc*, 944 F.3d 1287 (11th Cir. 2019).

201. *See FLOC*, 56 F.4th at 351–53.

exclusions of farmworkers from basic labor protections, and the utter lack of Latinx representation in the legislature that enacted [the law].²⁰²

The Fourth Circuit did not reject these facts; instead, following the same mode of analysis as *Walker*, it disregarded them, given that unions are not a suspect class and that labor rights are not fundamental. Lacking a specific intent by the legislature to discriminate based on race, the Fourth Circuit found a rational basis in avoiding the imposition of “administrative and relational costs on farmers,” by prohibiting collective bargaining agreements that require dues deductions from their payroll.²⁰³

Some courts have, to be sure, have found that the First Amendment can require heightened scrutiny of right-to-work legislation that targets specific unions and their members upon a showing that the “speaker/viewpoint distinction . . . [is] illusory,” or a “façade for viewpoint discrimination.”²⁰⁴ A public teacher’s union recently persuaded a trial court in *Anderson Federation of Teachers v. Rokita*,²⁰⁵ that an Indiana law banning use of a state payroll for automatic dues deduction by a public teacher union is subject to strict scrutiny because it targeted that specific union and its members. The court in *Rokita* distinguished *Walker* on the ground that in Act 10 in Wisconsin, the viewpoints of firefighters and police officers can be discounted as “coincidental.”²⁰⁶ The Indiana law, in targeting public sector teachers and their union, in contrast, “does have an inherent connection to a particular viewpoint—one that has often been in direct conflict with the State’s interests and views on various political issues impacting public education.”²⁰⁷

But *Rokita* is an exception to the general trend of courts ignoring evidence of the state disfavoring specific unions because of their viewpoint. The Sixth Circuit in *Bailey v. Callaghan*²⁰⁸ rejected the distinction offered by the court in *Rokita*, finding that even the state targeting of specific unions and their members for the denial of a subsidy offered to all other unions is viewpoint neutral.²⁰⁹ And even following a *Rokita* analysis, first amendment challenges to right-to-work laws can only plausibly attack restrictions that target specific unions and their members for adverse treatment. The effect of

202. *Id.* at 351.

203. *Id.* at 354.

204. Okla. Corrs. Pro. Ass’n v. Doerflinger, 521 F. App’x 674, 679 (10th Cir. 2013); *see also Walker*, 705 F.3d at 649–54, 664 (considering and rejecting unions’ argument that Act 10 is a “façade” for viewpoint discrimination).

205. 666 F. Supp. 3d 789 (S.D. Ind. 2023).

206. *Id.* at 806 (quoting *Walker*, 705 F.3d at 649).

207. *Id.*

208. 715 F.3d 956 (6th Cir. 2013).

209. *Id.* at 960.

this line of cases is to sap the institutional strength of unions, especially unions that criticize state elected leaders. In states without collective bargaining laws like North Carolina, it permits right-to-work legislation that would sharply restrict freedom of association in unions for agricultural workers and other workers excluded from the NLRA.

For similar reasons, federal law affords litigants with few plausible challenges to employer misuse of state initiatives and referenda. Corporations have a first amendment right to support or oppose a state referendum or initiative,²¹⁰ and courts routinely strike down, on first amendment grounds, state restrictions on the financing of initiative campaigns intended to protect against their domination by wealthy businesses and people.²¹¹ While Voting Rights Act protections apply to claims that state initiatives deny racial minorities equal access to the political process, these claims typically fail even upon a showing of “a deceptive political process,” so long as “minority and non-minority voters had equal access to” it.²¹²

Scholars critical of these trends have proposed a labor constitutionalism that would view labor rights as fundamental to freedom of speech and association, to racial and economic equality, and to “a more democratic and egalitarian political economy.”²¹³ This Section’s conclusion that federal constitutional litigation is a weak constraint on structural inequality should not cast doubt on the strength of this normative claim. Recasting labor rights as essential to reduce racial and economic inequality²¹⁴ and to safeguard free

210. See Briffault, *supra* note 86, at 418–19, 421; *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010).

211. The Supreme Court protects “unfettered campaign communication” rather than political equality and defines “corruption in terms of the favors that donors may obtain from officeholders rather than the undue influence monied interests may have over electoral outcomes.” Briffault, *supra* note 86, at 418–20; *see, e.g., ACLU of Fla. v. Byrd*, 608 F. Supp. 3d 1148, 1156, 1159 (N.D. Fla. 2022) (striking down \$3,000 individual donation limit as burdening associational freedom without any “clear connection between large individual contributions and fraud”).

212. *See, e.g., Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *15–17 (E.D. Mich. Aug. 29, 2006); *see also Welch v. McKenzie*, 765 F.2d 1311, 1316–17 (5th Cir. 1985) (rejecting VRA claim despite “decidedly suspicious” deception of Black voters because of a lack of evidence of “racial motivation or state-created impairment of black votes”). For an argument that the use of state initiatives to roll back civil rights gains reflects a “general defect in the American democratic political process,” *see* Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1262 (2008).

213. Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. L. REV. 985, 1069 (2024); *see, e.g., FISHKIN & FORBATH, supra* note 183, at 16, 479 (calling for a class-conscious “equality-of-opportunity” constitutional tradition to “build a regime of corporate governance that is compatible over the long run with democratic governance”); Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177, 209 (2016) (offering a “social democratic concept” of freedom of association to reconceive of workers “as both political and economic citizens”).

214. For evidence supporting this claim, *see* Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1344–55 (2021);

speech and association is crucial to resist the freedom of contract assumptions often underlying anti-regulatory constitutional theories and judicial deference to employer managerial and property interests.²¹⁵ But to date, this scholarship has not attended to current instances of *state* labor constitutionalism, in which unions and worker centers have mobilized state constitutional law, affirmatively, to build countervailing power. The next Section will assess the legal mobilization of state constitutional claims, and conclude that, despite setbacks and varied outcomes, these claims have had important pro-movement effects.

B. State Constitutional Protections of Initiatives

In addition to constitutional claims grounded in free speech and association and equality, unions and worker centers have also used state constitutional protection of the state ballot initiative as a right that belongs to the people as a legal mobilization strategy. The single-issue rule and constraints on legislative nullification of initiatives in many state constitutions, while narrow and partial protections, can offer an effective platform for unions and worker centers to challenge employer domination of the state voter initiative process as anti-democratic behavior that harms left-leaning voters and vulnerable workers.

Massachusetts and California, the sites of recent high-profile challenges of employer use of initiatives, both constitutionally protect the initiative right with versions of the single-issue rule.²¹⁶ In those states, TNCs sought to codify the exclusion of app-based drivers in those states by initiative, which unions and civil rights groups challenged, with different results. In *El Koussa*

Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSPS. 3, 13, 24 (2020); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 513 (2011) (finding the decline of organized labor accounts for up to a third of growth in inequality); RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7–11 (1984); Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 233 (2021) (explaining that unions can lower white racial resentment and increase white support for policies that benefit African Americans); ECON. POL'Y INST., UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY 1–2 (2021).

215. Andrias, *supra* note 214, at 1062–74 (describing recent employer claims seeking to dismantle labor rights through, e.g., “the Takings Clause, the Supremacy Clause, the private and public nondelegation doctrines, the Dormant Commerce Clause, the Due Process and Equal Protection Clauses,” in addition to property and contract law); *see, e.g.*, *Olson v. California*, 62 F.4th 1206, 1218–20 (9th Cir. 2023) (finding that TNC allegations that state legislators disparaged TNCs and refused to consider exempting their app-based drivers from California’s broad definition of employees while exempting other, similar workers demonstrated sufficient animus to state an equal protection claim), *vacated and reh’g en banc granted*, 88 F.4th 781 (9th Cir. 2023); *Wash. Food Indus. Ass’n & Maplebear, Inc. v. City of Seattle*, 524 P.3d 181, 196–200 (Wash. 2023) (denying motion to dismiss claims that pandemic-era ordinance requiring TNCs to offer premium pay to app-based delivery drivers violated Takings and Contract Clauses).

216. CAL. CONST. art. II, § 8(d); MASS. CONST. art. XLVIII, § 3.

v. Massachusetts,²¹⁷ the companies' petitions included an unrelated provision for tort claims by third-party customers alongside an exemption of app-based drivers from state employment law. The Massachusetts high court held that the initiative was vaguely worded and violated the single-issue rule.²¹⁸ In *Castellanos v. State*,²¹⁹ in contrast, an intermediate court struck down part of Proposition 22 on separation of powers grounds, but upheld most of the initiative, finding that it had a single purpose, to create "a new balance of benefits and obligations for app-based drivers" even as it reached across a number of state labor and employment law statutes to do this.²²⁰

These challenges confronted employer countermeasures as harmful to low-wage workers who are racial minorities and women, and as anti-democratic behavior. In briefing the courts on the single-issue argument in *El Koussa*, organized labor characterized Proposition 22 and the Massachusetts initiative as "a bait and switch fueled by a massive disinformation campaign" to hide the low pay, expenses, and entrenched racial inequity which resulted from the misclassification of app-based drivers.²²¹ A broad range of amici, including civil rights organizations, argued that app-based drivers, who are disproportionately racial minorities and immigrants, would be subject to a subminimum wage without anti-discrimination protections,²²² and deprived of state paid leave for family and medical leave, earned sick time, leave protections for domestic violence, and equal pay, pregnancy, and workplace harassment protections.²²³ This pro-worker, pro-democracy framing was persuasive to the Massachusetts Supreme Court in *El Koussa*, which held that the purpose of the single-issue rule is to restrict wealthy, sophisticated repeat players from taking advantage of the initiative process to bypass the legislature.²²⁴

The trial court in *Castellanos*, likewise, agreed with the framing of the TNC initiative in the complaint that Proposition 22 misled voters into believing that it protects app-based drivers. It found that a provision of Proposition 22 that would restrict the legislature's power to permit app-based drivers to engage in collective bargaining does not promote the interests of workers and "appears only to protect the economic interests of the network companies in having a divided, ununionized workforce, which is not a stated

217. 188 N.E.3d 510 (Mass. 2022).

