CONSTITUTIONAL AND ADMINISTRATIVE INNOVATION THROUGH STATE LABOR LAW

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This Essay explores recent efforts by worker organizations to transform labor policy in states, as well as countermobilizations by business and conservative groups. It focuses on two particularly promising efforts: the development of worker standards boards and pro-labor changes to state constitutional law. It shows why, as a matter of political economy, such reforms have been achievable at the state and local levels, but not the federal level, and explores the potential of state reforms to build greater economic and political power for working people, notwithstanding limits imposed by federal preemption doctrine. Ultimately, this Essay argues that these recent innovations in state labor law have the potential not only to reshape U.S. labor policy but also to serve as a model for a more democratic approach to administrative governance and constitutional law generally.

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INTRODUCTION

Workers in the United States face acute problems of low wages, poor working conditions, and a lack of voice both on the job and in our democracy. Collective bargaining coverage is lower than in nearly any other industrial democracy—and economic inequality is at near-record highs.[1] Yet, efforts to reform labor law at the federal level have repeatedly failed, leading scholars to declare labor law "ossified."[2] And the U.S. Constitution, as interpreted by the Supreme Court, offers workers little protection—whether in terms of basic minimum entitlements or the rights to organize, bargain, and strike—with no hope of amendment.[3]

At the state level, however, the picture is far less fixed and, in many jurisdictions, far more promising for workers. Despite the preemption doctrine, states have long addressed labor rights through their constitutions and statutes, including through direct democracy mechanisms like ballot initiatives. States have also used innovative administrative practices to advance labor rights. In recent years,

1. *See* Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), https://www.pewresearch.org/short-reads/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/ [https://perma.cc/F2VN-U4JL] (describing trends regarding income and wealth inequality); *Collective Bargaining Coverage*, ORG. FOR ECON. COOP. & DEV., https://data-viewer.oecd.org?chartId=078390cc-8473-4389-98cf-5c1c40a4b7b4 [https://perma.cc/4MRL-WRRU] (Nov. 29, 2023, 10:58 AM) (collecting data regarding collective bargaining coverage by country).

2. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). As I detail elsewhere, federal labor law is also less ossified than it seems at first glance due to substantial innovation led by the National Labor Relations Board, though that progress could soon be threatened by the Supreme Court's cramped understanding of administrative authority. *See* Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1016–19 (2024) [hereinafter Andrias, *Constitutional Clash*] (discussing the Board's efforts); *id.* at 1057–64 (discussing the legal threats to the Board's authority).

3. *See* Andrias, *Constitutional Clash*, *supra* note 2, at 1009–12.

significant and important innovation has occurred along both administrative and constitutional dimensions.[4]

Consider one recent example from California: On April 1, 2024, over five hundred thousand low-wage California workers saw an increase in their hourly wage to a minimum of twenty dollars an hour.[5] This increase—to nearly three times the federal minimum wage—was the product of years of organizing by fast-food workers. In addition to the wage increase, the fast-food workers won the creation of a new administrative council—a "worker standards board"—that gives them the right to negotiate industry standards with their employers and state officials.[6] Though California fast-food workers still have not achieved a collective bargaining agreement (federal preemption doctrine prohibits the State from legislating in the area of collective bargaining for most private sector workers[7]), the new law promises to transform labor policy while also innovating how state administration governance occurs. Meanwhile, a constitutional amendment is percolating in the California Legislature that would affirm the right of Californians to join a union and to negotiate with their employers.[8] The amendment would prohibit the passing of any statute or ordinance that interferes with such rights.[9]

This Essay will explore these and other recent efforts to transform labor policy in states, as well as countermobilization by business and conservative groups, with a focus on emerging administrative mechanisms and constitutional law designed to enable collective worker rights. It will argue that state and local efforts have the potential not only to reshape American labor law but also to serve as a model for a more democratic approach to administrative governance and constitutional law generally.

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4. For other scholarship tracing innovation in state labor law, see Kate Andrias & Virginia Doellgast, *Stärkung des Tarifvertragssystems in den USA* [*Strengthening Collective Bargaining in the United States*], 76 WSI-MITTEILUNGEN 185 (2023) (English version on file with author); Kate Andrias & Benjamin I. Sachs, *The Chicken-and-Egg of Law and Organizing: Enacting Policy for Power Building*, 124 COLUM. L. REV. 777, 812–29 (2024) [hereinafter Andrias & Sachs, *Chicken-and-Egg*]; Andrew Elmore, *Confronting Structural Inequality in State Labor Law*, 83 MD. L. REV. 1192, 1236–59 (2024); Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers' Rights*, 33 STUD. AM. POL. DEV. 50, 64–72 (2019).

5. *See* Assemb. 1228, 2023 Leg., Reg. Sess. (Cal. 2023); Terry Chea & Adam Beam, *New $20 Minimum Wage for Fast Food Workers in California Is Set To Start Monday*, ASSOCIATED PRESS, https://www.apnews.com/article/california-fast-food-minimum-wage-a04c2e559b09cbcd26dd5702e0755a83 (Mar. 31, 2024, 11:29 AM).

6. Cal. Assemb. 1228.

7. Andrias & Sachs, *Chicken-and-Egg*, *supra* note 4, at 818.

8. *See* S.C.A. 7, 2023 Leg., Reg. Sess. (Cal. 2023).

9. *See id.*

This Essay proceeds in three parts. Part I surveys the political economy of labor law at the federal and state levels, examining why labor law reform has been largely unachievable at the federal level but not at the state level. Part II surveys the legal constraints on how states and localities can legislate on unionization and collective bargaining and examines several recent efforts to take advantage of the interstices of the preemption rules, as well as countermobilization by business. Part III focuses on two of labor's efforts—tripartite administrative boards and constitutional rights articulation—both of which aim to build greater power for workers while improving working conditions. It considers the extent to which labor's innovations offer a model for a more social democratic approach to public law that could be expanded beyond labor. This Essay concludes by acknowledging the countermobilization by business and the challenges to reshaping labor law, public law, and the political economy of the United States.

I. THE POLITICAL ECONOMY OF FEDERAL AND STATE LABOR LAW REFORM

The COVID-19 pandemic brought to the fore the essential nature of workers' contributions to society. At the same time, dangerous working conditions, persistently low wages, staggering economic inequality, and the looming threat of artificial intelligence and algorithmic management underscored for many just how thoroughly the U.S. political economy fails workers. Against this background, support among Americans for unions has increased considerably in recent years with more than sixty-five percent expressing favorable views in opinion polls.[10] An upsurge in labor activity has accompanied the rise in unions' favorability rates. Since 2018, hundreds of thousands of workers have engaged in work stoppages, while others have organized new unions at companies once thought unorganizable, ranging from Starbucks to Amazon to numerous news outlets and universities.[11] Overall, there has been a more than fifty percent increase in workers petitioning the National Labor

10. Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way,* GALLUP (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx [https://perma.cc/L4Y6-H3RM].

11. THOMAS A. KOCHAN ET AL., WORKER EMPOWERMENT RSCH. NETWORK, U.S. WORKERS' ORGANIZING EFFORTS AND COLLECTIVE ACTIONS: A REVIEW OF THE CURRENT LANDSCAPE 18–20, 24–27 (2022), https://mitsloan.mit.edu/sites/default/files/2022-06/Report%20on%20Worker%20Organizing%20Landscape%20in%20US%20by%20Kochan%20Fine%20Bronfenbrenner%20Naidu%20et%20al%20June%202022.pdf [https://perma.cc/58DQ-XKCR].

Relations Board (NLRB) for union elections,[12] and strike activity has reached its highest peak since 2000.[13]

A. The Political Economy of Federal Labor Law

Yet even with all of this labor activity, only about six percent of private sector employees are unionized.[14] One key reason for the gap between preference and reality is the structure of federal labor law. The National Labor Relations Act (NLRA) promises to protect workers' rights to organize, bargain, and strike,[15] but it fails to do so in practice.[16]

Several weaknesses pervade federal labor law.[17] First, minimal penalties and limited enforcement mechanisms, along with strong protections for employer property and managerial rights, make it exceedingly difficult for workers to organize new unions and reach first contracts with their employers.[18] One study found that U.S. employers are charged with violating the law in over forty percent of union campaigns,[19] and nearly two-thirds "of all organized units had no collective bargaining agreement 1 year after certification."[20]

Second, the primary mechanism workers have for achieving gains is collective action, but protections for the right to strike have been significantly whittled down by both courts and Congress since the

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12. *Compare 2018 Union Filing Report*, UNION ELECTIONS, https://unionelections.org/data/reports/2018 [https://perma.cc/5LTD-LGRQ] (counting 1,569 representation cases filed), *with 2023 Union Filing Report*, UNION ELECTIONS, https://unionelections.org/data/reports/2023 [https://perma.cc/P63N-XLYY] (counting 2,408 representation cases filed).

13. Press Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Major Work Stoppages in 2023 (Feb. 21, 2024), https://www.bls.gov/news.release/wkstp.nr0.htm [https://perma.cc/N5EF-BYKQ].

14. Press Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Union Members Summary (Jan. 23, 2024), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/5LT9-GF3V].

15. 29 U.S.C. § 151.

16. Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983).

17. *See generally* KATE ANDRIAS & BRISHEN ROGERS, ROOSEVELT INST., REBUILDING WORKER VOICE IN TODAY'S ECONOMY (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf [https://perma.cc/G76M-ZBFM].

18. *Id.* at 21.

19. CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., UNLAWFUL 2 (2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/9GHH-TWNX].

20. John Kallas, Dongwoo Park & Rachel Aleks, *Breaking the Deadlock: How Union and Employer Tactics Affect First Contract Achievement*, 54 INDUS. RELS. J. 223, 229–31 (2023).

1930s.[21] To take just one example, the law purports to protect the right to strike but permits employers to permanently replace workers who strike for economic reasons.[22]

Third, the law excludes too many workers from its protections, including independent contractors, agricultural workers, and domestic workers—exclusions that are, in part, a legacy of institutionalized racism.[23] These exclusions have become more capacious and detrimental as more firms rely on workers they classify as independent contractors.[24] Public sector workers too are excluded, resulting in a patchwork of coverage for government workers around the country.[25]

Finally, the NLRA's orientation around worksite-by-worksite bargaining fails to give workers sufficient power to set wages and working conditions throughout their sector even when they do successfully organize at a given workplace.[26] This problem, too, has become more acute with the rise of the "fissured workplace," with more corporations relying on outsourcing, franchising, temporary labor, and other precarious work arrangements.[27] Workers at one McDonald's franchise who win a union election, for example, are only entitled to bargain with their franchise owner; they have little bargaining power vis-à-vis the multinational corporation that controls more than ten thousand franchise and corporate stores.[28]

In contrast to the U.S. system, nearly all other industrial democracies provide mechanisms for workers to bargain together across a sector, while also providing for worker voice at the local "shop" level.[29] In light of these features of U.S. labor law, it is not surprising that the United States has some of the lowest levels of collective

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21. James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1071–72 (1987); James Gray Pope, *How American Workers Lost the Right To Strike, and Other Tales*, 103 MICH. L. REV. 518, 518 (2004) [hereinafter Pope, *Right To Strike*]; JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS 9–11, 14 (2016).

22. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

23. IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 266–69 (2013); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987).

24. 29 U.S.C. § 152(3); Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 519, 524–26 (2021); *see also* 29 C.F.R. § 795.100 (2024).

25. 29 U.S.C. § 152(2); *see infra* notes 90–97 for a discussion of public sector workers and state laws that grant or deny them collective bargaining rights.

26. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 6 (2016) [hereinafter Andrias, *The New Labor Law*].

27. *See id.* at 28–29 (detailing the mismatch between the economy and the labor law system); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 167–74 (2014).

28. Andrias, *The New Labor Law*, *supra* note 26, at 58–61.

29. *Id.* at 35.

bargaining coverage in the industrialized world—and some of the highest levels of income and wealth inequality.[30] As social scientists have demonstrated, with the decline of unions, the United States has lost a key equalizing force in politics and the economy.[31]

Yet despite widespread scholarly consensus about the shortcomings of U.S. labor law—and substantial overwhelming popular support for unions—efforts to reform labor law at the federal level have repeatedly failed.[32] Political scientists like Jacob Hacker and Daniel Galvin have demonstrated that the failure to amend the NLRA has resulted in substantial "policy drift."[33] That is, labor policy has not remained static but rather has become weaker over time because of the failure to reform the law in light of changing economic conditions and structures.[34]

Distinctive features of the American political economy help explain these problems of ossification and drift. For one, the American political system is nonmajoritarian.[35] The federal separation-of-powers system, featuring an outsized number of veto points, means that even when political majorities support reform, it is not necessarily enacted.[36] Other features of the constitutional system, including the countermajoritarian

30. Zsolt Darvas, Giulia Gotti & Kamil Sekut, *Collective Bargaining Is Associated with Lower Income Inequality*, BRUEGEL (Mar. 14, 2023), https://www.bruegel.org/analysis/collective-bargaining-associated-lower-income-inequality [https://perma.cc/NEV4-3TMR]; *see also* Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, ECON. POL'Y INST. (Apr. 8, 2021), https://files.epi.org/uploads/225389.pdf [https://perma.cc/3TFJ-3YCR] (describing decline of union density over time).

31. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 4–8, 86–88 (2014).

32. *See* Estlund, *supra* note 2, at 1540–42 (summarizing history of law reform failures through the 1990s). More recently, labor and its allies have been unable to pass both the PRO Act and the Employee Free Choice Act (EFCA) despite having Democratic majorities in Congress and Democratic Presidents in the White House. *See* Emily DiVito, *The Filibuster Strikes Again: How It Inhibited Workers' Rights in the 117th Congress*, ROOSEVELT INST. (Jan. 3, 2023), https://rooseveltinstitute.org/2023/01/03/the-filibuster-strikes-again-how-it-inhibited-workers-rights-in-the-117th-congress/ [https://perma.cc/42VJ-Y5E7] (describing the PRO Act's failure to advance after House passage because of a threatened filibuster by Republicans in the Senate); Harold Meyerson, Opinion, *Under Obama, Labor Should Have Made More Progress*, WASH. POST (Feb. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020902465.html [https://perma.cc/3PEC-ZKAZ] (describing the Senate's inability to pass EFCA as "devastating and galling" for the unions).

33. Daniel J. Galvin & Jacob S. Hacker, *The Political Effects of Policy Drift: Policy Stalemate and American Political Development*, 34 STUD. AM. POL. DEV. 216, 224 (2020).

34. *Id.* at 217–24.

35. Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2334, 2354 (2021).

36. *Id.* at 2334–54.

nature of the Senate and the Electoral College, further undermine the ability of popular majorities to achieve policy change.[37]

Relatedly, the United States has an exceptionally powerful judiciary with greater policymaking authority and constitutional supremacy than those in other countries.[38] Perhaps not surprisingly, given its elite makeup, the Supreme Court has interpreted the NLRA in ways that are pro-business and solicitous of common law property and managerial rights, often framing its rulings as constitutional and beyond the reach of political reform.[39]

In addition, the institutional terrain produced by the highly fragmented structure of American government advantages political actors with the capacity and financial resources to work across multiple venues.[40] Moreover, as interpreted by the courts, the Constitution protects the rights of large corporations and wealthy elites to spend staggering amounts of money on campaigns and lobbying across multiple levels of government.[41]

Another notable characteristic of the U.S. political economy is its deep racial divisions, with long-established structures of public policy and social organization reflecting and reinforcing embedded racial inequalities.[42] These inequalities have long defined labor policy, with entire sectors of the economy excluded from protection due in part to their racial makeup and with business often exploiting racial, ethnic, and immigration-status divisions among workers.[43]

The above features of the American political economy—countermajoritarianism, including an unusually powerful judiciary; the

37. *Id.* at 2334–44.

38. *See* Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487, 490–93 (2012) (comparing the weak-form judicial review in Commonwealth countries to strong-form judicial review in the United States while also recognizing the similarities between the two approaches); K. Sabeel Rahman & Kathleen Thelen, *The Role of the Law in the American Political Economy*, *in* THE AMERICAN POLITICAL ECONOMY 76, 78–83 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2022) (discussing role of the judiciary in the American political economy generally); *see generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (critiquing U.S. judicial supremacy).

39. *See, e.g.*, Andrias, *Constitutional Clash*, *supra* note 2, at 1011–12. On the role of courts in labor policy, see generally *id.*; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 293–336 (1978); and WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

40. Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, *Introduction* to THE AMERICAN POLITICAL ECONOMY, *supra* note 38, at 1, 2–3.

41. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

42. Hacker, Hertel-Fernandez, Pierson & Thelen, *supra* note 40, at 13.

43. *Id.* at 13, 23–27.

costly nature of political action; and racial divisions—have made achieving labor reform at the federal level nearly impossible. But another distinctive feature of the American political economy—federalism—is currently providing a path for a partial de-ossification and renovation of labor policy, in ways that have the potential to increase the political and economic power of working people. This has not always been the case: The highly decentralized form of federalism that characterizes the United States has often contributed to the country's deeply inegalitarian political economy. With regard to labor policy in particular, federalism, and its overlap with the nation's racial history, has been a distinctly negative force. Southern states have long sought to maintain control over their highly exploitative system of labor, with acquiescence from northern elites.[44] In addition, the fragmented and weak bureaucracy produced by America's distinctive form of federalism impedes effective enforcement of law and allows regulatory arbitrage.[45]

B. Dynamic Labor Federalism

Yet, federalism can also be a tool for achieving progressive change when reform is blocked at the federal level.[46] The California fast-food example discussed above illustrates one way in which unions and worker advocates are engaged in significant innovation at the state and local level, albeit constrained by principles of federal preemption.[47]

Frequently, worker movements that lack power to enact legislation at the national level nonetheless possess enough legislative influence in some states and localities to take advantage of a very different political

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44. KATZNELSON, *supra* note 23, at 265–69; Tami Friedman, *Exploiting the North-South Differential: Corporate Power, Southern Politics, and the Decline of Organized Labor After World War I*, 95 J. AM. HIST. 323, 325 (2008); ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972, at 9–11 (2015). The mobilization of southern elected officials against the autoworkers' efforts to unionize in recent months is a contemporary illustration. Press Release, Kay Ivey, Ala. Governor, Governor Ivey & Other Southern Governors Issue Joint Statement in Opposition to United Auto Workers (UAW)'s Unionization Campaign (Apr. 16, 2024), https://governor.alabama.gov/newsroom/2024/04/governor-ivey-other-southern-governors-issue-joint-statement-in-opposition-to-united-auto-workers-uaws-unionization-campaign [https://perma.cc/3L9X-UUAX].

45. Hacker, Hertel-Fernandez, Pierson & Thelen, *supra* note 40, at 15–17.

46. On this dynamic, see Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1951–56 (2014) [hereinafter Bulman-Pozen, *From Sovereignty and Process*]. On federalism as a tool to build countervailing power, see Andrias & Sachs, *Chicken-and-Egg*, *supra* note 4, at 812–29.

47. *See supra* text accompanying notes 5–9.

economy.[48] In particular, due to geographic sorting of the population, states are more likely to have unified party control: Eighty percent of the states as of January 2024 were controlled by a single political party.[49] In jurisdictions where control is Democratic, pro-worker reforms are easier to achieve, although by no means guaranteed.[50] States also have governance systems that are more majoritarian: Only seven states have processes equivalent to the filibuster; many have mechanisms for ballot initiatives or referenda; and many have elected judiciaries and constitutions that are easier to amend.[51] Finally, while racial inequality remains pervasive and intractable in many states, other states and localities have taken affirmative steps to undo the effects of systemic racism.[52]

To be sure, as Andrew Elmore has documented, structural inequality between labor and business is replicated at the state level, even in "blue" jurisdictions.[53] Corporations are often able to dominate state initiatives and legislative processes in order to limit pro-worker reforms. However, in blue states, the combination of geographic sorting and fewer veto points, a differently constituted judiciary, and a less entrenched racial hierarchy means that more pro-worker legislation and

48. Andrias & Sachs, *Chicken-and-Egg*, *supra* note 4, at 784–85; *see also* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–82 (2014).

49. Andrias & Sachs, *Chicken-and-Egg*, *supra* note 4, at 814.

50. *See, e.g.*, Mark Pazniokas, *Lamont Vetoes Bill Intended To Give State Aid to Striking Workers*, CT MIRROR (June 11, 2024, 4:55 PM), https://ctmirror.org/2024/06/11/lamont-vetoes-bill-intended-to-give-state-aid-to-striking-workers/ (reporting on the decision of Governor Ned Lamont—the Democratic Governor of Connecticut—to veto a "bill that was intended to provide up to $3 million in state aid to striking workers").

51. *Id.* at 815–17; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 876–79 (2021); Kate Andrias, *The Perils and Promise of Direct Democracy: Labour Ballot Initiatives in the United States*, 34 KING'S L.J. 260, 271–76 (2023) [hereinafter Andrias, *Perils and Promise*].

52. For instance, some states recently passed laws prohibiting employment discrimination based on an employee wearing natural hair, which has long been a way that employers discriminate against Black people, especially Black women. *See, e.g.*, Dianne Lugo, *Oregon's New CROWN Act Explicitly Prohibits Raced-Based Hair Discrimination*, STATESMAN J., https://www.statesmanjournal.com/story/news/2022/01/01/oregon-crown-act-law-prohibits-hair-discrimination-black-natural-texture-braids-locs-bantu-knot/9068083002 [https://perma.cc/6TCK-8GPE] (Jan. 4, 2022, 2:09 PM). Other states have tightened restrictions on the use of criminal background checks in hiring, which often have discriminatory effects because of disproportionate policing. *See, e.g.*, Lisa Burden, *Illinois Expands Employment Protections for Workers with Criminal Histories*, HR DIVE (Apr. 7, 2021), https://www.hrdive.com/news/illinois-expands-employment-protections-for-workers-with-criminal-histories/597775 [https://perma.cc/TX7C-PCHF].

53. *See* Elmore, *supra* note 4, at 1205–11; *see also* Andrias, *Perils and Promise*, *supra* note 51, at 263–66 (describing power of gig companies in California).

constitutional law is possible. In "red" states, reform tends to be decidedly anti-worker, but even in those environments, there are openings for popular pro-worker reform using direct democracy mechanisms. For example, numerous conservative states have increased their minimum wage via ballot initiative, despite staunch Republican opposition in state legislatures.[54] In any event, in both red and blue states, the legal regime is far less ossified than at the federal level.

Critically, reforms at the state level can be transported to other states or to the national level. This is an important feature of federalism generally, as Jessica Bulman-Pozen has explored.[55] Legislation enacted in one state can demonstrate the efficacy and plausibility of reform, create administrative capacity, and expand supportive constituencies in ways that increase the likelihood of reform both in other states and at the national level.[56]

As Benjamin Sachs and I have previously argued, when it comes to legislation that either encourages or discourages unions and other social movement organizations, the dynamic nature of state and local reform is even more pronounced: Once organizing-enabling legislation or constitutional reform is achieved in a state or city, labor unions and their allies can use that reform not only as a model and persuasive test case—the classic laboratory of ideas for which federalism is known—they can also use it to build organization, and therefore political and economic power.[57] They then can export that power across jurisdictional lines, potentially to enact similar laws in other states or cities—and ultimately at the federal level where, to date, they have been too weak to overcome the obstacles discussed above.[58] Conversely, when conservative forces use legislative reform to weaken unions in a given state, they not only use that law as a model, but also reduce unions' resources and weaken workers' ability to affect future political change in that state, in other states, and at the national level.[59]

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54. Andrias, *Perils and Promise*, *supra* note 51, at 272.

55. Bulman-Pozen, *From Sovereignty and Process*, *supra* note 46, at 1955–56.

56. *Id.*; *see also* Jamila Michener, *Medicaid and the Policy Feedback Foundations for Universal Healthcare*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 125–30 (2019).

57. Andrias & Sachs, *Chicken-and-Egg*, *supra* note 4, at 828–29 (exploring federalism dynamics of law reform that builds organizational power).

58. *Id.*

59. Andrias, *Perils and Promise*, *supra* note 51, at 273–75.

II. STATE LABOR LAW INNOVATION UNDER THE SHADOW OF FEDERAL PREEMPTION

What, then, is the labor law reform occurring at the state and local level? States have wide latitude to enact employment legislation that protects workers as individuals, including by passing standards above federal minimums with respect to wages, overtime, family leave, health and safety, and antidiscrimination law. In contrast, federal law preempts most state and local legislation relating to union organizing and collective bargaining. Under what is known as *Garmon* preemption, states and localities are prohibited from regulating any activity that is protected or prohibited (or arguably protected or prohibited) by the NLRA.[60] Under *Machinists* preemption, they are also prohibited from regulating activity that Congress intentionally left unregulated.[61] As a result of these doctrines, states are largely unable to pass legislation that directly governs organizing and bargaining rights of most private sector employees.