218. *Id.* at 516.

219. 305 Cal. Rptr. 3d 717 (Cal. Ct. App. 2023), *as modified* (Apr. 12, 2023).

220. *Id.* at 738.

221. Brief for the American Federation of Labor and Congress of Industrial Organizations et al. as Amici Curiae Supporting Appellants at 2, *El Koussa v. Att'y Gen.*, 188 N.E.3d 510 (Mass. 2022) (No. 13237).

222. *Id.* at 15, 30, 33.

223. *Id.* at 15.

224. *El Koussa*, 188 N.E.3d at 522–23.

goal of the legislation.”²²⁵ The *Castellanos* intermediate court reversed on this point, because “voter confusion and logrolling are not standalone bases for invalidating an initiative.”²²⁶ But these arguments were more persuasive for this court in a separation of powers challenge. The court struck down the restriction on future lawmaking about collective bargaining on separation of powers grounds because it purported to restrict the legislature from regulating an area (collective bargaining) that the law itself did not prohibit.²²⁷ *Castellanos* has been appealed.

Worker centers and economic justice organizations in *Mothering Justice v. Nessel* used a similar framing in challenging the Michigan state legislature’s adoption and amendment of minimum wage and paid sick leave voter petitions in order to weaken their requirements.²²⁸ They stressed that this adopt-and-amend legislative maneuver “stymied the will of the citizens who sought to place questions on the ballot . . . [and] evad[ed] any chance that it would be held accountable” by amending the laws just after elections.²²⁹ The trial court agreed, finding that the Michigan legislature, by defeating the initiatives without ever subjecting them to a popular vote, “thwarted the intent of the People and denied them the opportunity to vote on whether they preferred the voter-initiated proposal or the Legislature’s suggested modifications.”²³⁰ But the Michigan intermediate court reversed.²³¹ Since the legislature “has all legislative power unless specifically limited,” and the state’s initiative right did not expressly prohibit it, that court upheld the constitutionality of the legislature’s adopt-and-amend strategy.²³² That case is also on appeal.²³³

These recent challenges to employer countermeasures reveal important pro-movement effects despite their varying outcomes. Social movement literature stresses the importance of law in collective-action frames.²³⁴ Here,

225. *Castellanos v. State*, No. RG21088725, 2021 WL 3730951, at *11 (Cal. Super. Ct. Aug. 20, 2021), *aff’d in part and rev’d in part*, 305 Cal. Rptr. 3d 717 (Cal. Ct. App. 2023), *appeal granted*, 530 P.3d 1129 (2023).

226. *Castellanos v. State*, 305 Cal. Rptr. 3d 717, 741 (Cal. Ct. App. 2023), *as modified* (Apr. 12, 2023), *appeal granted*, 530 P.3d 1129 (2023).

227. *Id.* at 748.

228. No. 21-000095, 2022 WL17548484 (Mich. Ct. Cl. July 19, 2022).

229. Brief for the ACLU of Michigan et al. as Amici Curiae Supporting Appellees at 3, *Mothering Just. v. Att’y Gen.*, No. 362271, 2023 WL 444874 (Mich. Ct. App. Jan. 26, 2023).

230. *Mothering Just.*, 2022 WL17548484, at *24.

231. *Mothering Just. v. Att’y Gen.*, No. 362271, 2023 WL 444874, at *1 (Mich. Ct. App. Jan. 26, 2023), *appeal granted*, 991 N.W.2d 198 (Mich. 2023).

232. *Id.* at *6, 9, 15.

233. *Mothering Just. v. Att’y Gen.*, 991 N.W.2d 198, 198 (Mich. 2023).

234. See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611 (2000). Pro-movement legal claims identify an oppositional “they,” and “a collective identity built around the shared experience of that injustice.” Andrias & Sachs, *supra* note 23, at 591.

cause lawyers, organized labor, and allied civil rights groups framed the TNCs' and Michigan legislature's behavior as harmful to two different collective identities—low-wage workers and left-leaning voters—inviting these groups into a broad coalition to oppose these employer countermeasures. Cause lawyers in these cases successfully persuaded numerous courts, including the Massachusetts high court, to find within technical arguments about the single-issue rule and the legislature's role in initiatives a value-laden one about the threat of misuse of the state initiative right to vulnerable workers and democratic state processes. In so doing, movement lawyers advanced a potent pro-worker, pro-democracy collective-action frame.

While, at writing, *Castellanos* and *Mothering Justice* are on appeal, these intermediate court rulings offer a mixed assessment of state constitutional challenges. The intermediate court in *Mothering Justice* minimized the harmful effects of the adopt-and-amend strategy. The mixed ruling by the intermediate court in *Castellanos* shows that the single-issue rule can be applied in a narrow, technical manner that offers ample room to discount the asserted harms and dismiss them as ordinary politics.²³⁵ *Castellanos* would permit Proposition 22 to exempt app-based drivers from state employment law (but not labor law) if upheld on appeal. *Castellanos* and *Mothering Justice* together caution against an assumption that state courts uniformly view the initiative power as a fundamental right that belongs to the people, the interference of which is subject to heightened scrutiny. Some courts have taken this position, but most have not.²³⁶

Even *El Koussa* is a qualified victory for organized labor, given that TNCs have already announced a new petition in Massachusetts that the state has found satisfies the procedural requirements found wanting in that case.²³⁷ This suggests that even when courts reject initiative petitions on single-issue grounds, this constraint is a speedbump, not a guardrail.

But such a view underestimates the value of state constitutional litigation in advancing social movement goals by mobilizing its constituents and garnering public support, notwithstanding the ultimate legal outcome.²³⁸ *Castellanos* and *Mothering Justice* have raised public awareness of

235. *Mothering Just.*, 2023 WL 444874, at *1.

236. While the Idaho Supreme Court in *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021), found that state interference with the initiative and referendum powers in the state constitution is subject to strict scrutiny because these are fundamental rights reserved to the people, *id.* at 184, most other state courts have upheld limitations on ballot initiatives ranging from requiring that signatures fit on a single sheet of paper (requiring petitioners to use tiny type and gigantic sheets) to striking down the initiative process altogether. See Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 317–18 (2022).

237. Davalos & Eidelson, *supra* note 179.

238. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 1011 (2011).

Proposition 22 and the Michigan legislature's adopt-and-amend strategy as anti-democratic behavior. The plaintiffs in *Castellanos* framed the harms of Proposition 22 in ways that enabled unions and worker centers to anticipate and respond to similar TNC campaigns in other states, such as in Massachusetts. In Michigan, the worker center seeking to abolish the tip credit in the state minimum wage has mobilized its membership through *Mothering Justice*, now at the state supreme court, including by advancing a new petition for a \$15 minimum wage state voter ballot initiative.²³⁹ A legislative strategy is, moreover, now plausible in Michigan after an independent commission redrew its political map to improve the democratic responsiveness of the state legislature.

And in this light, while temporary, *El Koussa* reveals direct pro-movement effects in disrupting TNC capture of the state ballot initiative process. Control over information is a key means by which business interests can dominate the state ballot initiative process.²⁴⁰ *El Koussa* prevented TNCs from launching a Proposition 22-style campaign to exclusively control communication to state residents about its Massachusetts initiative before app-based drivers could effectively mobilize against it. The litigation, while not preventing TNCs from seeking another initiative, afforded the union leading the opposition the opportunity to draft a competing ballot initiative granting app-based drivers collective bargaining rights in Massachusetts.²⁴¹ The state attorney general has certified both petitions for the November 2024 ballot.²⁴² *El Koussa* not only provided defensive cover in this labor contest, but also created a platform for offensive action, offering organized labor the opportunity to advance an alternative vision of state labor law that can reduce structural inequality.

III. CONFRONTING STRUCTURAL INEQUALITY IN STATE LABOR LAW

This Part extends the analysis of the previous Part by shifting the focus from state litigation to policymaking. It begins by highlighting state labor constitutionalism, which aims to reduce structural inequality by protecting pro-worker state labor law from employer countermeasures to limit or nullify it. The remainder of this Part will show the implications of this approach for

239. Byron Tollefson, *What Would a \$15 Minimum Wage Mean for Servers, Restaurants?*, WOODTV (Oct. 23, 2023, 6:12 PM), <https://www.woodtv.com/news/michigan/what-would-a-15-minimum-wage-mean-for-servers-restaurants/>; *Michigan \$15 Minimum Wage Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Michigan_\\$15_Minimum_Wage_Initiative_\(2024\)](https://ballotpedia.org/Michigan_$15_Minimum_Wage_Initiative_(2024)) (last visited May 1, 2024).

240. Andrias, *supra* note 21, at 261 (explaining that while ballot initiatives “can be an important pro-worker and pro-democratic tool,” the initiative process is vulnerable to business capture when employers have “particular control over” the information voters receive about them).

241. Raymond, *supra* note 179.

242. *Id.*

reducing the threats of employer domination of negotiated sectoral standard-setting and of state-law preemption of local labor policymaking.

A. *State Labor Constitutionalism*

State constitutional protection of the fundamental rights to join independent unions, strike, and collectively bargain can enable low-wage workers excluded from the NLRA to build countervailing power in unions, while reducing the threat of employer countermeasures to nullify and limit state labor rights.