However, federal preemption doctrine leaves open a few important avenues for states to regulate in ways that enable unionization or otherwise facilitate worker voice. First, federal law permits states and localities to enact generally applicable employment standards, even when such standards are the product of or help facilitate collective voice among workers.[62] Second, federal law allows states and localities to establish organizing, bargaining, and strike rights for industries excluded from the NLRA, like domestic, agricultural, and public sector work.[63] Third, federal law provides states and localities some authority to make decisions about labor relations when they are acting as market participants (*i.e.*, when they are purchasing services or spending money), unless the use of this power is so broad it becomes regulatory.[64]

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60. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959).

61. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 140–41 (1976). In addition, if a state law claim is dependent on analysis of the terms of a collective bargaining agreement, then it is typically preempted under section 301 of the Labor-Management Relations Act (LMRA). *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

62. *See N.Y. Tel. Co. v. N.Y. State Dep't of Lab.*, 440 U.S. 519, 532–33, 546 (1979) (plurality opinion); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756–57 (1985).

63. *See Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1366–69 (9th Cir. 1994).

64. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.* (*Boston Harbor*), 507 U.S. 218, 227, 232–33 (1993); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022–24 (9th Cir. 2010); *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1005–06 (7th Cir. 2005); *Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC*,

In the last few years, due to effective organizing by labor unions, as well as worker centers and community groups, blue states and localities have been pursuing all three of the non-preempted legal strategies in an effort to improve working conditions and to give workers more power in the political economy—albeit with counterefforts by business, particularly in red states.

A. Employment Standards

States and localities have passed a range of laws that improve standards for workers, including significant increases in the minimum wage, scheduling protections, and limitations on the use of noncompete agreements. The scope of new labor federalism in the United States over the last twenty years has been significant. Laws establishing local minimum wages higher than the federal level have passed in thirty states and about sixty localities.[65] Sixteen states (including the District of Columbia), seventeen cities, and four counties have enacted paid sick leave laws.[66] Numerous states have enhanced laws that prohibit the use of child labor.[67]

All of these laws raise the floor above which unions can organize and bargain. They are also almost all the product of union campaigns. In the face of a broken federal labor system, unions in sectors that are largely unorganized are pressing their demands through state legislation

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390 F.3d 206, 213–18 (3d Cir. 2004); *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35–36 (D.C. Cir. 2002). *But see Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 62, 70–71, 76 (2008) (holding that the State of California did not act as a market participant when it prohibited state fund recipients from using those funds to deter union activity).

Benjamin Sachs details another way states and cities have made labor policy despite preemption: "[G]overnment actions in areas of law unrelated to labor — but of significant interest to employers — are exchanged for private agreements through which unions and employers reorder the rules of union organizing and bargaining," thereby shaping labor policy on the ground. *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154 (2011). As discussed *infra* Section II.C, these have sometimes been negotiated when employers fail to comply with contracting standards imposed by states and localities.

65. Andrias, *Perils and Promise*, *supra* note 51, at 272.

66. Molly Weston Williamson, *The State of Paid Sick Time in the U.S. in 2024*, CTR. FOR AM. PROGRESS (Jan. 17, 2024), https://www.americanprogress.org/article/the-state-of-paid-sick-time-in-the-u-s-in-2024; NAT'L P'SHIP FOR WOMEN & FAMS., PAID SICK DAYS STATUTES (2023), http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf [https://perma.cc/G6UK-FY2L].

67. Chris Mar, *State Child Labor Penalties Expand in Pushback on Relaxed Limits*, BLOOMBERG L. (May 14, 2024, 4:30 AM), https://news.bloomberglaw.com/daily-labor-report/state-child-labor-penalties-expand-in-pushback-on-relaxed-limits.

or the regulatory process, instead of through private bargaining.[68] Indeed, many recent gains are sector specific. Examples include the enactment of just-cause laws protecting fast-food workers in New York City and parking attendant workers in Philadelphia from termination without due process.[69] Another is the recent New York City law raising wages and providing new rights, including providing bathroom access, to delivery workers.[70]

In addition to laws regulating traditional employment standards, in the last few years, numerous states have enacted laws prohibiting employers from requiring employees to attend anti-union meetings, as well as meetings about any religious or political matters.[71] Business groups have filed suit, arguing both that the statutes violate the First Amendment and that they are preempted; regarding preemption, the question is whether they are generally applicable employment standards or laws that directly conflict with a right prohibited or protected by the NLRA.[72] Whether the laws are ultimately upheld or not, they have garnered widespread support in progressive states.[73] The laws have been important as an organizing tool with constitutional import: They have highlighted the problem of employers using their authority to force political views on employees and have advanced a different vision of what protecting the freedom of speech requires than that which federal courts have adopted.[74]

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68. Andrias, *The New Labor Law*, *supra* note 26, at 63–69.

69. KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 27 (2021), https://www.rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/HL4Q-FA86].

70. N.Y.C., N.Y., MUN. CODE §§ 20-563.6, 20-1522 to -1523 (2024).

71. *See, e.g.*, CONN. GEN. STAT. § 31-51q (2024); Worker Freedom of Speech Act, S. 3649, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024); ME. STAT. tit. 26, § 600-B (2024); MINN. STAT. § 181.531(1)(1) (2023); S. 4982, 2023–24 Leg., Reg. Sess. (N.Y. 2023); N.Y. LAB. LAW § 201-D (McKinney 2024); S. 5778, 68th Leg., Reg. Sess. (Wash. 2024); *see also* Andrea Hsu, *Illinois Bans Companies from Forcing Workers To Listen to Their Anti-Union Talk*, NPR, https://www.npr.org/2024/07/30/nx-s1-5040451/captive-audience-anti-union-religious-meetings-afl-cio [https://perma.cc/FS3U-FQBW] (July 31, 2024, 12:41 PM) (noting that eighteen states "have either passed or are considering [similar] legislation").

72. Complaint at 2, *Chamber of Com. of the U.S. v. Bartolomeo*, No. 22-cv-01373 (D. Conn. filed Nov. 1, 2022); Complaint at 2, *Minn. Chapter of Associated Builders & Contractors, Inc. v. Ellison*, No. 24-cv-00536 (D. Minn. filed Feb. 2, 2024); Complaint at 1–2, *Ill. Pol'y Inst. v. Ill. Dep't of Lab.*, No. 24-cv-06976 (N.D. Ill. filed Aug. 8, 2024); *see also N.Y. State Vegetable Growers Ass'n v. James*, No. 23-CV-1044, 2024 WL 1161115, *1–3 (W.D.N.Y. Feb. 21, 2024).

73. *See* Hsu, *supra* note 71.

74. *See* ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS 218–20 (2018) (discussing potential legal barriers to limiting employers' political messaging directed at employees).

A third category of new state employment law, discussed in more detail in Part III, involves a form of participatory administration used previously during the Progressive and early New Deal eras. States and localities are enacting new worker standards boards, also known as councils or industry committees, which enable worker organizations and businesses, along with public officials, to set employment standards through administrative processes.[75] New tripartite boards in industries such as nursing homes, fast food, and domestic work enable workers, employers, and public officials to set wages and working conditions that are specific to the industrial sector.[76]

B. Laws Allowing Excluded Workers To Unionize and Strengthening Rights for Public Sector Workers

States and localities have also been creating new pathways to organization and voice for workers not covered by the NLRA. For example, over the last couple of decades, unions have used innovative lawyering and legislative strategies to transform state-funded homecare and childcare workers into state employees, or quasi-state employees, in numerous jurisdictions.[77] After doing so, they won the right to hold representational elections for these workers and to bargain on a sector-wide basis.[78] This has helped significantly expand the ranks of union members in states including Illinois, Minnesota, and California.[79]

More recently, due to efforts by worker centers, alt-labor groups, and some traditional unions, several progressive states and localities have expanded protections for domestic workers and farmworkers, long

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75. *See infra* Section III.A.

76. *See infra* Section III.A.

77. This Section of the Essay expands on a previously published blog post. *See* Kate Andrias, *State and Local Government Efforts To Build Worker Power*, CONSORTIUM ON AM. POL. ECON.: AM. POL. ECON. BLOG (June 5, 2024), https://www.americanpoliticaleconomy.org/blog-articles/state-and-local-developments-in-labor-policy-to-build-worker-power [https://perma.cc/T3BS-K6J2].

78. *See* EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA 183–210 (2012).

79. *See* Press Release, SEIU Healthcare Ill. & Ind., SEIU Healthcare Home Care Workers and Child Care Providers Join Governor J.B. Pritzker in Approving Historic Collective Bargaining Agreements (Jan. 16, 2020), https://seiuhcilin.org/2020/01/seiu-healthcare-home-care-workers-and-child-care-providers-join-governor-j-b-pritzker-in-approving-historic-collective-bargaining-agreements/ [https://perma.cc/KCY4-3ARE]; *see also* SEIU HEALTHCARE MN & IA, HOME CARE WORKERS CONTRACT: JULY 1, 2023 THROUGH JUNE 30, 2025 (2023), https://drive.google.com/file/d/1c2hNfxVDVn-vXRK9YMra2ydCjrTRNIVf/view [https://perma.cc/Z9NN-W8X6]; *Child Care Providers United Contract*, CHILD CARE PROVIDERS UNITED, https://childcareprovidersunited.org/ourcontract [https://perma.cc/2Q2B-RKF4].

excluded from federal labor law.[80] As discussed in more detail in Part III, many of these new systems emerge from an assertion of state constitutional rights and employ new forms of participatory administration.[81] For example, New York State recently enacted bargaining rights for farmworkers after the Court of Appeals, the state's highest court, held that the State Constitution required such rights; the Legislature included a worker standards board in the new statutory framework.[82] Domestic worker organizations have successfully pushed for new "bills of rights" and worker standards boards in eleven states and three cities, including California, Connecticut, Illinois, Nevada, New York State, Philadelphia, and Seattle.[83]

Other groups of workers, including gig workers who provide app-based driving and delivery services, are currently working with unions to push for organizing rights at the state level.[84] These workers are currently considered outside the NLRA's definition of "employee," thus granting states and cities the opportunity to legislate on their behalf.[85] However, while most experts agree that labor law preemption does not apply to such initiatives, the extent to which antitrust law preempts collective action among workers classified as independent contractors is disputed.[86] One way to ensure an exception from the antitrust law is for states to design collective bargaining regimes consistent with the *Parker* exception, which allows collective action when

80. *See* Dan Galvin, *Building Power at the Margins of the Labor Market*, CONSORTIUM ON AM. POL. ECON.: AM. POL. ECON. BLOG (June 5, 2024), https://www.americanpoliticaleconomy.org/blog-articles/dan-galvin-on-wage-theft [https://perma.cc/9VPP-AVGQ].

81. *See infra* Section III.A.

82. Assemb. 8419, 2019–20 Leg., Reg. Sess. (N.Y. 2019); *see also Hernandez v. State*, 99 N.Y.S.3d 795, 800–01 (App. Div. 2019).

83. *Domestic Workers Bill of Rights*, NAT'L DOMESTIC WORKERS ALL., https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights [https://perma.cc/3993-L4AQ].

84. Eli Tan, *Ride-Hailing Drivers in Massachusetts Win Right To Unionize*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/technology/uber-lyft-drivers-unionize-massachusetts.html; *see also* Nate Raymond, *Dueling Massachusetts Gig Worker Ballot Measures Clear Key Hurdle*, REUTERS (Sept. 6, 2023, 2:31 PM), https://www.reuters.com/legal/government/dueling-massachusetts-gig-worker-ballot-measures-clear-key-hurdle-2023-09-06.

85. National Labor Relations Act, 29 U.S.C. § 152(3). *But see Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95, 5, 8, 15 (June 13, 2023) (adopting a more capacious definition of employee and opening door for the Board to consider whether rideshare drivers and other gig workers are employees).