While the unsuccessful movement in the interwar years to enshrine labor rights in the federal constitution is well understood,²⁴³ the state constitutional protection of workplace rights is relatively underdiscussed. State constitutions, unlike the U.S. Constitution, have structural features, including the right of the people to regularly amend state constitutions, that are intended to prevent state capture by regional elites.²⁴⁴ Constitutional conventions in dozens of states from the Civil War to the New Deal established state constitutional protections of minimum wages and hours, mechanic's liens, and workers' compensation regimes.²⁴⁵ Organized labor leaders at the time were drawn to state constitutional law, as political scientist Emily Zackin explains, to "facilitate political organizing within their own social movement."²⁴⁶ Specifically, labor reformers sought constitutional labor protections to prod reluctant legislatures to pass worker-protective statutes, while protecting this legal mobilization strategy from constitutional challenges in front of unfriendly courts.²⁴⁷

State constitutional labor rights for private- and public-sector employees, which currently exist in Florida, Hawai'i, Illinois, Missouri, New Jersey, and New York, grew out of this history.²⁴⁸ They have enabled unions

243. Unions during this period challenged antistrike and anti-picketing legislation as intruding upon first and thirteenth amendment protections. *See* WEINRIB, *supra* note 32, at 1–2, 4, 270–328; Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1599–602 (2016); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997).

244. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 860 (2022).

245. ZACKIN, *supra* note 34, at 111; Marshfield, *supra* note 244, at 911.

246. ZACKIN, *supra* note 34, at 109.

247. *Id.* at 109, 123; *see also* Marshfield, *supra* note 244, at 911–15 (finding that nineteenth-century state conventions reflected a "growing popular concern about workers' rights as well as elite capture of state government").

248. *See* FLA. CONST. art. I, § 6 ("The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged."); HAW. CONST. art. XIII; ILL. CONST. art. I, § 25(a) ("Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work."); MO. CONST. art. I, § 29 ("[E]mployees shall have the right to organize and to bargain collectively through

in these states to (1) successfully challenge disfavored treatment in right-to-work lawmaking; and (2) extend unionism as a source of countervailing power to low-wage workers excluded from the NLRA.

Beginning with the first, state labor constitutionalism can serve the defensive role of persuading state courts to invalidate right-to-work lawmaking that targets specific unions for disfavored treatment as a violation of equal protection and employees' labor rights. In Missouri, for example, the legislature in 2018 enacted House Bill No. 1413 ("HB 1413"), which, like Act 10 in Wisconsin, imposed "a myriad of requirements" and restrictions on all unions regulated by state labor law except for "public safety" unions, which the law defined as those that "primarily represent" emergency medical and criminal law enforcement.²⁴⁹ In a state constitutional challenge to the law, *Missouri National Educational Association ("MNEA") v. Missouri Department of Labor and Industrial Relations*,²⁵⁰ the Missouri Supreme Court affirmed the intermediate court's conclusion that HB 1413 violated the state constitution.²⁵¹ Missouri's Supreme Court recognized that the right-to-work law forced employees "to choose between representation by a labor organization saddled with additional restrictions and one without," which logically "creates pressure to join a labor organization exempt from these requirements."²⁵² Unlike *Walker*, the Missouri high court found that even under rational basis review, exempting unions with "51 percent" but not "49 percent public safety employees" from its restrictions was arbitrary,

representatives of their own choosing."); N.J. CONST. art. I, para. 19 ("Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."); N.Y. CONST. art. I, § 17 ("Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."). Other states afford more circumscribed protections, such as prohibiting employment discrimination because of union membership. *See, e.g.*, ARK. CONST. amend. XXXIV, § 1 (prohibiting denial of "employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union"); NEB. CONST. art. XV, § 13 (prohibiting denial of employment because of union membership).

249. *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indus. Rels.*, 623 S.W.3d 585, 591 (Mo. 2021) (citing MO. REV. STAT. § 105.500(8)). Among other requirements, HB 1413 required members to annually authorize dues collection, and required non-exempt unions to prepare "detailed reporting and annual filings," and undergo more rigorous election, certification, and recertification procedures. *Id.* at 589.

250. 623 S.W.3d 585 (Mo. 2021).

251. The lower court found that selectively imposing onerous requirements only on those unions that do not "primarily represent" specific types of employees violates equal protection and interferes with employees' right to make an uncoerced choice about which union will represent them. *Id.* at 587–88; *see also* *Mo. Corr. Officers Ass'n, Inc. v. Mo. Off. of Admin.*, 662 S.W.3d 26, 41 (Mo. Ct. App. 2022) (finding that state constitutional "fundamental right to organize and to bargain collectively" requires a showing that the state's refusal to permit union dues deductions is "narrowly tailored to further a compelling governmental interest").

252. *Mo. Nat'l Educ. Ass'n*, 623 S.W.3d at 591.

irrational, and invalid as violative of equal protection.²⁵³ Where the court in *Walker* dismissed the state's disfavored treatment of unions as ordinary politics, the Missouri Supreme Court in *MNEA* recognized the equality interests of workers excluded from the NLRA to be free from heavy-handed state regulations that prevented them from joining their preferred union.

And second, as a New York intermediate court explained in *Hernandez v. State*,²⁵⁴ state labor constitutionalism can serve an affirmative agenda of requiring states to broadly extend statutory collective bargaining rights to low-wage workers who are often excluded from them. *Hernandez* involved a state constitutional challenge to the exclusion of farmworkers from state collective bargaining law.²⁵⁵ Despite New York's constitutional protection of private-sector employee labor rights,²⁵⁶ its collective bargaining law expressly excluded farmworkers from its coverage.²⁵⁷ In *Hernandez*, farmworkers challenged their exclusion on state constitutional grounds. The court first found that the broad language of the right of all "employees" to join unions and collectively bargain showed that the right is fundamental, requiring the exclusion to survive strict scrutiny.²⁵⁸ Finding that the exclusion was "not narrowly tailored to any compelling state interest," the court struck down the exclusion as unconstitutional.²⁵⁹ Soon after this decision, the state legislature enacted the Farmworker Fair Labor Practices Act, which "provides protections for farmworkers, such as collective bargaining protections, a day of rest, and overtime premiums, among others."²⁶⁰ State courts in Florida and Missouri have upheld similar challenges to exclusions of workers from collective bargaining statutes who are often excluded from the NLRA, such as employees with supervisory responsibilities and graduate students.²⁶¹

253. *Id.* at 593.

254. 99 N.Y.S.3d 795 (N.Y. App. Div. 2019).

255. *Id.* at 108.

256. N.Y. CONST. art. I, § 17.

257. *Hernandez*, 99 N.Y.S.3d at 798–99.

258. *Id.* at 802–03 (holding that state constitutional right to organize and collectively bargain "is a fundamental right, and that any statute impairing this right must withstand strict scrutiny"); see also *George Harms Constr. Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 87 (N.J. 1994) (recognizing that the right to collective bargaining "should be accorded the same stature as other fundamental rights" (internal citations omitted)); *Coastal Fla. Police Benevolent Ass'n v. Williams*, 838 So. 2d 543, 548 (Fla. 2003) (same).

259. *Hernandez*, 99 N.Y.S.3d at 801–03.

260. Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHI.-KENT L. REV. 245, 257 (2020) (discussing Farm Laborers Fair Labor Practices Act, S.B. 6578, 2019–2020 Reg. Sess. (N.Y. 2019) (enacted)).

261. See *Coastal Fla. Police Benevolent Ass'n*, 838 So. 2d at 547, 552 (rejecting argument that deputy sheriffs are "managerial level employees" who cannot engage in collective bargaining); *Coal. of Graduate Workers v. Curators of Univ. of Mo.*, 585 S.W.3d 809, 813–15 (Mo. Ct. App.

In this analysis, state labor constitutionalism can protect unions and their members from adverse treatment in right-to-work lawmaking and prod state legislatures to extend state labor law protections to low-wage workers excluded from the NLRA. The Workers' Rights Amendment, affirmed by Illinois voters as Amendment 1 in 2022, illustrates how a modern state constitutional amendment enables workers excluded from the NLRA to build countervailing power in state labor law. Illinois's Amendment 1, widely supported by organized labor in the state,²⁶² provides that:

Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.²⁶³

Illinois's Amendment 1 goes beyond most other current state constitutional labor protections by expressly declaring that labor rights are fundamental for all workers and prohibiting state and local right-to-work legislation. These express protections leave little ambiguity that state legislatures must include employees excluded from the NLRA in collective bargaining statutes and that courts must apply strict scrutiny to state interference with their labor rights. While the expansive state constitutional labor protections of Illinois's Amendment 1 are most likely in politically liberal states, it is a plausible law reform strategy in all states, including Missouri and Florida, where voters can amend the state constitution by voter initiative. Because constitutional protections are given a broader construction than statutory provisions, labor rights achieved through constitutional law reform are less susceptible to hostile state judicial interpretation and legislative nullification common in these states.²⁶⁴ But, while less vulnerable

2019) (holding that state constitutional labor rights apply to graduate students despite "academic relationship" between students and universities).

262. See Jeff Schuhrke, *Unionizing Is Now a Constitutional Right in Illinois. Here's How It Happened.*, IN THESE TIMES (Nov. 11, 2022), <https://inthesetimes.com/article/illinois-midterm-election-workers-rights-amendment-labor-unions-dsa-constitution>.

263. ILL. CONST. art. I, § 25(a).

264. See *City of Tallahassee v. Pub. Emps. Rels. Comm'n*, 410 So. 2d 487, 491 (Fla. 1981) (finding that the constitutional right to collective bargaining prevents the state legislature from setting pension benefits unilaterally); *State v. Fla. Police Benevolent Ass'n*, 613 So. 2d 415, 419 (Fla. 1992) ("The constitutional right of public employees to collectively bargain . . . guarantee[s]

than statutory reform, popular constitutional reform is not immune to legislative tampering.²⁶⁵

This analysis of state labor constitutionalism as a legal mobilization strategy by unions seeking to organize workers excluded from the NLRA recasts the role of state labor law in literature about the need for law reform to revitalize organized labor in the United States.²⁶⁶ Despite the burgeoning literature about state *employment* law as a potential foundation for labor revitalization,²⁶⁷ state *labor* law receives little attention in this scholarship.²⁶⁸ On its face, this is curious, since state labor law regulates the workplaces of roughly half of union members in the United States.²⁶⁹ But this is for several, good reasons. First, as labor historian Joseph McCartin observes, the dramatic growth of state labor laws for state and local public sector employees after the 1940s did not lead to a labor renewal. He attributes this to the weakness and fragmentation of state labor laws.²⁷⁰ In addition to prohibiting striking, state labor laws often narrowly apply only to state and local employees, sealing off these public sector unions from broader organizing efforts.²⁷¹ Most scholarship about state labor law since that period has focused on judicial and legislative attacks on public sector unions, in the banning of fair share fees in *Janus* and state right-to-work lawmaking.²⁷² And, as Sachs concludes, any consideration of state collective bargaining law

that the right may not be taken away or limited.”). In Missouri, the constitutional right of private-sector employees to join unions effectively erodes the state’s rigid application of the common law at-will doctrine. *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 250, 252–54 (Mo. 1963).

265. A notorious, recent example of this is Amendment 4 in Florida in 2018, a ballot initiative to restore voting rights to individuals with felony convictions. Shortly after Proposition 4 overwhelmingly passed in Florida, state legislators intervened to weaken it by defining a sentence as incomplete until all fines and fees are paid. FLA. STAT. § 98.0751(2)(a) (2023). Nearly a million Florida residents with a felony conviction remain disenfranchised. Ashley Lopez, *Advocates in Florida Clamor for a Fix for the Formerly Incarcerated Who Want to Vote*, NPR (May 4, 2023, 5:01 AM), <https://www.wusf.org/politics-issues/2023-05-04/advocates-in-florida-clamor-for-a-fix-for-the-formerly-incarcerated-who-want-to-vote>.

266. See, e.g., Sharon Block, *Go Big or Go Home: The Case for Clean Slate Labor Law Reform*, 41 BERKELEY J. EMP. & LAB. L. 167, 181–85 (2020).

267. Elmore, *supra* note 11, at 297–99; Sachs, *supra* note 6, at 2687; Galvin, *supra* note 41, at 52; Andrias, *supra* note 14, at 52–57; MADLAND, *supra* note 41, at 19–22.

268. Henry Drummonds proposes state collective bargaining law as an alternative to NLRA reform. See Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL’Y 83, 140–41 (2009).

269. *Union Members Summary*, U.S. BUREAU OF LAB. STATS. (Jan. 23, 2022), <https://www.bls.gov/news.release/union2.nr0.htm>.

270. Most state labor laws do not confer a right to strike to public sector employees, and many states have no collective bargaining laws at all. Joseph A. McCartin, “*A Wagner Act for Public Employees*”: *Labor’s Deferred Dream and the Rise of Conservatism, 1970-1976*, 95 J. AM. HIST. 123, 124 (2008).

271. *Id.*

272. See Fischl, *supra* note 24, at 40–41; Fisk & Malin, *supra* note 24, at 1860–75; Andrias, *supra* note 14, at 25; Sachs, *supra* note 24, at 1076.

innovation “must contend with the doctrine of federal labor preemption.”²⁷³ Given this history, law, and the structural inequalities that state labor law reproduces in many states, state labor law would seem to be a poor foundation for labor renewal.

But viewing state constitutional labor law in the manner of Progressive Era labor reformers, to mobilize pro-movement lawmaking and to protect it from litigation challenges, offers a plausible reassessment. As Zackin explains, Progressive Era labor activists sought constitutional labor rights for organizing purposes, to prod reluctant legislatures by “rally[ing workers] around the constitution.”²⁷⁴ In turn-of-the-century Colorado, for example, that state’s constitutional mandate for an eight-hour day “helped to legitimate labor’s claims about the corruption of the state’s political institutions and served as a banner which labor leaders used to rally miners” after the state legislature failed to pass maximum hours legislation sought by the miner’s union.²⁷⁵ For Zackin, state constitutional law enabled unions to hold *Lochner* Era state legislators accountable for failing to pass worker-protective legislation by removing state constitutional restrictions as an excuse for inaction.²⁷⁶

State labor law, whether originating in state constitutions or statutes, can have pro-movement effects, especially for unions and worker centers seeking to organize workers excluded from the NLRA. Sociologist Moon-Kie Jung’s analysis of the International Longshoreman’s and International Warehousemen’s Union’s (“ILWU”) use of state labor law to organize Hawai’i sugar and pineapple plantation workers in the 1940s offers an example. Hawai’i plantation workers were segregated in the workplace by race, and many were exempt “agricultural” workers under the NLRA.²⁷⁷ ILWU at first organized only workers recognized as employees under the NLRA, while lobbying for passage of Hawaii Employment Relations Act (“HELA”).²⁷⁸ Once ILWU secured HELA’s enactment in 1945, which expansively defines “employee” to include agricultural workers,²⁷⁹ the ILWU effectively organized all workers involved in the plantation economy in the

273. Sachs, *supra* note 71, at 1164.

274. ZACKIN, *supra* note 34, at 141.

275. *Id.* at 142.

276. State constitutional law, of course, would not protect state statutes from federal constitutional claims, but as Zackin explains, at the time state constitutional due process challenges were seen as the more pressing threat. *Id.*

277. MOON-KIE JUNG, REWORKING RACE: THE MAKING OF HAWAII’S INTERRACIAL LABOR MOVEMENT 61–68, 143 (2006).

278. *Id.* at 140–43.

279. *Id.* at 165; HAW. REV. STAT. § 377-1 (2023) (defining employee as “any person, other than an independent contractor, working for another for hire in the State, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise”).

state.²⁸⁰ Hawai'i later constitutionalized the rights of public- and private-sector employees to join unions and collectively bargain,²⁸¹ and currently has the highest union membership rate among the states in the country.²⁸²

This is not to suggest that state labor law was the primary driver of the history of unionism in Hawai'i,²⁸³ or that state labor law can reliably reduce structural inequality.²⁸⁴ Rather, it suggests the enduring importance of labor law for workers seeking to build collective power despite the dominance of employment law as the foundation for workplace rights for most employees in the United States. This analysis contributes to scholarship about the future of low-wage worker organizing by emphasizing the need for state labor law to address the structural problem mapped in Part I. While the legal mobilization of state and local employment law standards can build power for workers who are effectively excluded from federal labor law,²⁸⁵ countervailing power is needed to resist employer efforts to fend off government intrusion. To the extent that this comes from the institutional power of unions,²⁸⁶ legal mobilization strategies centering state *employment* law may depend on state *labor* law reform.

Home health care worker organizing in Nevada offers a modern illustration of this. Unions responded to the exclusion of home health care workers from the NLRA by developing an innovative bargaining relationship with the states.²⁸⁷ After the Supreme Court undercut the institutional strength of home health care unions in *Harris*, home health care workers in Nevada sought negotiated sectoral standard-setting to gain client, staffing agency, and state government support for higher wage rates. State labor law, though

280. JUNG, *supra* note 277, at 143.

281. See HAW. CONST. art. XIII, § 2 (right of public sector employees to join unions in 1968); HAW. CONST. art. XIII, § 1 (right of private-sector employees to join unions in 1978).

282. *Union Membership (Annual) News Release, Tab. 5: Union Affiliation of Employed Wage and Salary Workers by State (2021–22)*, U.S. BUREAU OF LAB. STATS. (Jan. 20, 2022), https://www.bls.gov/news.release/archives/union2_01202022.htm (stating that 24.1% of Hawai'i's employees are union members).

283. The ILWU's sustained commitment to interracial organizing, which enabled it to organize Filipino/a immigrants hired by plantation owners to break the ILWU's Great Sugar Strike of 1946, and its historical context, just after suspension of martial law and before passage of the Taft-Hartley Act, were key reasons for the rapid unionization of Hawai'i plantation workers in the 1940s despite overwhelming employer opposition. JUNG, *supra* note 277, at 144–84.

284. State labor lawmaking extending labor rights to agricultural workers has not, thus far, significantly increased union membership outside of Hawai'i. See Knapp, *supra* note 69, at 468 (explaining that fewer than two percent of agricultural workers belong to a union, at least in part because of the organizing challenges in agriculture, a seasonal industry with a transnational workforce, in which workers must cross state lines throughout the growing season).

285. Elmore, *supra* note 11, at 296–99.

286. See Fisk, *supra* note 42, at 10–11 (cautioning that social movement activism by worker centers requires a legal structure, akin to labor law, to institutionalize it).

287. See Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1390–91 (2008).

weakened by *Harris*, was a crucial foundation for this strategy, as it enabled home health care workers to join a union and collectively lobby for the Home Health Employment Standards Board, and then lobby for state legislators to adopt its recommendations. In Nevada home health care organizing, state labor law was a key element of the union's strategic use of negotiated sectoral standard-setting to build countervailing power in state law.

B. Implications for Negotiated Sectoral Standard-Setting

This Section will extend analysis of the need for countervailing power in state labor law to reduce the threat of employer cooptation of worker representatives and domination of the negotiated sectoral standard-setting process. It will offer transparency and worker participation, directly and through independent unions and worker centers, in the administrative design of negotiated sectoral standard-setting to reduce these threats.

1. The Democratic Potential of Negotiated Sectoral Standard-Setting

Agency-supervised negotiated standard setting can reduce structural inequality by enabling worker representatives to negotiate for workplace standards with employer representatives without garnering an individual employer's hostility from intruding into that company's workplace, and at a much larger scale—across entire regions and industries—than enterprise-level bargaining would typically permit.²⁸⁸ Negotiated sectoral standard-setting also speaks to recent calls by administrative law scholars for democratic forms of administrative policy formation.²⁸⁹ It positions agencies as a foundation for deliberative democracy,²⁹⁰ with opportunities for public participation far beyond those available in standard notice-and-comment rulemaking procedure.²⁹¹

The Nevada Home Care Employment Standards Board illustrates the promise of negotiated sectoral standard-setting as a source of deliberative

288. Andrias, *supra* note 24, at 58–68.

289. EMERSON, *supra* note 29, at 7 (calling for “administrative structures . . . [that] are capable of efficient action and yet remain open to the participation of the public in the formation of policy”); RAHMAN, *supra* note 29, at 23–25 (proposing agencies “as sites for participatory, contestatory democratic politics” that can expand democratic agency and check economic domination).