86. *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 311 (1st Cir. 2022); *see also* Dan Papscun & Khorri Atkinson, *Antitrust Shield for Independent Worker Action Gains Momentum*, BLOOMBERG L. (May 9, 2023, 4:00 AM), https://news.bloomberglaw.com/antitrust/antitrust-shield-for-independent-worker-action-gains-momentum.

clearly permitted and actively supervised by the state.[87] In most cases, these laws have been staunchly opposed by industry groups.[88] They also divide the labor movement; some unions take the position that seeking union rights without full employee status is a mistake, while others emphasize the importance of building collective power and achieving interim gains.[89]

In addition, a few states have recently strengthened protections for public sector workers. For example, in 2023, Michigan repealed laws that constrained public employees' ability to bargain.[90] Vermont passed the Vermont PRO Act in 2024, which, among other pro-labor reforms, enables public sector workers to organize through "card check," *i.e.*, with a majority of workers signing union cards, rather than undergoing a lengthy union election process.[91] In 2022, Illinois passed a constitutional amendment affirming the right of workers to organize

87. *See Parker v. Brown*, 317 U.S. 341, 352 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104–05 (1980); *cf. Chamber of Com. v. City of Seattle*, 890 F.3d 769, 775, 781–82 (9th Cir. 2018).

88. *See, e.g.*, Raymond, *supra* note 84 (discussing platform opposition to worker-led ballot measures that would affect the collective bargaining rights of gig drivers).

89. *See* Katie Johnston, *As Showdown with Uber and Lyft Draws Near, Labor Groups Are Split on Their Aims*, BOS. GLOBE, https://www.bostonglobe.com/2024/04/29/business/uber-lyft-drivers-classification-employment-union-bargaining/ [https://perma.cc/AAN6-7H98] (Apr. 29, 2024, 5:52 AM); *see also* Tan, *supra* note 84; Press Release, Int'l Bhd. of Teamsters, Teamsters Call on Mass. Lawmakers To Vote Down Worker Misclassification Bill (Mar. 8, 2024), https://teamster.org/2024/03/teamsters-call-on-massachusetts-lawmakers-to-vote-down-worker-misclassification-bill/ [https://perma.cc/QT3Q-8AZT]. Other unions have supported gig worker organizing bills as long as they contain sufficient protections for workers. *Compare* Press Release, Kyle Bragg, SEIU 32BJ President, 32BJ Statement Regarding Possible Gig Worker Legislation, May 24, 2021, https://www.seiu32bj.org/press-release/32bj-statement-regarding-possible-gig-worker-legislation [https://perma.cc/UTF3-YUXL] (denouncing proposed New York state bill that would have granted weak organizing rights to app-based drivers), *with* Press Release, SEIU, Massachusetts Uber, Lyft Drivers Launch Historic Initiative to Win Union Rights (July 3, 2024), https://www.seiu.org/2024/07/massachusetts-uber-lyft-drivers-launch-historic-ballot-initiative-to-win-union-rights (announcing campaign to enact gig worker organizing rights in Massachusetts).

90. Press Release, Gretchen Whitmer, Mich. Governor, Gov. Whitmer Signs Legislation To Recruit and Retain Educators (July 26, 2023), https://www.michigan.gov/whitmer/news/press-releases/2023/07/26/whitmer-signs-legislation-to-recruit-and-retain-educators [https://perma.cc/ZJ8G-QVX5].

91. S. 102, 2023–24 Gen. Assemb., Reg. Sess., § 4 (Vt. 2024) (relating to expanding employment protections and collective bargaining rights); *see also About VT PRO Act*, PASS THE VT. PRO ACT, https://www.passvtproact.com/about [https://perma.cc/T6JM-D73L]. The new Vermont law also extends organizing rights to domestic workers and limits captive audience meetings. However, after intense agricultural lobbying, it does not extend organizing rights to farmworkers, instead establishing a commission to study the issue. Vt. S. 102, § 3.

unions and engage in collective bargaining.[92] As detailed in Part III, numerous other states have passed or are considering similar constitutional amendments.

C. States as Purchasers

States and localities have also taken advantage of the exception in preemption doctrine that allows them to make decisions about labor relations when they are acting as market participants and not as regulators. That is, increasingly, states and localities have set labor standards for their contracts in order to further labor peace and ensure good jobs and efficient services in their supply chains.[93] Numerous states and cities, for example, require or incentivize contractors to pay a prevailing wage on certain contracts,[94] or to enter into "labor peace" agreements with unions to avoid disruption to projects.[95] Unions like the Communication Workers of America (CWA) have used these contracting provisions to seek agreements that enable union organizing in new manufacturing industries like offshore wind and electric vehicles.[96] Notably, a number of these efforts take advantage of cooperative

92. Jennifer Sherer, *Illinois Workers' Rights Amendment Sets New Bar for State Worker Power Policy*, ECON. POL'Y INST.: WORKING ECON. BLOG (Dec. 7, 2022, 1:35 PM), https://www.epi.org/blog/illinois-workers-rights-amendment-sets-new-bar-for-state-worker-power-policy-other-state-legislatures-should-seize-the-moment-to-advance-worker-racial-and-gender-justice-in-2023/ [https://perma.cc/JWR4-JW8J].

93. *See* DAVID MADLAND & ALEX ROWELL, CTR. FOR AM. PROGRESS ACTION FUND, HOW STATE AND LOCAL GOVERNMENTS CAN STRENGTHEN WORKER POWER AND RAISE WAGES 11–12 (2017), https://www.americanprogressaction.org/wp-content/uploads/sites/3/2017/05/C4-StateLocalWorkerVoice-report.pdf [https://perma.cc/Q93S-XH7W].

94. KARLA WALTER, MALKIE WALL & ALEX ROWELL, CTR. FOR AM. PROGRESS, A HOW-TO GUIDE FOR STRENGTHENING STATE AND LOCAL PREVAILING WAGE LAWS 4–5 (2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/12/PrevailingWages-report.pdf [https://perma.cc/9MRQ-R6WB]; N.J. STAT. ANN. §§ 34:11-56.25 to .26 (West 2024).

95. MADLAND & ROWELL, *supra* note 93, at 11–12.

96. Press Release, Commc'ns Workers of Am., IUE-CWA and GE Reach Labor Peace Agreement on Proposed New York Offshore Wind Facilities (May 15, 2023), https://cwa-union.org/news/releases/iue-cwa-and-ge-reach-labor-peace-agreement-proposed-new-york-offshore-wind-facilities [https://perma.cc/YGX3-5AXC]; Press Release, Commc'ns Workers of Am., First-Ever Comprehensive Labor Neutrality Agreement in Semiconductor Industry Sets Historic New Precedent on Brink of $52 Billion Allocation of Federal CHIPS Funding (Nov. 27, 2023), https://cwa-union.org/news/releases/first-ever-comprehensive-labor-neutrality-agreement-semiconductor-industry-sets [https://perma.cc/JX8N-5M3Z] (announcing "first-in-the-industry labor neutrality agreement for semiconductor production workers," which has "applications in clean-energy equipment, electric vehicles, communications and aerospace/defense").

federalism programs—the money derives from major federal infrastructure spending programs.[97]

Along with CWA, the nonprofit Jobs to Move America (JMA) has led many of the recent efforts regarding contracting requirements; it seeks to ensure that publicly funded jobs are good jobs, particularly in the growing electric vehicle industry.[98] JMA has successfully lobbied numerous states and municipalities to adopt a set of high-road contracting standards that prioritize job creation and retention in assessing manufacturer bids for public contracts.[99] It has then worked with unions to hold companies accountable to those standards, ultimately enabling unionization.[100]

For example, in 2012, bus manufacturer New Flyer submitted a bid for a $500 million contract with Los Angeles County, which had adopted good-jobs contracting standards; the bid promised to create fifty new jobs of which ninety percent would earn more than $18.35 per hour.[101] New Flyer won the contract, but it allegedly did not pay the wages it promised and misrepresented the value of the benefits it provided.[102] In 2018, JMA sued in a qui tam action under the California False Claims Act, and in 2022, New Flyer settled the claims for $7 million and a community benefits agreement.[103] Under that community benefits agreement, New

97. *See* Scott Cummings & Madeline Janis, *Reclaiming the Progressive Potential of Local Procurement*, L. & POL. ECON. PROJECT (Jan. 10, 2024), https://lpeproject.org/blog/reclaiming-the-progressive-potential-of-local-procurement [https://perma.cc/SKE8-2QNN] (discussing recent updates to federal guidance that allow states and localities to use federal funds to procure these agreements).

98. *See Good Jobs Policies*, JOBS TO MOVE AM. (Dec. 18, 2019), https://jobstomoveamerica.org/resource/good-jobs/ [https://perma.cc/J66S-UG3R].

99. *See U.S. Employment Plan*, JOBS TO MOVE AM. (Apr. 10, 2020), https://jobstomoveamerica.org/resource/u-s-employment-plan-2/ [https://perma.cc/WZ4J-QW3Z].

100. *See, e.g.*, Press Release, Jobs To Move Am., United Auto Workers and Community Groups Demand Accountability from Hyundai Ahead of Major Transit Contract Approval (Jan. 29, 2024), https://jobstomoveamerica.org/press-release/united-auto-workers-and-community-groups-demand-accountability-from-hyundai-ahead-of-major-transit-contract-approval/ [https://perma.cc/YJ4Y-UTDS].

101. Noam Scheiber, *Fraud Case Against Bus Maker Shows Risks of Pay Promises in City Contracts*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/business/economy/public-contracts-wage-commitments.html.

102. *Id.*

103. Noam Scheiber, *Bus Maker Settles Fraud Case Tied to Government Contract*, N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/business/new-flyer-ca-fraud.html; Press Release, Jobs To Move Am., Major Electric Vehicle Manufacturer Signs First Multi-State Agreement with Community and Civil Rights Group for Equitable Hiring and Good Jobs (May 26, 2022) [hereinafter Press Release, New Flyer CBA Announcement], https://jobstomoveamerica.org/press-release/major-electric-vehicle-manufacturer-signs-first-multi-state-agreement-with-community-and-civil-rights-group-for-equitable-hiring-and-good-jobs/ [https://perma.cc/D4RD-T9PV].

Flyer agreed to remain neutral in the event of a unionization campaign and to recognize a union upon a majority of cards signed—not only at its plant in California but also in its plant in Anniston, Alabama, where organizers had drawn attention to poor labor conditions, and ultimately at other plants.[104] Within a year, the International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers–Communications Workers of America (IUE-CWA) began organizing the six hundred workers at the Anniston plant, supported by workers at the contractor's Minnesota plants, which had been unionized for two decades.[105] In January 2024, the union reached a majority on cards, and by the end of May 2024, the workers ratified their first contract, which included significant wage increases, improved benefits, and training programs.[106]

However, state and local good-jobs contracting standards, even paired with community benefits agreements, are not guarantees of future improved labor practices or union growth.[107] For example, in December 2020, JMA negotiated a community benefits agreement with Proterra, an EV bus manufacturer, and the United Steelworkers, which had recently unionized a Proterra plant in City of Industry, California.[108] Three years later, however, Proterra decided to close the California plant and move its operations to a nonunion plant in Greer, South Carolina.[109] Federal law was of little help.[110]

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104. Scheiber, *supra* note 103; Press Release, New Flyer CBA Announcement, *supra* note 103; Ella Fanger, *The Win for EV Workers in the South You Didn't Hear About*, NATION (July 1, 2024), https://www.thenation.com/article/economy/new-flyer-union-alabama/.

105. *See* Fanger, *supra* note 104; Benjamin Y. Fong, *The Art of the Green New Deal*, JACOBIN (May 19, 2024), https://jacobin.com/2024/05/green-new-deal-jobs-move-america [https://perma.cc/2KT4-AQBB].

106. Fanger, *supra* note 104.

107. Xavier de Souza Briggs & Madeline Janis, *Will 'Made in America' Really Lead to Good Jobs?*, AM. PROSPECT (Apr. 19, 2023), https://prospect.org/economy/2023-04-19-made-in-america-good-jobs [https://perma.cc/X7GX-T6KW] (describing factors that have historically contributed to or detracted from leveraging federal funds to make social change).

108. *Our CBA with Electric Bus Builder Proterra,* JOBS TO MOVE AM. (Jan. 4, 2021), https://jobstomoveamerica.org/resource/our-cba-with-electric-bus-builder-proterra [https://perma.cc/KG2X-VVTM]; Press Release, United Steelworkers, Proterra Workers To Join USW (Nov. 19, 2019), https://usw.org/news/media-center/releases/2019/proterra-workers-to-join-usw [https://perma.cc/27JZ-EP3F].