290. See EMERSON, *supra* note 29, at 99–101 (describing Progressive Era intellectual Mary Parker Follett's theory of regulation, in which, as in negotiated sectoral standard-setting, agencies assign responsibilities to private groups to develop responsive forms of regulation); JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 85 (Thomas Burger trans., MIT Press 1991) (1962).

291. EMERSON, *supra* note 29, at 172 (attributing the democratic deficit in rulemaking to “the background information and opportunity costs faced by members of the public and all but the best-funded and most well-connected public interest groups”).

democracy. The Board hearings in Nevada enabled home health care workers, clients, and staffing agencies to identify their aligned interest in a higher minimum wage rate and a state reimbursement rate to support it, and to adopt an investigatory role to develop a unified wage and reimbursement rate proposal.²⁹² The Board also afforded them with a responsive regulatory process, in which the Board's composition and the voting strength of the members prevented any one member from dominating policymaking decisions.²⁹³ Reaching consensus generated democratic power, in the form of a compelling case for the state to adopt the recommended minimum wage increase as the product of an agreement by relevant stakeholders after a year-long, joint deliberation.

The Board hearings also enabled Black and Latinx women home health care worker representatives to implement the Board's authority to inquire into "[t]he impact of systemic racism and economic injustice on home care employees,"²⁹⁴ by pressing the state to acknowledge that their poor workplace conditions are a result of systemic racism that the state has an obligation to redress. In the words of one worker representative: "[S]ystemic racism is at the heart of why we are so underpaid for our essential work and why we have no healthcare, paid time off, or other benefits Because we're majority women and people of color, we've been exploited, undervalued, underpaid, and held down for so long."²⁹⁵ The Board created a Subcommittee on Systemic Racism and Economic Injustice and tasked it with bringing forward responsive proposals to the Board.²⁹⁶ The subcommittee proposed, and the Board recommended, that the agency acknowledge "that poverty wages paid to home care workers and low

292. Home health care worker representatives sought a Board recommendation of a \$15 an hour minimum hourly wage after finding from their survey that most Nevada home health care workers earn less than \$12.75 an hour, and few employers reimburse home health care workers for travel costs between client homes. This led employer members to develop a "Medicaid Cost Tool" showing that a \$25 an hour reimbursement rate was required to support this wage rate. HCES June 2022 Board Minutes, *supra* note 143.

293. One employer representative on the Board, for example, moved that the Board recommend that the state abandon its daily overtime rate. But the motion failed, with opposition from all employee representatives, and that member later withdrew from the Board. Nev. Dep't Health & Hum. Servs., Home Care Employment Standards Board Minutes (Mar. 29, 2022), <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%203.29.22%20Meeting%20Minutes.pdf>.

294. NEV. REV. STAT. § 608.640(2)(f) (2021).

295. NEV. DEP'T OF HEALTH & HUM. SERVS., HOME CARE EMPLOYMENT STANDARDS BOARD REPORT 12 (2022), <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/2022%20Report%20-%20Nevada%20Home%20Care%20Employment%20Standards%20Board%20-%20FINAL.pdf> (statement of Safiyya Abdul Rahim). As Eileen Boris and Jennifer Klein explain, insufficiently funded, politically vulnerable, and fissured home care work arrangements reflect a "repackage[d]" separate spheres ideology that subordinates Black and Latinx women by devaluing the emotional labor of care work. BORIS & KLEIN, *supra* note 118, at 7–11, 94–121, 191–92.

296. HCES June 2022 Board Minutes, *supra* note 143.

investment in these essential services is a historic product of systemic racism,” which creates a “moral imperative” to increase the minimum wage and reimbursement rate in home care.²⁹⁷ In addition to enabling home health care workers to voice their lived experience of workplace racial and gender subordination in a deliberative setting, the Board generated a new, equality-based justification for the minimum wage increase for the Nevada agency and legislature.²⁹⁸ The Board also concluded that the misclassification of home health care employees as independent contractors by staffing agencies depresses work conditions in the home health care sector.²⁹⁹ This resulted in a recommendation that the agency refuse Medicaid funding to staffing agencies that classify their home health care workers as independent contractors.³⁰⁰ These examples suggest that the Board succeeded in generating democratic power and creating a forum for workers often excluded from policymaking to identify and pursue racial, gender, and economic justice goals.

But, while the aligned interests of home health care workers, clients, and staffing agencies in raising wage and reimbursement rates facilitated deliberation and group consensus, the potential of negotiated sectoral standard-setting as a form of democratic policy formation in other sectors, such as fast-food and app-based driving, is less clear. In Nevada, home health care clients and staffing agencies benefitted from their participation in the Board in order to raise state fees to pay for a higher wage rate. In contrast, fast food franchisors and TNCs are locked in a zero-sum, long-term contest with their workers about whether, as a threshold matter, they have any legal obligation to workers as employers. The risk of employer domination of sectoral standard-setting processes by employers as a countermeasure to fend off government regulation of these sectors seems high.

Generally, democratic theorists caution that the deliberative democracy goal of generating consensus can be undermined by private domination

297. Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Minutes, (Oct. 4, 2022), <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%2010.4.22%20Meeting%20Minutes.pdf>. The Board Chair Cody Phinney reported to the Nevada legislature that the Board recommended “an industry-wide investigation . . . [to] develop[] policy solutions to systemic racism in the field, such as annual reporting by employers to safeguard against discrimination.” Phinney June 2022 Letter, *supra* note 144.

298. Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Subcommittee on Systemic Racism and Economic Injustice Meeting Minutes (Sept. 19, 2022), <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/HCESB%20SREI%20Sub%2019.19.22%20Meeting%20Minutes.pdf> (reporting that seventy-seven percent of surveyed Nevada home care workers are women, and sixty-one percent are people of color.).

299. HCES June 2022 Board Minutes, *supra* note 143.

300. *Id.* While members considered recommending a presumption of employment status for all home health care workers, the Board rejected this idea after workers hired directly by patients (and not by staffing agencies) raised concerns that patients would not hire them as employees. *Id.*

unless accompanied by popular participation.³⁰¹ In this account, negotiated sectoral standard-setting is only likely to check employer domination if it permits low-wage workers to develop a collective identity and build countervailing power within its process of negotiating sectoral standards.³⁰²

By this measure, the California Fast Food Council holds promise as a site in which unions and worker centers can build countervailing power to check employer domination. First, the California Fast Food Council responds to the structural inequality of employers and low-wage workers in fissured industries by offering a site at which labor contestation can transform workplace conditions in fast-food stores whether or not franchisors are joint employers under the NLRA. This has opened the possibility of fast-food workers joining the newly-created California Fast Food Workers Union as a “members-only” or “minority” union, and collectively improving their work standards as representatives in the Fast Food Council.³⁰³ While employers currently have no duty to bargain with a minority union in NLRA-regulated collective bargaining, the NLRA permits employees to join minority unions, and minority unions to enter into enforceable agreements with employers on behalf of their members.³⁰⁴ In this approach, the union would not need the support of a majority of employees in a bargaining unit of a particular employer. Instead, the California Fast Food Workers Union can mobilize its members to obtain agreements for their members in specific workplaces while also leveraging its state-wide political power in the Fast Food Council to negotiate for higher sectoral standards as a regulatory agenda. Workers’ and workers’ representatives’ equal voting strength with franchisors and

301. See Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454, 465 (2021) (concluding that that “popular participation is the linchpin” of deliberative democracy, civic republicanism, and agonistic pluralism theories of democracy); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 148 (2003) (criticizing deliberation as a goal for failing to account for its cooptation by sophisticated interests that can subordinate less powerful groups).

302. See PETTIT, *supra* note 51, at 5; K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 690 (2020); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745 (1999) (explaining role of conflict in politics and in forming collective identities); CHANTAL MOUFFE, *AGONISTICS* 1–18 (2013) (explaining agonistic pluralism); Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14 (2022) (Instead of hiding, resolving, or insulating agencies from these contests, agonistic pluralism would “emphasize[] the inevitability of conflict and build[] democratic legitimacy around it.”).

303. Alejandra Reyes-Velarde, *California Gains New, First-of-Its-Kind Union to Advocate for Fast-Food Workers*, KQED (Feb. 11, 2024), <https://www.kqed.org/news/11975340/california-fast-food-workers-gain-new-first-of-its-kind-union-to-represent-them>.

304. See *Retail Clerks Int’l Ass’n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962); *Consol. Edison v. NLRB*, 305 U.S. 197, 237 (1938); Fisk & Malin, *supra* note 24, at 1834 n.58; Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 COMP. LAB. L. & POL’Y J. 47, 57 (1998).

franchisees in the Fast Food Council is a further check on franchisor domination of the Council's policymaking process.³⁰⁵

In contrast, the "third category" TNC legislative campaigns illuminate the risk of company-dominated sectoral standard-setting. TNC proposals would entrench their priorities in the administrative design of sectoral standard-setting by only permitting standards approved by a super-majority of TNCs.³⁰⁶ Unconstrained by the NLRA's prohibitions on company-dominated unions, TNCs are also free to coopt the sectoral standard-setting process by dominating unions that represent app-based drivers. In 2016, for example, Uber formed an exclusive relationship with the Independent Drivers Guild ("IDG") in New York, which is funded directly by Uber (instead of by workers' dues), and which accepted Uber's classification of drivers as independent contractors, in return for exclusive, limited app-based driver benefits, grievance, and bargaining rights.³⁰⁷ Employer-funded organizations that depend on a single employer for their existence, like IDG, have an inherent conflict of interest in representing app-based drivers in negotiations with TNCs.³⁰⁸ Yet, the TNC proposals would permit company-dominated unions to seek exclusive representation in sectoral standard-setting upon a showing of support by only ten percent of app-based drivers.³⁰⁹ TNCs, moreover, have sought to foreclose the possibility of independent unions challenging company-dominated ones by prohibiting concerted protest by app-based drivers as a condition of sectoral standard-setting.³¹⁰ The TNC proposals for app-based drivers, both in coopting the bargaining process and worker representatives, seem designed to dismantle rather than build collective worker power.³¹¹ They illuminate the heightened risk of a company-dominated sectoral standard-setting process for workers, such as app-based drivers, who are classified as independent contractors exempt from labor and employment law. With conflicted worker representation and no baseline, company-dominated sectoral standard-setting risks setting terms

305. CAL. LAB. CODE § 1475(a) (2024).

306. Ben Penn & Keshia Clukey, *New York Gig Workers to Get Easy Unionizing Path in Draft Bill*, BLOOMBERG L. (May 21, 2021, 5:03 PM), <https://news.bloomberglaw.com/daily-labor-report/new-york-gig-workers-to-get-easy-unionizing-path-in-draft-bill> (requiring supermajority vote of sixty percent of TNC members, with interest arbitration if impasse).