109. Press Release, Jobs To Move Am., EV Bus Manufacturer Proterra Closes Unionized LA Factory To Move to Anti-Union South (Oct. 5, 2023) [hereinafter Press Release, Proterra Closes and Moves], https://jobstomoveamerica.org/press-release/ev-bus-manufacturer-proterra-closes-unionized-la-factory-to-move-to-anti-union-south/.

110. The decision to move the California factory, if it occurred in retaliation for union activity, arguably violated federal law, but the caselaw is divided and remedies, in any event, are minimal. *Compare Textile Workers Union v. Darlington Mfg. Co.*, 380

D. Counter-Movements

As the Proterra factory story highlights, the above pro-worker innovations are largely limited to blue states. Indeed, in red states, business interests have aggressively mobilized to undermine worker rights.[111] Not only have conservative states repealed child labor protections and blocked minimum wage increases, they have also exploited the same openings in labor law preemption doctrine to make it harder for workers to organize.[112] Florida recently passed a law reducing protections for public sector workers who join unions and forbidding automatic dues deduction from public employees' pay.[113] And the Iowa Legislature is considering a bill that would decertify public sector unions if their employer fails to timely file certain paperwork.[114]

Numerous conservative states have enacted or proposed bills that would prohibit employers from recognizing unions through card check.[115] Alabama, Georgia, and Tennessee, for example, have passed bills that "require employers that receive economic development incentives to demand secret ballot union elections, rather than grant voluntary 'card check' recognition."[116] Arizona, South Carolina, South Dakota, and Utah

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U.S. 263, 269–74 (1965) (holding that employers do not commit an unfair labor practice when they shut their entire business down), *with* Complaint and Notice of Hearing, *Boeing Co.*, Case 19-CA-32431 (N.L.R.B. Apr. 20, 2011) (charging company with an unfair labor practice (ULP) for moving factory down south in retaliation for union activity).

111. Steven Greenhouse, *Republicans Want Working-Class Voters — Without Actually Supporting Workers*, GUARDIAN (Oct. 25, 2022, 6:00 AM), https://www.theguardian.com/us-news/2022/oct/25/republicans-working-class-voter-unions-worker-protections-organize [https://perma.cc/DA2C-NDM5].

112. Michael Sainato, *Republicans Continue Effort To Erode US Child Labor Rules Despite Teen Deaths*, GUARDIAN (Oct. 20, 2023, 7:00 AM), https://www.theguardian.com/us-news/2023/oct/20/republican-child-labor-law-death [https://perma.cc/3RBT-NVVD].

113. Briana Michel, *Public-Sector Bill Will Dismantle Unions, but They're not Going down Without a Fight*, FLA. PHOENIX (Mar. 23, 2023, 8:09 PM), https://floridaphoenix.com/2023/03/23/public-sector-bill-will-dismantle-unions-but-theyre-not-going-down-without-a-fight [https://perma.cc/XK4V-NQ2T].

114. Robin Opsahl, *Teamsters Leaders Say Further Action May Be Taken To Oppose Senate Union Bill*, IOWA CAP. DISPATCH (Feb. 21, 2024, 4:07 PM), https://iowacapitaldispatch.com/2024/02/21/teamsters-leaders-say-further-action-may-be-taken-to-oppose-senate-union-bill [https://perma.cc/27WM-6QAN].

115. Chris Marr, *Red State Bills Resisting UAW Growth Risk Labor Law Override*, BLOOMBERG L. (May 2, 2024, 4:05 AM), https://news.bloomberglaw.com/daily-labor-report/red-state-bills-resisting-uaw-growth-risk-labor-law-override.

116. *Id.*; John Sharp, *'Alabama Is Not Michigan': Ivey Signs Union Bill as Mercedes Workers Vote on Joining UAW,* AL.COM (May 13, 2024, 5:49 PM), https://www.al.com/news/2024/05/alabama-is-not-michigan-ivey-signs-union-bill-as-mercedes-workers-vote-on-joining-uaw.html [https://perma.cc/CWR9-XNFG].

previously enacted amendments to their state constitutions guaranteeing workers the right to a secret-ballot election.[117]

This last set of laws may well be held preempted, even though couched under spending power, because they operate with broad regulatory effect.[118] The NLRB has argued that these laws are in direct conflict with the NLRA, which permits employers to grant voluntary recognition.[119] In other contexts, however, because of the way the Supreme Court has interpreted the NLRA, preemption doctrine often gives employer-advocates more room to legislate than it does unions. For example, the NLRA has been interpreted to allow states to enact "right-to-work" laws that prohibit employers and unions from negotiating fair-share fees—fees that require all employees who benefit from a contract to contribute to the cost of administering and negotiating it.[120] In 2017, Kentucky became the twenty-seventh state to adopt a right-to-work law.[121] (In 2024, however, Michigan became the first state in decades to reject similar legislation.[122]) The Supreme Court also recently allowed a tort action to proceed against a union for engaging in arguably protected strike activity; the Court's decision threatens to chill future strike activity in spite of the protection that preemption should provide.[123]

Further illustrating federalism's double-edged sword, conservative states are legislating to preempt progressive local labor and employment legislation.[124] This has become more common in recent years, with

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117. ARIZ. CONST. art. II, § 37; S.C. CONST. art. II, § 12; S.D. CONST. art. VI, § 28; UTAH CONST. art. IV, § 8.

118. *See Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 69–74 (2008) (striking down California law requiring employer neutrality despite its use of the state's spending power).

119. *See Dana Corp.*, 356 N.L.R.B. 256, 262–63 (2010), *aff'd sub nom.*, *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

120. *See Sweeney v. Pence*, 767 F.3d 654, 658–65 (7th Cir. 2014); *Int'l Union of the United Ass'n of Journeymen & Apprentices Loc. Union No. 141 v. NLRB*, 675 F.2d 1257, 1260–62 (D.C. Cir. 1982). *But see* 29 U.S.C. § 164(b) (forbidding collective bargaining clauses requiring employees to become members of a union in states that prohibit such clauses, but saying nothing about compulsory payment of dues and fees); Stanley D. Henderson, *The Confrontation of Federal Preemption and State Right-To-Work Laws*, 1967 DUKE L.J. 1079, 1122–23 (arguing that state laws that prohibit core fee-for-services agreements are preempted by the NLRA).

121. KY REV. STAT. § 336.130 (West 2024); *Right-To-Work Resources*, NAT'L CONF. OF ST. LEGISLATURES, https://www.ncsl.org/labor-and-employment/right-to-work-resources [https://perma.cc/4NU6-S6MB] (Dec. 19, 2023).

122. *See* John Nichols, *Michigan Just Became the First State in 6 Decades To Scrap an Infamous Anti-Union Law*, NATION (Feb. 16, 2024), https://www.thenation.com/article/politics/michigan-right-to-work-law/ [https://perma.cc/7AU3-HUNK].

123. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1414 (2023).

124. *See generally Elmore, supra* note 4.

conservative (often majority-White) state legislatures seeking to limit the ability of liberal (often majority-Black) cities to protect workers' rights and other civil rights.[125] In 2016, for example, after an organizing campaign by low-wage workers led by the Service Employees International Union (SEIU), the City of Birmingham increased its minimum wage to $10.10 per hour.[126] The State of Alabama responded by prohibiting localities from raising the minimum wage higher than the federal minimum of $7.25.[127] More recently, Texas enacted a bill that strips cities of the ability to set standards for local workplaces (and also strips their ability to ensure civil rights and protect natural resources).[128]

And even in the "bluest" of states, corporations have mobilized to block pro-labor reforms. The most striking recent example was Uber and Lyft's successful effort to repeal via ballot initiative a California law that had the effect of granting employee status to drivers.[129]

In short, in the face of countermobilization by business, it is still an open question whether the pro-labor state reforms will facilitate more organizing among workers, whether these new laws will enable future wins in red states or at the national level, or rather whether business's agenda will prevail in red and blue states alike. But at the very least, the state level labor reforms in the more progressive states offer a model for a different kind of labor relations.

III. ADMINISTRATIVE INNOVATION THROUGH LABOR LAW

The above innovations are reshaping labor policy in blue states by (1) lifting wages and working conditions for low-wage workers and allowing workers to participate in standard-setting for their industries; (2) seeking to blunt authoritarian exercises of employer power in the workplace; (3) reducing longstanding exclusions from labor law; and (4)

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125. *Id.* (arguing that employers reproduce the structural inequality that exists at the federal level in state law, often by dominating state initiatives and legislative processes).

126. *See* Mitchell Hirsch, *Huffington Post: Alabama Shuts Down Raises for 40,000 Workers in Birmingham as Minimum Wage Fight Continues*, NAT'L EMP. L. PROJECT (Mar. 1, 2016), https://www.nelp.org/alabama-shuts-down-raises-for-40000-workers-in-birmingham-as-minimum-wage-fight-continues [https://perma.cc/QTD7-JEQC].

127. *Elmore, supra* note 4, at 1256–57; Hirsch, *supra* note 126.

128. Sarah Holder, *Texas Wrests Power from Local Governments with Sweeping New Law*, BLOOMBERG (June 28, 2023, 3:23 PM), https://www.bloomberg.com/news/articles/2023-06-28/texas-preemption-law-overrides-city-laws-on-workers-rights-evictions.

129. *Castellanos v. State*, No. S279622, 2024 WL 3530208 (Cal. July 25, 2024) (upholding industry-backed ballot initiative); *see also* Andrias, *Perils and Promise*, *supra* note 51, at 263–66 (examining California gig worker fights and ballot initiative efforts).

using state funds to advance workers' interests. But the import of the state reforms is not limited to labor policy; they also offer a model for innovation in public law more broadly.

A. The Reemergence of Worker Standards Boards

A critical development at the state level is the use of new forms of administrative governance that are both participatory and power-building. States have been enacting new "worker standards boards"—tripartite administrative boards or councils made up of worker representatives, employer representatives, and public representatives that give workers a formal voice in decisions about their industries.[130]

Worker standards boards have gained in popularity in recent years, but they are not a new feature of employment policy in the United States. During the Progressive Era, numerous states created boards to investigate working conditions and set labor standards on an industry-by-industry basis.[131] This approach briefly existed at the federal level as well. When the Fair Labor Standards Act (FLSA) was passed, it required the Department of Labor to convene boards, known as industry committees, made up of union and business representatives.[132] The boards held hearings and negotiated increases in the minimum wage in the lowest-paid industries.[133] The theory behind the early worker standards boards was partly that industries varied and therefore required more targeted regulation. But the boards also embodied a commitment to a more democratic form of administration than governs today—one grounded not in presidential or gubernatorial control, technocratic expertise, and judicial-like procedures, but rather in empowering citizen

130. Aurelia Glass & David Madland, *Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries*, CTR. FOR AM. PROGRESS (Feb. 18, 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries [https://perma.cc/R9PX-KRPT].

131. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 625 (2019) [hereinafter Andrias, *Forgotten Promise of FLSA*]; Nelson Lichtenstein, *Sectoral Bargaining in the United States: Historical Roots of a Twenty-First Century Renewal*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 87, 93 (Angela B. Cornell & Mark Barenberg eds., 2022); *see also* Nelson Lichenstein, *Economic Royalists and Their Kingdom in the New Deal Era and Beyond*, *in* CAPITALISM CONTESTED 179, 185 (Romain Huret, Nelson Lictenstein & Jean-Christian Vinel eds., 2020) (discussing industry leaders' opposition and acquiescence to tripartite bargaining).

132. Andrias, *Forgotten Promise of FLSA*, *supra* note 131, at 625.

133. *Id.*

organizations and establishing a system of negotiation among social partners.[134]

After World War II, business mobilized against labor rights and enacted several anti-labor statutory reforms, most notably the Taft–Hartley Act, which significantly weakened the NLRA.[135] At the same time, the country embraced a particular form of administration embodied in the Administrative Procedure Act; this privileged technocratic expertise and judicial-like procedures, rather than social partnership and power-sharing regimes popular in European social democracies.[136] Against this background, worker standards boards were cut from FLSA and fell into desuetude in most states.[137] After more than half a century, however, they were reinvigorated when, in 2012, the "Fight for $15" campaign convinced the Governor of New York to constitute a tripartite board under state law to address low wages in the fast-food industry.[138] That board included representation from the fast-food workers' union, business, and the public; held hearings in which numerous workers participated; and ultimately extended a fifteen dollar minimum wage to fast-food workers in the state.[139]

In the last few years, the model has been taken up across the country with new energy and in new forms. In total, six states and three local governments have now enacted this type of policy since 2018, creating twelve new worker standards boards.[140] In addition to California's fast-food council, mentioned above, Minnesota has created, by statute, a standards board to govern nursing homes,[141] and Michigan has created, by Executive Order, a "nursing home workforce stabilization council."[142] Nevada and Colorado have created boards to develop minimum

134. *Id.* at 707.

135. Marc Dixon, *Limiting Labor: Business Political Mobilization and Union Setback in the States*, 19 J. POL'Y HIST. 313, 313–14 (2007).

136. Andrias, *Forgotten Promise of FLSA*, *supra* note 131, at 628–29.

137. *Id.* at 688–89.

138. Andrias, *The New Labor Law*, *supra* note 26, at 64–66.

139. *Id.*

140. *See* Aurelia Glass & David Madland, *Momentum for Worker Standards Boards Continues To Grow*, CTR. FOR AM. PROGRESS (Sept. 7, 2023), https://www.americanprogress.org/article/momentum-for-worker-standards-boards-continues-to-grow.

141. MINN. STAT. § 181.212(1)(a) (2023).

142. Press Release, Gretchen Whitmer, Mich. Governor, Whitmer Signs Executive Order Establishing Nursing Home Workforce Stabilization Council (Dec. 14, 2021), https://www.michigan.gov/whitmer/news/press-releases/2021/12/14/gov--whitmer-signs-executive-order-establishing-nursing-home-workforce-stabilization-council [https://perma.cc/N26Z-UCTB].

employment standards for homecare.[143] Numerous other states and cities are considering similar laws. One proposal in New York would have created a mechanism for nail salon owners and workers to set minimum prices and wages,[144] while another would create a broad system of worker standards boards for most industries in the state.[145] Illinois is considering a law that would create a standards board for childcare workers,[146] while Minneapolis has proposed one that could provide recommendations for any industry.[147]

Several of the new worker standards boards cover industries that have long been excluded from labor law. Colorado and New York have both created committees made up of workers and business to analyze and improve conditions in the agricultural industry, with the aim of engaging farm workers, mostly immigrants, who have been long excluded from many labor protections and who toil under exploitative conditions.[148]

Similarly, domestic worker organizations have won a few new tripartite boards to address problems in their industry. Like agricultural workers, domestic workers have long been excluded from the NLRA; domestic work tends to be low paid and women of color and immigrants primarily populate the jobs.[149] Because the work is inherently individualized and private, collective action is challenging. Against this background, domestic worker organizations have sought to create tripartite administrative boards that provide these workers a collective voice in their industry. They have simultaneously enacted bills of rights that safeguard minimal working conditions. For example, both Philadelphia and Seattle enacted domestic worker standards boards in 2019, which include designated seats for worker, employer, and

143. S. 23-261, 74th Leg., 1st Reg. Sess. (Colo. 2023); NEV. REV. STAT. § 608.640 (2023).

144. Nail Salon Minimum Standards Council Act, S. 8166, 2021–22 Leg., Reg. Sess. (N.Y. 2022) (proposing "a mechanism to raise industry standards for nail salon workers, owners, and customers" through the establishment of a "nail salon minimum standards council").

145. S. 6757A, 2023–24 Leg., Reg. Sess. (N.Y. 2024).

146. H.R. 2310 § 15, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

147. Susan Du & Katelyn Vue, *Minneapolis Mayor, City Council Members To Create a New Labor Board To Address Worker Dissatisfaction*, STAR TRIB. (June 15, 2022, 5:33 PM), https://www.startribune.com/minneapolis-mayor-city-council-members-to-create-a-new-labor-board-to-address-worker-dissatisfaction/600182460 [https://perma.cc/AM94-KX2R].

148. S. 21-087, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2021); Assemb. 8419, 2019–20 Leg., Reg. Sess. (N.Y. 2019).

149. *See* Elaine Zundl & Yana van der Meulen Rodgers, *The Future of Work for Domestic Workers in the United States: Innovations in Technology, Organizing, and Laws*, *in* REVALUING WORK(ERS): TOWARD A DEMOCRATIC AND SUSTAINABLE FUTURE 201, 201–02 (Tobias Schulze-Cleven & Todd E. Vachon eds., 2021).

government representatives.[150] Worker representatives have been drawn from leading domestic worker rights organizations like the Nanny Collective and the National Domestic Workers Alliance.[151] In both Seattle and Philadelphia, the boards are charged with making recommendations to city policymakers about policies related to domestic work.[152] However, neither has the authority to make rules.[153]

Compared to the agricultural and domestic boards, the California Fast Food Council and the Minnesota Nursing Home Workforce Standards Board have more power—and offer the most developed models for future legislation. As a product of a multi-year campaign by SEIU, the California Council is charged with determining minimum wages for fast-food workers in the state within statutory bounds, though the State Labor Commissioner must find that the proposed standards are consistent with Council authority.[154] The Council can also propose other labor standards for adoption by agencies within the state government

150. PHILA., PA., MUN. CODE §§ 9-4500, -4509 (2023) (creating a task force appointed by the City Council upon recommendation from the Mayor and including city councilmembers, leaders from the National Domestic Workers Association, and employers of domestic workers); SEATTLE, WASH., MUN. CODE § 14.23.030(B) (2024) (creating a board with six members appointed by the Mayor, six by the City Council, and one appointed by the board itself and requiring these members to be "domestic workers or worker organization representatives," "hiring entities or their representatives," or a "community representative"); *see also* PHILA. DOMESTIC WORKERS TASK FORCE, SPRING 2023 REPORT 4–6 (2023) [hereinafter PHILA. BOARD REPORT], https://www.phila.gov/media/20230426140536/Domestic-Workers-Task-Force-Spring-2023-Report.pdf [https://perma.cc/KDV2-K5JD]; *Who We Are*, DOMESTIC WORKERS STANDARDS BD., https://www.seattle.gov/domestic-workers-standards-board/who-we-are [https://perma.cc/3CLK-7CQW].

151. *See Who We Are*, DOMESTIC WORKERS STANDARDS BD., https://www.seattle.gov/domestic-workers-standards-board/who-we-are [https://perma.cc/3CLK-7CQW].

152. Both boards have produced reports detailing recommendations for implementing the cities' respective existing laws or for new laws or regulations that would improve working conditions for domestic workers. *See* SEATTLE DOMESTIC WORKERS STANDARDS BD., REPORT AND RECOMMENDATIONS TO CITY COUNCIL & MAYOR (2021), https://www.seattle.gov/documents/Departments/LaborStandards/DWSB%20Recs_FINAL_040621.pdf [https://perma.cc/8V6C-BX5A]; PHILA. BOARD REPORT, *supra* note 150, at 4–11.

153. SEATTLE, WASH., MUN. CODE § 14.23.030(A); PHILA., PA., MUN. CODE § 9-4509(2) (2023). *Cf.* César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United State*s, 90 U. CHI. L. REV. 703, 729 (2023) (distinguishing wage boards that lack rulemaking power from tripartite workplace government).

154. CAL. LAB. CODE § 1475(d)(2) (West 2024). Originally, the Council had a broader mandate, but its powers were cabined after negotiations with the industry in a compromise that involved the industry dropping a ballot initiative in opposition. Jeanne Kuang & Alexei Koseff, *Last-Minute Deal: Wage Hike for Fast Food Workers, No Ballot Measure in 2024*, CALMATTERS, https://calmatters.org/politics/2023/09/california-fast-food-deal [https://perma.cc/AU6R-VDVA] (Dec. 29, 2023).

(specifically the Occupational Health & Safety Standards Board and the Civil Rights Council).[155] The Council includes several government officials and equal numbers of representatives of employees and their advocates, and representatives of franchisees and franchisors.[156] Some of the representatives are appointed by the Governor while others are appointed by the Speaker of the Assembly and the Senate Committee on Rules.[157] The Council must hold public hearings every six months, rotating them around the state to make hearings accessible to workers; its members are compensated for their work and given resources in the form of research and analysis.[158] The Council's work got underway in March 2024.[159]

The Minnesota Nursing Home Workforce Standards Board was also created in 2023 as a result of union advocacy; it was packaged with numerous other reforms to strengthen state labor law, including a mandate for paid sick leave, a prohibition on noncompete clauses, and the ban on captive audience meetings discussed above.[160] The Nursing Home Board is similar in composition to the California Fast Food Council, with three ex officio government members, three employers or employer organization representatives, and three workers or worker organization representatives, but all of its members are chosen by the Governor, without the Legislature's involvement.[161] As in California, the

155. LAB. §§ 1475(e)–(f).

156. § 1475(a)(1).

157. § 1475(a)(3).

158. §§ 1475(a)(6)–(7), (h).

159. In its first iteration, the Council's members are Joseph Bryant, Executive Vice President of the SEIU; Maria Maldonado, Director of the California Fast Food Workers Union; and fast-food workers Anniesha Williams and Angelica Hernandez. Peter Romeo, *Labor Airs Its Next Set of Demands from California's Fast Food Council*, REST. BUS. (Mar. 14, 2024), https://www.restaurantbusinessonline.com/workforce/labor-airs-its-next-set-demands-californias-fast-food-council [https://perma.cc/3KWT-D4ZV]. According to news reports, "[r]epresenting employers are Michaela Mendelsohn, a six-unit El Pollo Loco franchisee, and SG Ellison, CEO of the 300-store Taco Bell and Arby's franchisee Diversified Restaurant Co. Serving as proxies for fast-food franchisors are Joe Johal, CEO of the Wendy's operation that runs corporate stores in the state, and Richard Reinis, an attorney and former CEO of Great Circle Family Foods, a Krispy Kreme area developer. The Council is chaired by an industry outsider, Nicholas Hardeman, Chief of Staff since 2016 for California Senate President pro Tempore Emeritus Toni G. Atkins. Hardeman is expected to cast the deciding vote in any deadlock between the labor and employer representatives." *Id.*

160. *See* S. 1621, 93rd Leg., Reg. Sess. (Minn. 2023); Act of Jun. 7, 2023, 2023 MINN. LAWS ch. 53, art. 11, § 28; art. 6, § 1; David Madland, *Minnesota Is Transforming Its Nursing Home Industry with a Model that Empowers Workers*, MINN. REFORMER (June 15, 2023, 6:00 AM), https://minnesotareformer.com/2023/06/15/minnesota-is-transforming-its-nursing-home-industry-with-a-model-that-empowers-workers [https://perma.cc/A9VN-PB47].

161. MINN. STAT. § 181.212(1)(a) (2023).

Board is required periodically to establish minimum standards, including minimum pay and benefits, and is empowered to do so through rulemaking.[162] The statute sets a timeline for a first set of standards and establishes factors for the Board to consider.[163] Insofar as the Board advances health and safety standards that overlap with the authority of the Commissioner of Labor, the Board can make recommendations.[164] The Commissioner must implement these recommendations unless they fall outside of the Commissioner's authority or are otherwise unlawful, in which case the Commissioner must issue a written opinion explaining why the recommendation cannot be implemented.[165]

Both California's and Minnesota's new worker standards boards will no doubt raise wages and improve working conditions. The new statutes have clear mandates to do. Both also establish a more democratic and participatory approach to administration than what previously existed; they will engage representatives of workers and business in governing their own industries, while also requiring broad public participation. Finally, both provide for technical expertise to aid the stakeholders in their deliberations.

However, the two entities face different challenges regarding representation of workers because of the nature of their industries and the existing representational landscape. Minnesota's nursing homes are already unionized in substantial numbers.[166] There, the Board is a vehicle for organized workers and employers to improve industry standards, while they simultaneously bargain at the firm level. By virtue of its level of representation in the industry, the union representatives on the Board have significant democratic legitimacy among workers in the state.[167]

In contrast, although the California Council emerged from a union campaign, the fast-food industry has almost no union density, making the Council the primary means for raising sectoral standards and presenting

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162. §§ 181.213(1)(a)–(b).

163. §§ 181.213(1)(b), (2)(b).

164. § 181.213(1)(c).

165. *Id.*

166. *SEIU HCMNIA Run Statewide Ads Thanking Gov. Walz as Nursing Home Standards Board Votes To Implement Groundbreaking Policy Changes*, SEIU HEALTHCARE MN & IA (May 21, 2024), https://www.seiuhcmnia.org/news/seiu-hcmnia-run-statewide-ads-thanking-gov.-walz-as-nursing-home-standards-board-votes-to-implement-groundbreaking-policy-changes [https://perma.cc/C83W-ZXH4] (noting that SEIU Minnesota and Iowa "represent[s] thousands of nursing home workers").