307. Estlund & Liebman, *supra* note 64, at 392 (describing IDG's agreement with Uber, granting to IDG a process to bargain with Uber and grieve deactivations, and providing Uber drivers with access to some benefits).

308. Barenberg, *supra* note 4, at 780, 803–04, 806–08, 820–21 (explaining that tethering a labor organization to a single company creates a conflict of interest that cleaves the interests of worker representatives from employees).

309. A. B. 1000, Gen. Assemb., Jan. 2021 Sess. (Conn. 2021) (referred to the Committee on Labor and Public Employees).

310. *See* Penn & Clukey, *supra* note 89.

311. Dubal, *supra* note 89.

that are lower than the minimum guarantees offered workers classified as employees.

Negotiated sectoral standard-setting, in sum, can advance a compelling racial and economic justice collective action frame and generate democratic power to support state labor policymaking, especially for workers who cannot effectively access NLRA rights. It is a promising approach to foster deliberation and consensus among worker and employer representatives in multi-party negotiations, especially in sectors, like home health care, in which stakeholders have aligned interests. It can also enable unions and worker centers to build countervailing power in fissured sectors such as fast food, where the NLRA duty to bargain has a limited reach. But, as in TNC company-dominated sectoral standard-setting proposals, this deliberative democracy goal can be easily coopted, particularly if workers are excluded from labor law protections, and in sectors where independent unions are absent. Controlling this risk in negotiated sectoral standard-setting is undertheorized.³¹² The next Section will undertake this project by proposing administrative designs that encourage worker, union, and worker center participation as needed forms of bottom-up accountability.

2. *Protecting Against Employer Domination of Negotiated Sectoral Standard-Setting*

Agencies prevent capture by insulating agency decisionmaking from outside influence and by encouraging public participation in the regulatory process to provide democratic accountability.³¹³ While insulation can protect agencies from capture and preserve agency independence to make decisions based on internal expertise,³¹⁴ agency insulation can also reduce the

312. The Harvard Law School Labor and Worklife Program proposes sectoral bargaining as a pillar of labor law reform and provides specific recommendations about thresholds of employee support to create a sectoral bargaining panel, “triggers” for bargaining rounds, selecting employee and employer representatives, and voting rights. *See* SHARON BLOCK & BENJAMIN SACHS, HARV. L. SCH., CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 3 (2020); CLEAN SLATE FOR WORKER POWER, HARV. L. SCH., PRINCIPLES OF SECTORAL BARGAINING 14–20 (2021). Veena Dubal critiques TNC-sponsored versions of sectoral standard-setting for “limit[ing] democratic worker participation and voice in the conditions created through bargaining and risk[ing] turning collective representation into an instrument of management control,” and cautions that “democratic organizing and agitation” should drive these law reform efforts. *See* Dubal, *supra* note 92. The contribution of this Section is to offer specific legal and administrative design proposals enabling unions and worker centers to build countervailing power in the standard setting process in order to check employer domination.

313. For a general discussion of justifications for agency measures to prevent capture, see Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1356–62 (2013).

314. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19–24 (2010) (stating that insulation can provide an “extra buffer against

democratic accountability of agencies necessary for complex, value-laden determinations, and cannot protect against employer cooptation of worker representatives. Public participation measures, in contrast, can reduce the risk of regulatory capture by providing public transparency in agency determinations, and by empowering unions and worker centers to serve as watchdogs for regulatory compliance.³¹⁵

This Section will assess these measures in negotiated sectoral standard-setting, concluding that administrative designs that encourage direct worker participation can provide bottom-up accountability for negotiated sectoral standard-setting without eroding its democratic value.

a. Agency Insulation

Agency insulation is a standard protection against obvious forms of interest group domination.³¹⁶ Agencies could, for example, impose internal democracy requirements on representatives and forbid employer-funded groups, such as IDG, from representing app-based drivers.³¹⁷ The NLRA bans a broad range of employer-dominated worker organizations on the ground that employer domination of employee representation can cleave the interests of worker representatives from employees and subordinate the interests of employees who would otherwise seek an independent union.³¹⁸ For this reason, an agency could safely conclude that the risk of employer domination of the Nevada Board is lower than an analogous board for app-based drivers, to the extent that the union representing home health care

interest group pressures that might harm relatively weaker political interests, including the collective public interest of the general electorate or a vulnerable subgroup”).

315. Livermore & Revesz, *supra* note 313, at 1356–59 (identifying outreach to “protection-oriented groups” as a standard agency approach to improve the democratic accountability of agency decisions).

316. The Connecticut bill establishing negotiated sectoral standard-setting for app-based drivers, for example, would have charged the State Board with closely overseeing the industry council recommendations. Estlund & Liebman, *supra* note 64, at 397.

317. Analogizing to federal labor law, the Labor Management Relations Act (“LMRA”) prohibits payments by employers to unions (or their representatives) that exclusively represent the employers’ employees. 29 U.S.C. § 186 (2022); *United States v. Phillips*, 19 F.3d 1565, 1574 (11th Cir. 1994) (stating that LMRA is “a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement”), *amended*, 59 F.3d 1095 (11th Cir. 1995). While this would prevent the type of company unionism sought by TNCs, it would not extend a duty of fair representation by unions to workers in negotiated sectoral standard-setting, which is limited to those workers who are exclusively represented by unions in enterprise-level bargaining units. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

318. Barenberg, *supra* note 4, at 773, 780, 803–04, 806–08, 820–21 (explaining the NLRA’s concern with even non-coercive forms of employer control over unions as “illegitimate domination that potentially infect[s] collaborative relationships under conditions of asymmetric power in the workplace and elsewhere”).

workers under state collective bargaining law adequately represents those workers' interests on the Board.

But in less clear cases, the effectiveness of agency insulation can be contingent on agency expertise to assess the risk of employer domination based on the unique features of an industry, workforce, and history of worker representation in mass-membership organizations. This can be a complex determination. The low risk of employer domination of the Nevada Board is a function of the representation of home health care workers by an independent union and the lack of concentrated employer market power in that state's home health care sector. The risk of cooptation and domination, in comparison, could appear high for fast-food workers. Franchisors and their associated franchisees are highly concentrated in vertical relationships, and unlike home health care workers, unions do not represent a significant number of fast-food workers. But the decade-long history of Fight for \$15 mobilizing workers through state and local lawmaking, its wide-scale protests of industry-leading franchisors like McDonalds, and base building across franchisor brands, demonstrate significant independence. An agency may determine from this history that Fight for \$15 and the newly-formed Fast Food Workers Union can independently represent fast-food workers in negotiated sectoral standard-setting. But it is unclear how an agency should protect against employer domination of similar groups that are not unions and have a shorter or more mixed track record of representing worker interests.

Agency review of standards, likewise, could ensure that negotiated sectoral standard-setting determinations meet or exceed minimum standards in employment law, or prevailing standards in related occupations. Agencies could reduce the threat of negotiated sectoral standard-setting suppressing work standards by imposing minimum acceptable terms, for example forbidding negotiated sectoral standard-setting with app-based drivers to set a wage floor below the state minimum wage.³¹⁹ But here too, it is unclear how agencies can accurately determine whether the benefit of workers having the autonomy to pursue their economic interests is outweighed by the risk of cooptation and domination.

Even assuming agency expertise to make these decisions, this form of insulation does not prevent employers from coopting or nullifying negotiated sectoral standard-setting. As with TNC "third category" proposals, insulation would not prevent employers from offering a limited version of negotiated sectoral standard-setting, or dominating worker representatives, as a preemptive strategy to defeat independent unionism. While insulation can protect democratic workplace governance in clear cases, it is ill-equipped to

319. Placing a floor on negotiated sectoral standard-setting in this manner mirrors the current California Fast Food Council approach of establishing a \$20 an hour wage rate floor in conjunction with negotiated sectoral standard-setting. See Miranda, *supra* note 154.

address these complex questions and can erode its democratic value by limiting the scope of public participation.³²⁰

b. Public Participation

Improving public participation in negotiated sectoral standard-setting can give workers a more meaningful “seat at the table,” in contrast, by empowering workers, unions, and worker centers to check employer domination.³²¹ Current participation requirements in negotiated sectoral standard-setting are limited to requiring a set number of worker signatures to convene a board,³²² protecting workers from retaliation for their board participation,³²³ and enabling workers to observe and participate in board hearings by subjecting them to open meeting requirements.³²⁴ These measures allow agencies to make a threshold determination about worker support for negotiated sectoral standard-setting, and empower workers to become representatives and hold other representatives accountable. But they do not go far enough. Signing a petition for negotiated sectoral standard-setting is a weak demonstration of worker support. Sophisticated and well-funded companies can coopt negotiated sectoral standard-setting by misleading workers about the independence and power of worker representatives on the boards. Open meeting laws, likewise, are likely to be used primarily by the regulated community to lobby the agency for greater power over the process, unless accompanied by measures to encourage participation by workers.³²⁵

Reconceiving of public participation as worker-driven, bottom-up accountability, especially through independent unions and worker centers, can more meaningfully address the structural problem. Agencies could facilitate worker participation mobilized by unions and worker centers by funding workers to take time off from work to attend board meetings, creating worker-led subcommittees to identify areas of bargaining, and

320. For a discussion of the tension between agency insulation and democratic accountability, see Barkow, *supra* note 314, at 19 (arguing that “one person’s political pressure is another person’s democratic accountability”).