167. *See* Max Nesterak, *Minnesota's New Labor Board Votes for Nearly $23.50 an Hour Minimum Wage for Nursing Home Workers*, MINN. REFORMER (Apr. 29, 2024, 4:07 PM), https://minnesotareformer.com/2024/04/29/minnesotas-new-labor-board-votes-for-20-an-hour-minimum-wage-for-nursing-home-workers [https://perma.cc/AC26-XQCS] (discussing the Board's first wage-setting action, unions' involvement in the Board, and workers' impressions of the Board).

questions about how workers will be represented.[168] After winning the creation of the Council, SEIU established a new state-wide California Fast Food Workers Union, which will organize workers into a non-traditional union.[169] The union has a formal structure and a voluntary dues system, but it will not seek to win elections at individual stores at least as of now, instead using the Council to achieve improvements in standards.[170] In particular, in addition to seeking another wage increase, the union has announced it will press the Council to impose limits on when fast-food workers can be fired and to create a minimum number of hours a quick-service employer has to provide employees, and will ask state agencies to investigate problems of sexual harassment and heat injuries in restaurants.[171]

B. A Model for Democratic Administration

For unions, worker standard boards are often a means to get closer to sectoral bargaining when achieving actual sectoral bargaining is impossible. But as I have previously argued, and as Cynthia Estlund elaborates in more recent work, worker standards boards are distinct from traditional collective bargaining.[172] Under the NLRA, collective bargaining relies on private negotiation and typically occurs at the enterprise or company level; employers are not required to engage in multi-employer bargaining, and the millions of workers who are not represented by unions do not benefit directly from contracts that are

168. *See* DAVID MADLAND, CTR. FOR AM. PROGRESS, RAISING STANDARDS FOR FAST-FOOD WORKERS IN CALIFORNIA (2021), https://www.americanprogress.org/wp-content/uploads/sites/2/2021/04/Madland-FastFood-brief.pdf [https://perma.cc/T68K-388F].

169. Ann Rubin, *California Fast Food Workers Form Statewide Union*, FOX KTVU (Feb. 9, 2024, 9:59 PM), https://www.ktvu.com/news/california-fast-food-workers-form-statewide-union.

170. *Id.*

171. Romeo, *supra* note 159.

172. I have used the terms "tripartism," "social bargaining," and "democratic administration," while Estlund prefers the label "co-regulation." *Compare* Cythnia Estlund, *Part I: The Case for Sectoral Co-Regulation*, ONLABOR (May 21, 2024), https://onlabor.org/the-case-for-sectoral-co-regulation [https://perma.cc/8QD8-PBNY], *and* Cynthia Estlund, *Sectoral Solutions that Work: The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. 539, 541 (2023) [hereinafter Estlund, *Sectoral Co-Regulation*], *with* Andrias, *Forgotten Promise of FLSA*, *supra* note 131, at 623–30, Andrias, *The New Labor Law*, *supra* note 26, at 10–12, *and* Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 2017 HARV. L. & POL'Y REV. ONLINE 1 [hereinafter Andrias, *Social Bargaining*].

negotiated.[173] Worker standards boards, like collective bargaining, engage both workers and employers in setting employment conditions. But worker standards boards rely more on state regulatory power to achieve change, as the government ultimately imposes the standards through law; they also directly benefit all workers throughout a sector whether or not they are unionized. At the same time, they operate at a more targeted level than jurisdiction-wide employment standards like the minimum wage, enabling workers and firms to address issues particular to the industry.

Worker standards boards are thus an important mechanism to set employment standards. But the movement around worker standards boards also offers a promising model for administrative governance more generally: It offers a model that is more social democratic than neoliberal.[174] That is, instead of granting decision-making authority primarily to technocrats or market actors, this approach seeks to locate power with associations of citizens. Rather than relying primarily on judicial-like procedures and ultimately court review to ensure fairness, it embraces a system of negotiation among social partners, cabined by particular redistributive aims.[175] And rather than encouraging a free marketplace of liberal pluralistic participation, it self-consciously links regulation to social mobilization in order to redistribute power among social groups. Ultimately, it offers contemporary, on-the-ground experimentation with a more democratic form of administration, as theorists have urged.[176]

This model could be replicated in other areas of policy, from housing to education to consumer finance.[177] Indeed, tenant groups could

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173. That said, nonunion workers in unionized industries also tend to receive a wage-premium as employers seek to avoid unions and to compete with unionized employers. JOSH BIVENS ET AL., ECON. POL'Y INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE: GIVING WORKERS THE POWER TO IMPROVE THEIR JOBS AND UNRIG THE ECONOMY (2017), https://files.epi.org/pdf/133275.pdf [https://perma.cc/3662-FXP5].

174. Andrias, *Forgotten Promise of FLSA*, *supra* note 131, at 702.

175. *Id.* at 705–06. *Cf.* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (critiquing emphasis on procedure in administrative law).

176. *See* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1845–47 (2019) (citing JOHN DEWEY, *Democracy and Educational Administration, in* PROBLEMS OF MEN 57, 57 (1946)) (reprising John Dewey's argument that democracy required democratic participation in ultimate decision-making, not just in elections); *see also* 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).

177. *See generally* Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 626–27 (2021) [hereinafter Andrias & Sachs, *Constructing Countervailing*

advocate—and indeed, have advocated—for similar boards to address housing rights, building on existing rent boards.[178] Expanding the tripartite model would enable the engagement of ordinary Americans vastly underrepresented in governance, where corporations and wealthy interests dominate.[179] But doing so would also present substantial design challenges.

First and foremost, to be effective, such boards and councils require the existence of democratic membership organizations that organize people around shared political and economic interests and engage affected communities in the work of the boards. In the context of worker standards boards, labor unions have played this role—they have been critical both in bringing the boards into existence and at making them function in a representative fashion, engaging both union and nonunion workers in process, for example through public hearings.[180] Indeed, what has been most important to the ultimate success of boards thus far is not only the extent of the board's regulatory power, but also the engagement of a mass-membership organization that can use the board's recommendation as a tool to organize workers.[181]

Power] (arguing for legal mechanisms to build organizational power of the poor and working-class beyond labor).

178. *Id.* at 626.

179. KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 1–3, 6 (2012); BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? 4 (2020); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2–3 (2d ed. 2016); LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING 3 (2015).

180. This appears to be a point of departure between Estlund's perspective and mine, with Estlund arguing that scholars have overstated the role that worker organizations can, and should, play within the new hybrid strategies. Estlund, *Sectoral Co-Regulation*, *supra* note 172, at 543. In my view, the tripartite or cogovernance strategy of worker standards boards must involve unions and worker centers that have a broader agenda of transforming their members' lives through organizing, bargaining, and political activity in various fora. Indeed, the experience in California, Minnesota, and elsewhere throughout the country highlights the ongoing importance of existing unions and worker centers to the creation and operation of worker standards boards. Without the involvement of such organizations in the boards, and without effective organizing programs by the worker groups, the boards are unlikely to be effective at giving workers a greater voice in administration or in the economic sector or to result in significant material gain for workers.

181. *See* Andrias, *Social Bargaining*, *supra* note 172, at 9–10, 18 (emphasizing importance of organizing to make real the promise of worker standards boards); Elmore, *supra* note 4, at 1201 n.44 (noting that "even when a board's power is only advisory, negotiated sectoral standard-setting can permit workers who are effectively excluded from federal labor law to participate in meaningful forms of democratic workplace governance").

Yet, membership organizations do not always exist. Indeed, they have declined precipitously in American life during the last fifty years.[182] Nevertheless, as Benjamin Sachs and I have argued elsewhere, legal interventions could make the creation and flourishing of such organizations more likely, granting them the right to organize and providing them resources, as well as requiring democratic structures therein.[183] This need not be limited to labor but can extend to health care, housing, education, and more.

Another related challenge, even once organizations exist, is to ensure the representative nature of the boards—and to ensure that the boards are not merely the arm of a particular executive. There are different ways to achieve representativeness. At a minimum, statutes can specify that the organizations from which board members are drawn must be representative. Where multiple organizations meet the representativeness threshold, statutes can specify either that the most representative organization should be selected or that several representatives should be selected proportionate to their representativeness. The latter was the approach taken during the early years of FLSA. Another option is to be more specific regarding membership. For example, wage boards in both New York and New Jersey legislate a representation role for the state American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).[184] This has the advantage of ensuring certain groups are represented but can freeze in place organizational power. Several of the recently enacted boards are relatively large, allowing representatives from several groups to be appointed both on the industry and labor side. For example, the Seattle domestic worker board has thirteen members.[185] Another possibility is an electoral system under which the relevant constituency would vote for its representatives through a public election; this is particularly appealing where few representative organizations already exist, but creating such a system would present significant administrative

182. ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 81 fig.14 (rev. ed. 2001); LAINEY NEWMAN & THEDA SKOCPOL, RUST BELT UNION BLUES 88 tbl.3.1 (2023).

183. Andrias & Sachs, *Constructing Countervailing Power*, *supra* note 177, at 551 (arguing for legal interventions to facilitate "mass-membership organizations" that can "equalize the political voice of citizens who lack the political influence that comes from wealth").

184. *See* N.J. STAT. ANN. § 34:11-56a4.7 (West 2024); S. 6578, §§ 22, 674-a, 2019–20 Leg., Reg. Sess. (N.Y. 2019); *see also* Fair Labor Standards Act, ch. 676, 52 Stat. 1062 (1938) (requiring representatives of employees to serve on industry boards in the original FLSA).

185. *See* SEATTLE, WASH., MUN. CODE § 14.23.030(B) (2024).

challenges.[186] Yet another approach, where constitutionally permissible, is to divide the appointing authority among the branches of government, as the California Fast Food Council does, so that a single executive cannot have full control.[187] Whatever approach is taken, it is important that the statute cabins the discretion of the officials who are responsible for appointment and requires true representativeness.

Finally, the enabling statutes need to make clear a specific mission, enable robust administrative capacity, and create mechanisms for public participation.[188] That is, it is important that the mandate of the boards be clear, both to avoid legal challenge and to focus the work of the boards. It is also critical that they be given resources to do their work, including access to expertise and funding. Finally, public comment and participation should be required and facilitated. The bodies in California, Minnesota, and some other states and municipalities discussed above contain these features, all of which are essential to ensure that the boards serve democratic goals and achieve their intended functions.

IV. CONSTITUTIONAL INNOVATION THROUGH LABOR LAW

Along with administrative innovation, the new labor federalism described above entails significant constitutional innovation, again with relevance beyond the workplace. Over the last few years, labor has won (1) affirmative protection of collective labor rights through constitutional amendments and (2) new labor-friendly interpretations of existing state constitutional law, with implementation by both courts and legislatures. These efforts build on a long tradition of labor constitutionalism at the state level through which labor has sought to guard against corporate capture of legislatures, limit hostile decisions from courts, and enshrine as fundamental not only traditional individual rights, but also collective and positive rights.[189] Taken together, labor's state constitutional efforts suggest some possibilities for a more democratic approach to constitutionalism.

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186. *See* H.R. 1864, 128th Leg., Reg. Sess. (Me. 2018) (attempting to implement such an approach for home care workers in Maine).

187. CAL. LAB. CODE § 1475(a)(3) (West 2024).

188. For additional consideration of these and other design challenges see Andrias, *Social Bargaining*, *supra* note 172, at 15; KATE ANDRIAS, DAVID MADLAND & MALKIE WALL, CTR. FOR AM. PROGRESS, A HOW TO GUIDE FOR STATE AND LOCAL WORKER BOARDS (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/12/Wage-Board-Report.pdf [https://perma.cc/WG3F-CTGL]; Sara Slinn, *Workers' Boards: Sectoral Bargaining and Standard-Setting Mechanisms for the New Gilded Age*, 26 EMP. RTS. & EMP. POL'Y J. 191 (2023).

189. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 106–45 (2013) (exploring history of state constitutional protections for workers' rights).