321. Andrias, *supra* note 44, at 624.

322. The California Fast Food Council, for example, requires a threshold of worker signatures in order to convene. CAL. LAB. CODE § 1475(a)(1)(A)–(E) (2024).

323. *Id.* § 1476(a).

324. HCES January 2022 Board Minutes, *supra* note 141. Nevada Board hearings are subject to state open meeting laws, requiring public access to hearings and publicly available minutes of them. See NEV. REV. STAT. § 241.035 (2024); Del Papa v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nevada, 956 P.2d 770, 779 (Nev. 1998).

325. Transparency that can be equally accessed by the public can be misused by the regulated community to clog up information channels and dominate administrative fora. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 396 (2019); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324 (2010).

funding unions and worker centers to survey workers and report on their work standards and priorities.³²⁶ Agencies could also create an oversight role for unions and worker centers as watchdogs, by funding them to attend board meetings and review negotiated sectoral standard-setting proposals, which agencies would consider in their assessment of whether to approve a board-recommended standard. Applied to the TNC proposals for app-based drivers, app-based drivers could form committees to hold worker representatives accountable for their positions. Agency-funded watchdogs could closely monitor negotiated sectoral standard-setting for evidence of employer domination, which it could report directly to workers. Workers could themselves reject bargaining proposals after reaching a conclusion that they are too weak or are the product of employer domination. This would multiply the sites of labor contestation, making it less likely that employer representatives could dominate all of them.³²⁷

Transparency can also check employer domination of communications about sectoral standard-setting by providing workers with access to the process of negotiated sectoral standard-setting as additional sites of labor contestation. Agencies could require an explanation of the negotiated sectoral standard-setting process to workers who sign the petition and solicit participation from those workers in board events. Agencies could also require worker representatives to report their initial recommendations in in-person and online fora, at which workers could explain their support or opposition, and which representatives would account for in their final recommendations. Transparency for app-based drivers would, importantly, ensure that drivers understand how they can participate in negotiated sectoral standard-setting even lacking an ability to join a union, and prevent TNCs from misleading workers about the nature of negotiated sectoral standard-setting. In the Connecticut bill, for example, a petition would clarify for app-based drivers that the bill's definition of a "union" is different than a "labor association" subject to the internal democracy constraints of the NLRA,³²⁸ and that the "collectively negotiated recommendations," are subject to agency approval.³²⁹ These disclosures are themselves a weak democratic check on capture, since app-based drivers may justifiably view a deeply flawed negotiated sectoral standard-setting regime as preferable to nothing. But it would enable workers to understand these weaknesses, and to participate in

326. These recommendations are similar to those of Kate Andrias and Benjamin Sachs, in proposing law that expressly protects the right to engage in collective organizing for greater rights in the future. Andrias & Sachs, *supra* note 23, at 592–93.

327. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19–53, 71 (1992).

328. S.B. 1000, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

329. *Id.*

negotiated sectoral standard-setting to hold worker representatives accountable to them.

One might critique these public participation measures as sowing internal division and undermining the ability of worker representatives in negotiated sectoral standard-setting to build power for workers to improve work standards.³³⁰ Indeed, where the worker representatives are members of an independent union and the risk of employer domination is low, the collective power gained by workers represented by unions in negotiated sectoral standard-setting may justify limiting forms of public participation that might undermine it.³³¹ But negotiated sectoral standard-setting in sectors where workers are excluded from labor and employment law can lower minimum baseline standards without the countervailing power of independent unions to raise them.³³² In these circumstances, integrating sites of contestation in negotiated sectoral standard-setting for unions and worker centers to build countervailing power is preferable to forcing a settlement that is a product of domination.³³³

Finally, offering administrative designs to reduce the threat of employer domination of sectoral standard-setting should not suggest that they can serve as a substitute for labor and employment law rights, especially the right to join an independent union. Independent unions are an important source of countervailing power in the standard-setting process, as shown in Nevada, where state labor law enabled home health care workers to lobby for the Home Care Employment Standards Board and for state legislators to adopt its recommendations, and (though still nascent) in California, where the Fast Food Workers Union can represent members in the Fast Food Council to improve workplace standards throughout the sector despite its “minority” union status. In both instances, independent unions and worker centers built countervailing power to establish negotiated sectoral standard-setting regimes and make them accountable and responsive to workers in those sectors. In sectors in which workers cannot join independent unions and independent worker centers do not exist as sources of countervailing power, administrative protections against employer domination of the standard-setting process cannot substitute for them.

330. This critique is a version of the “inherent tension between localized democracy and collective power,” which pervades labor law. Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1626 (2016).

331. *See id.* at 1641–42. In these cases, the agency may select as the worker representative the most representative union, or a combination of unions based on their exclusive membership of workers in the sector.

332. *See* Dubal, *supra* note 89.

333. *See* Andrias & Sachs, *supra* note 23, at 628.

C. *Implications for Labor Localism*

The need for countervailing power to address the structural problem in state labor law, finally, has important implications for the role of cities as critical sites of participatory democracy and battlegrounds for labor policy reform. City-level mobilization of labor standards is more than “second-best” policymaking: Cities offer legal and political advantages as places where voters are open to redistributive policy reforms, and low-income, majority-minority, and immigrant communities can demand responsive representation.³³⁴ For decades, organized labor has embraced a strategic labor localism, leveraging the political incentives of cities to respond to the needs of its residents to seek local policymaking that makes employers and cities accountable to the interests of labor.³³⁵ Since at least the 1990s, organized labor has sought to organize low-wage service workers by mobilizing local labor policymaking, such as requirements that companies accept labor neutrality as a condition of operating in publicly held assets like airports and that developers seeking access to economic development programs negotiate community benefits agreements with organized labor and other community stakeholders.³³⁶ In large U.S. cities, strategic labor localism has ignited a virtuous cycle of lowering employer resistance to unions, building local power to mobilize voters in favor of prolabor candidates, and sparking prolabor policymaking that can be scaled vertically (to state law) and diffused horizontally (to other cities).³³⁷

While strategic labor localism is shaped by the existing rules of NLRA preemption and state-law preemption, businesses, unions, and worker centers have contested and changed these boundaries over time. Unions and worker centers have overcome state-law preemption in some states by pivoting to new policy areas and scaling up to state-level reform.³³⁸ Repositioning cities as defenders of democratic labor policymaking has, additionally, aligned many cities with unions and worker centers in seeking to preserve local authority against employer attacks on city power.³³⁹

334. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1065–66, 1071–73 (1980); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 395–96 (1990) (explaining that “the longing for a greater degree of citizen involvement in public life has led many participation theorists to make the contemporary vestige of the polis—local government—a focal point for efforts to advance participatory democracy”). For majority-minority cities underrepresented in state government, residents of those cities can make local concerns about, e.g., racial segregation, urban poverty, and unequal access to quality jobs, central to labor policymaking. Elmore, *supra* note 11, at 286–91.

335. Cummings & Elmore, *supra* note 15, at 170–80.

336. *Id.*

337. *Id.* at 199–204

338. Elmore, *supra* note 11, at 296–97.

339. State and local government law scholars drafted a set of principles for the National League of Cities in favor of expanding home rule powers and protecting them from abusive forms of state

To date, however, sweeping state-law preemption has enabled employer-backed groups to successfully block local labor lawmaking as a legal mobilization strategy in roughly half the states.³⁴⁰ Twelve cities and counties have approved local minimum wage laws only to see them invalidated by state preemption statutes.³⁴¹ State-law preemption, as in other areas of state law detailed in Part I, permits employers to reproduce structural inequality in order to prevail in labor contests, in ways that can be anti-democratic and harmful to low-wage workers, especially in majority-minority cities in states with countermajoritarian legislatures.³⁴² For example, shortly after the majority-Black city of Birmingham, Alabama approved a minimum wage ordinance in 2017 to \$10.10 an hour, an all-white majority of Alabama state legislators enacted a state preemption law to extinguish it.³⁴³ In *Lewis v. Alabama*,³⁴⁴ federal constitutional litigation by organized labor and civil rights groups challenging Alabama's preemption statute, an Eleventh Circuit panel refused to dismiss plaintiffs' equal protection claim.³⁴⁵ In its decision, the panel relied on the complaint's allegations that state preemption harmed "Birmingham's poorest black residents," through a "rushed, reactionary, and racially polarized" legislative process, which drew from "Alabama's historical use of state power to deny local black majorities authority over economic decision-making."³⁴⁶ While the Eleventh Circuit ultimately dismissed the suit en banc for lack of standing, it did not disturb the panel's finding that these allegations sufficed to allege a discriminatory motive behind Alabama's preemption of the Birmingham ordinance.³⁴⁷

preemption. RICHARD BRIFFAULT ET AL., NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), as reprinted in 100 N.C. L. REV. 1329 (2022) (proposing the right to local self-government in state constitutional law, providing for broad local initiative authority, and establishing a presumption against state preemption to curb abusive forms of state interference with local authority); see also Elmore, *supra* note 11, at 302.

340. See, e.g., Seifter, *supra* note 236, at 347; Davidson & Schragger, *supra* note 45, at 1389–90, 1415–16; Seifter, *supra* note 26, at 1741–43; Diller, *supra* note 45, at 355–81.

341. LAURA HUIZAR & YANNET LATHROP, NAT'L EMP. L. PROJECT, FIGHTING WAGE PREEMPTION: HOW WORKERS HAVE LOST BILLIONS IN WAGES AND HOW WE CAN RESTORE LOCAL DEMOCRACY (2019).

342. *Id.* (estimating that Alabama's preemption of the Birmingham minimum wage ordinance resulted in the loss of over \$100 million in earnings to nearly 30,000 low-wage residents in that city).

343. Elmore, *supra* note 11, at 280–81.

344. 896 F.3d 1282 (11th Cir. 2018), *rev'd in part on other grounds on reh'g en banc*, 944 F.3d 1287 (11th Cir. 2019).

345. *Id.* at 1299.

346. Lewis, 896 F.3d at 1295. Olatunde Johnson offers equal protection as a legal argument to challenge state preemption of local labor and civil rights lawmaking, while acknowledging the significant litigation barriers to this approach. Johnson, *supra* note 24.

347. The Eleventh Circuit held, en banc, that plaintiffs lacked standing because the state attorney general lacked the necessary enforcement authority to grant the requested injunctive relief, and relief

Confronting state preemption as anti-democratic behavior that harms vulnerable workers must contend not only with federal litigation barriers as in *Lewis*, but also the historic deference that state courts grant state legislatures in regulating cities as subdivisions of the state. While most cities have home rule authority to provide for the general welfare, including by setting minimum workplace standards, state courts broadly construe the authority of a state legislature to preempt local lawmaking.³⁴⁸ In *City of Miami Beach v. Florida Retail Federation*,³⁴⁹ for instance, an intermediate state court rejected Miami Beach's argument that Florida's 2004 constitutional right to a minimum wage superseded the Florida legislature's 2003 statute preempting local minimum wage ordinances.³⁵⁰ Applying a presumption that the legislature has the authority to preempt city lawmaking, the Court found a lack of "clear and direct language" in the constitutional provision necessary to "nullify" the state preemption statute.³⁵¹ A constitutional right to a minimum wage, the Court held, did not imply a limitation to the legislature's power to preempt cities from enacting higher wage standards.³⁵²

The need for state law enabling unions and worker centers to build countervailing power has important implications for state preemption as a leading employer strategy to reproduce structural inequality in state law. Unions and worker centers can advance state initiatives, as in Michigan, that create independent commissions charged with reducing partisan gerrymandering.³⁵³ This approach would reduce the incentives of state legislators to enact state preemption statutes by making them electorally accountable for unpopular lawmaking.³⁵⁴ Unions and worker centers can,

would be unlikely in any event because the city declined to state whether it would enforce the ordinance. *See Lewis v. Governor*, 944 F.3d 1287, 1305–06 (11th Cir. 2019).

348. Elmore, *supra* note 11, at 276–80.

349. 233 So. 3d 1236 (Fla. Dist. Ct. App. 2017).

350. *Id.* at 1238.

351. *Id.* at 1239–40.

352. *Id.* at 1240.

353. The independent commission that redrew Michigan's political map came as a result of a successful voter initiative amending the state constitution to create it in 2018. *2018 Michigan Election Results*, MICH. DEP'T OF STATE (Nov. 26, 2018, 2:47 PM), https://mielections.us/election/results/2018GEN_CENR.html. State voter initiatives are among the few remaining means to reduce the partisan gerrymandering of state legislatures since the Supreme Court ruled in 2019 that partisan gerrymandering is a political question beyond the reach of federal courts. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). *But see Grisham v. Van Soelen*, 539 P.3d 272, 293 (N.M. 2023) (applying intermediate scrutiny to equal protection challenge to partisan gerrymandering under state constitution).

354. This approach is aligned with Olatunde Johnson's caution that preserving labor localism will require "confront[ing] the politics that make preemption possible." Johnson, *supra* note 24, at 1196. In Michigan, for example, the state senate's labor committee in September 2023 voted to advance bills to repeal a sweeping 2015 state preemption statute—nicknamed the "Death Star" bill—that preempts all local labor standards. *See Kyle Davidson, Senate Panel Votes to Repeal*

likewise, protect labor localism by countering efforts to gerrymander state judiciaries.³⁵⁵ This may allow judicial candidates to strike down legislative maneuvers to preempt popular forms of local labor lawmaking without courting legislative attack.³⁵⁶ More broadly, in states where the median voter supports home rule authority for their local governments, state-wide judicial elections may encourage candidates who are protective of the equality and democracy values advanced by local labor policymaking in state-law preemption disputes.³⁵⁷

State constitutional law can also reduce the preemption threat by superseding state preemption statutes. In Florida, for example, Amendment 2 could have (but did not) accept the court's invitation in *Miami Beach* "to restrict the Legislature's ability to prohibit a municipality from adopting its own minimum wage ordinance [with] . . . clear and direct language to achieve that purpose."³⁵⁸ Just as the Illinois Workers' Rights Amendment reduced the threat of state and local right-to-work ordinances in its constitutional protection of labor rights, future minimum wage constitutional protections can anticipate and limit the use of state-law preemption as an employer countermeasure to extinguish local labor lawmaking.

State labor law can also integrate local labor policymaking, notwithstanding state-law preemption. The FAST Act as originally proposed in California offers an example of this legal design. It would have permitted cities to form Local Fast Food Councils, separate from the state-wide Fast Food Council, in which local representatives could conduct hearings and recommend standards to the state-wide Council.³⁵⁹ Importantly, this example of state-local cooperation would not depend on local authority, since Local Fast Food Council recommendations would have become state law only after

'Death Star' Legislation Hampering Local Governments, MICH. ADVANCE (Sept. 21, 2023), <https://michiganadvance.com/2023/09/21/senate-panel-votes-to-repeal-death-star-legislation-hampering-local-governments/>.

355. Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 19–20 (2022) (observing that where state courts have checked state legislatures, those legislatures have often responded by "gerrymander[ing] the state courts into acquiescence, with other collateral effects on the rule of law and due process").

356. See Davidson, *supra* note 27, at 954, 972 (explaining that courts in Missouri and Ohio struck down "preemptive legislation appended to entirely unrelated bills" as violative of state constitutional "single-subject" mandates).

357. *Id.* at 989–90 (proposing that courts "help translate the values underlying those commitments" to localism, including "addressing questions of racial subordination and economic inequality").

358. *City of Miami Beach v. Fla. Retail Fed'n, Inc.*, 233 So. 3d 1236, 1240 (Fla. Dist. Ct. App. 2017); see Elmore, *supra* note 11, at 291 n.245 (noting the "missed opportunity" in Florida's Amendment 2, which constitutionalized a \$15 minimum wage without superseding the state's preemption statute).

359. A.B. 257, 2021–2022 Reg. Sess. (Cal. 2022) (proposing to amend CAL. LAB. CODE §§ 1471(h)–(i)).

adoption by the state-wide Fast Food Council. Because the FAST Act only permitted local hearings and recommendations, this model of state-local coordination does not require local government to engage in lawmaking. State labor law can also integrate localism in other ways, by requiring paid leave for employees who participate in local policymaking and protecting them from employer retaliation for organizing.³⁶⁰ Cities, likewise, can provide or subsidize child care and transportation, make available virtual and physical spaces for organizing,³⁶¹ and fund the projects of local unions and worker centers that organize workers excluded from NLRA protections.³⁶² Because these activities do not require home rule authority, state preemption statutes do not prohibit them.

CONCLUSION: THE NEED FOR A STATE-LEVEL FOCUS ON STRUCTURAL
INEQUALITY IN LABOR RELATIONS DESPITE FEDERAL LABOR LAW
SUPREMACY

Structural inequality pervades the workplaces of low-wage workers excluded or effectively excluded from the NLRA, who lack the individual bargaining power to press workplace demands and cannot build power collectively under federal labor law. While state law permits unions and worker centers to innovate new labor law and build power through legal mobilization, employers can often prevail in these labor contests by reproducing structural inequality in state law. By positioning discussion of structural inequality in the states, this Article turns attention to state-level legal mobilization through which unions and worker centers might reduce the precarity of low-wage work by building countervailing power. Litigation and policymaking that enables workers to challenge anti-democratic behavior by their employers can also serve the goal of strengthening democratic institutions in state government.

But identifying structural inequality as a threat to racial and economic justice and as encouraging anti-democratic behavior begs the question of why the focus of this inquiry is not *federal* rather than *state* law. NLRA exclusions and weaknesses are why workers seek refuge in the states in the first place. Federal labor law reform can enable workers to build countervailing power by extending its coverage to these workers. Noting that these exclusions are entrenched, longstanding features of federal labor law only underscores the urgency of federal labor law reform.

360. See Andrias & Sachs, *supra* note 23, at 592–623.

361. RAHMAN & GILMAN, *supra* note 47, at 213 (proposing administrative creation of in-person and online support “for building solidarities and deep relationships”).

362. See Andrias & Sachs, *supra* note 23, at 606 (proposing “government funding of social-movement organizations as a supplement to self-funding and charitable donations”).

This Article's focus on the states should not cast doubt on the primacy of federal law in labor contests and the desirability of federal labor law reform to reduce structural inequality. But federal labor law excludes many low-wage workers from its protections and does very little to stem state democratic backsliding in the states.³⁶³ And a view of federal labor law supremacy that ignores subfederal labor policymaking misses the critical role of state law in *all* labor contests, and the unique features of state law that can reproduce, or reduce, structural inequality. Sustained focus on the shift of labor contests to the mobilization of state and local law is in order.

This Article, in undertaking this project, illuminates the value of legal mobilization strategies that permit workers excluded from the NLRA to reduce structural inequality by building countervailing power in state labor law. State constitutional labor law can enable low-wage workers excluded from the NLRA to build collective power in unions. Administrative designs that encourage public participation in negotiated sectoral standard-setting can protect independent unionism from employer domination and make real the administrative commitment to democratic policymaking. Constitutional constraints on state preemption statutes and reimagining the state/local relationship notwithstanding state preemption can protect local government as a crucial source of labor policymaking and political power for low-wage workers. These prescriptions can contribute to the unfinished, foundational NLRA purpose of reducing structural inequality by permitting workers to build countervailing power in the states.

363. See HERTEL-FERNANDEZ, *supra* note 20, at 143–91; GRUMBACH, *supra* note 17, at 202–03.