A. State Constitutional Protection of Labor Rights

1. History of Constitutional Labor Rights

Labor's success at constitutional lawmaking at the state level marks a sharp contrast from the federal level. With the exception of a brief period during the mid-twentieth century, the U.S. Constitution has been interpreted by the Supreme Court to provide few labor rights. The Court has held that the First Amendment protects a right to associate in unions; however, there is no constitutional right to bargain or strike, and constitutional protections for labor picketing and protest are severely limited.[190]

Numerous scholars have critiqued this doctrine,[191] and in the mid-twentieth century it looked like the Court might go in a different direction.[192] Yet there is virtually no chance the current Supreme Court will expand constitutional protections for collective labor activity. To the contrary, the Court is increasingly using the Constitution to limit labor rights and to weaken unions, as in *Janus v. AFSCME*,[193] where the Court held that the First Amendment protects the right of a worker not to pay any union fees even when receiving the benefits of union contracts and representation,[194] or in *Cedar Point Nursery v. Hassid*,[195] where the Court held that the Takings Clause prevents a state from allowing union organizers access to talk to otherwise inaccessible farmworkers about unionization.[196] Moreover, amending the Constitution has become, under the current political alignments, near impossible.[197]

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190. *See* Andrias, *Constitutional Clash*, *supra* note 2, at 1011–12, 1020; Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253, 258–67 (2018); Pope, *Right To Strike*, *supra* note 21, at 520–26; James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984); *see also* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1281–84 (2020) (arguing that the First Amendment should be conveyed symmetrically with respect to labor and corporate speech).

191. *See, e.g.*, Pope, *Right To Strike*, *supra* note 21, at 520–26; Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2076–84 (2018).

192. *See* LAURA WEINRIB, THE TAMING OF FREE SPEECH 226–69 (2016).

193. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

194. *Id.* at 2459.

195. 141 S. Ct. 2063 (2021).

196. *Id.* at 2079–80.

197. *See* U.S. CONST. art. V; Vicki C. Jackson, *The (Myth of Un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J.

State constitutions, however, are both more protective of worker rights, including collective worker rights, and easier to amend than the Federal Constitution. This is not surprising given that, from the outset, state constitutions were designed as a device for democratic majorities to control both elected government officials and the judiciary.[198] As Emily Zackin has detailed, from the Civil War to the New Deal, labor organizers established state constitutional protections for labor rights in order to respond to judicial decisions finding that legislatures lacked power to enact pro-worker legislation.[199] They also drafted state constitutional provisions to try to force legislatures to protect workers—and to constrain wayward legislators. As Zackin writes, "[s]tate legislatures were often perceived as unscrupulous and on the payroll of corporations. Thus, some labor amendments were passed with the express purpose of circumventing or controlling these corrupt legislative bodies."[200] Late nineteenth and early twentieth-century labor amendments to state constitutions were also important for movement building, helping to raise citizen expectations.[201]

Most of the early labor rights provisions added to state constitutions created individual rights to fair treatment at work or enabled legislatures to enact protective legislation.[202] For example, dozens of provisions enacted between the 1880s and 1940s created rights to safe workplaces, maximum hours, and minimum wages, among other rights.[203]

But several states also enacted protections for collective labor rights, with some guaranteeing the right to organize and bargain collectively,[204]

CONST. L. 575 (2015) (arguing that the difficulty of amending the Federal Constitution comes, in part, from cultural norms against amendment and that the resultant unamendability is undemocratic); *cf.* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2389–95 (2021) (describing the ambiguities in Article V and arguing that they present possibilities for constitutional change).

198. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 860 (2022); ZACKIN, *supra* note 189, at 14–15.

199. ZACKIN, *supra* note 189, at 106–45.

200. *Id.* at 139 (footnote omitted).

201. *Id.* at 141.

202. *Id.* at 110–11 (collecting state positive labor rights).

203. *Id.* at 110. For a table breaking down how these provisions appear in state constitutions, see *id.* at 111.

204. *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, §§ 1–2 ("Persons in private employment shall have the right to organize for the purpose of collective bargaining. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."); 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

and others prohibiting employment discrimination because of union membership.[205] The advocates for constitutional labor rights offered three main justifications for why such provisions were needed: (1) to ensure that legislatures did not succumb to corporate influence and undermine collective bargaining contrary to popular preferences; (2) to prevent courts from invalidating collective bargaining legislation as violations of existing constitutional rights, by instead making collective bargaining rights coordinate with other traditional constitutional rights; and (3) to recognize that the right to unionize had become "deep seated," "inalienable," and "fundamental" in the same way as traditional constitutional rights and should be placed beyond the reach of ordinary politics.[206]

2. Amending State Constitutions To Protect Labor

Over the last few years, the labor movement has returned to active use of state constitutions, including by seeking amendments enshrining the right to unionize—and for largely the same reasons as the early twentieth century reformers.[207] Most prominently, in Illinois, the labor movement mobilized to add a "Workers' Rights Amendment" to the state constitution in 2022.[208] It declares that "[e]mployees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing" and also prohibits legislators from restricting union rights, including by enacting right-to-work laws.[209] Because of the preemption doctrine, the provision will not change the process by which private sector workers organize and bargain, but it has

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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 representatives of their own choosing."); N.J. CONST. art. I, ¶ 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.").

205. 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).

206. Marshfield, *supra* note 198, at 915–17 (2022).

207. *See* Elmore, *supra* note 4, at 1200.

208. Jeff Schuhrke, *Unionizing Is Now a Constitutional Right in Illinois. Here's How It Happened.*, THESE TIMES (Nov. 11, 2022), https://inthesetimes.com/article/illinois-midterm-election-workers-rights-amendment-labor-unions-dsa-constitution [https://perma.cc/9WGP-CM6N] (describing union campaign and business opposition).

209. ILL. CONST. art I, § 25.

expressive value. In celebrating the passage of the amendment, Illinois Governor J.B. Pritzker invoked the state's "rich union history" from "the 1887 Haymarket Affair to the 1894 Pullman Strike" and celebrated Illinois workers for being "at the forefront of fighting for fair wages, reasonable hours, and safe working conditions."[210] The amendment also has the potential to strengthen efforts to win union rights among those not covered by preemption who currently lack such rights, such as gig workers, domestic workers, and agricultural workers; indeed, it has already been invoked to support the right of workers in the state legislature to organize.[211]

Numerous other states are considering similar provisions. California's Legislature is considering Amendment 7, which would constitutionally guarantee collective bargaining rights and prohibit right-to-work.[212] The bill will need to be approved by two-thirds of the members in each chamber and then by voters on a statewide ballot.[213] In Pennsylvania, a proposal is moving through the General Assembly to add a clause to the State Constitution specifying that "no law shall be passed that interferes with, negates or diminishes the right of employees to organize and bargain collectively" over certain matters, including wages, terms and conditions, and would prohibit limitations on agreements "requiring membership in an organization as a condition of

210. Press Release, JB Pritzker, Ill. Governor, Governor Pritzker Issues Proclamation of Passage for Workers' Rights Amendment (Dec. 15, 2022), https://gov.illinois.gov/newsroom/press-release.25797.html [https://perma.cc/JCD4-MZD7].

211. *See, e.g.*, Andrew Hensel, *Pritzker Weighs In on Statehouse Staffers Attempting To Unionize*, CTR. SQUARE (Sept. 7, 2023) https://www.thecentersquare.com/illinois/article_c4621e14-4daf-11ee-8ff6-efb5e67bef62.html [https://perma.cc/L6VT-2K5V].

212. Chris Micheli, *Proposed Constitutional Amendment on Workers' Rights*, CAL. GLOBE (May 2, 2023, 6:32 AM), https://californiaglobe.com/fr/proposed-constitutional-amendment-on-workers-rights [https://perma.cc/327V-RMZT].

213. Leigh A. White, *Proposed California Constitutional Amendment for the Right To Organize and Negotiate with Employers*, CDF LAB. L.: CAL. LAB. & EMP. L. BLOG (June 27, 2023), https://www.callaborlaw.com/entry/proposed-california-constitutional-amendment-for-the-right-to-organize-and-negotiate-with-employers [https://perma.cc/9DMG-LFXG].

employment." [214] Vermont's Senate unanimously passed a similar provision in April; it next goes to the House.[215]

3. Litigating Constitutional Rights

In addition to amending state constitutions, unions and worker advocates have been breathing new life into longstanding constitutional provisions. One strategy has been to use such provisions to extend union rights to workers excluded from the NLRA.[216] In New York, for example, worker advocacy groups brought a constitutional challenge to a Jim Crow–era exclusion that denied farmworkers the right to organize and collectively bargain.[217] The Worker Justice Center of New York sued the State after its member was fired from his job as a dairy worker for meeting with coworkers and organizers to discuss workplace conditions.[218] They argued that, by excluding farmworkers from the State Employment Relations Act, the State violated the New York Constitution's guarantee of equal protection and infringed upon workers' fundamental right to organize and collectively bargain.[219] After the workers prevailed before a state appellate court, the New York Legislature enacted the Farm Laborers Fair Labor Practices Act, providing wage and hour protections; a new tripartite committee, discussed above; and robust organizing rights, including union recognition when a majority of workers sign union cards and a compulsory arbitration process through which farmworker unions can

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214. Zack Hoopes, *Committee Approves Bill To Add Union Rights to Pa. Constitution*, PENN LIVE PATRIOT NEWS (May 1, 2023, 8:28 PM), https://www.pennlive.com/news/2023/05/pa-house-committee-approves-bill-seeking-to-add-union-rights-to-state-constitution.html [https://perma.cc/627B-V4DQ]; *Bill: PA HB950*, BILL TRACK 50, https://www.billtrack50.com/billdetail/1620098 [https://perma.cc/6AP9-4NXE].

215. Bob Kinzel, *Vermont Senate Unanimously Passes Amendment Ensuring Workers' Right To Unionize*, VT. PUBLIC (Apr. 2, 2024, 5:08 PM), https://www.vermontpublic.org/local-news/2024-04-02/vermont-senate-unanimously-passes-amendment-ensuring-workers-right-to-unionize [https://perma.cc/SP7C-GQWA].

216. *See* Andrias, *Constitutional Clash*, *supra* note 2, at 1036–37; Elmore, *supra* note 4, at 1239.

217. *Hernandez v. State*, 99 N.Y.S.3d 795 (App. Div. 2019). California and Hawaii provide farmworkers more rights than most other states. *See* Benjamin I. Sachs, *Safety, Health, and Union Access in* Cedar Point Nursery, 2021 SUP. CT. REV. 99, 99–100 (2022) (discussing California labor law protections for agricultural workers); Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act* 11–12 (Fordham Univ. Sch. L. Working Paper, 2005), https://ssrn.com/abstract=733424 (discussing the relatively more pro-organizing farm labor laws in Hawaii and California).

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

219. *Id.*

secure first contracts.[220] Since the enactment of the law, more than six hundred farmworkers in the state have successfully organized across numerous farms and with several unions.[221]

In a number of states, public sector workers are turning to state constitutions in an attempt to protect their right to bargain and strike. The rate of labor activity among such workers has skyrocketed since 2018, when large numbers of teachers in red states went on strike and engaged in "sick outs" in what came to be known as "Red for Ed."[222] After a court enjoined a sick out in Las Vegas, the teachers' union there sued the State and the county school district to try to invalidate a Nevada statute that makes it illegal for public sector employees to strike.[223] The union argued the statute is in violation of Article 1, Section 8 of the Nevada State Constitution, which guarantees the rights of free speech and assembly, and claims the statute "'impinges upon the fundamental rights of speech and association of [the Clark County Education Association] and its members, is overbroad, void for vagueness, and is not narrowly tailored to achieve a compelling state interest.'"[224]

Unions have also relied on state constitutional provisions defensively to persuade state courts to invalidate legislation that targets specific public sector unions for disfavored treatment as a violation of equal protection and employees' labor rights.[225] In Missouri, for example, when the Legislature in 2018 limited the rights of all unions except public safety unions to engage in collective bargaining, public sector workers

220. *See* New York Farm Laborers Fair Labor Practices Act, Assemb. 8419, 2019–20 Leg., Reg. Sess. (N.Y. 2019).

221. Steven Greenhouse, *Union Wins at New York Farms Raise Hopes for Once-Powerful UFW*, GUARDIAN (July 6, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jul/06/new-york-farm-workers-ufw-unions [https://perma.cc/223U-6DBV]. On the legacy of unfree labor in the South, see Hamilton Nolan, *Mississippi Believes It Can Be Organized. Does Anyone Else?*, THESE TIMES (Oct. 18, 2021), https://inthesetimes.com/article/organizing-the-south-mississippi-labor-unions-aflcio-rwdsu-southern-civil-rights-racism [https://perma.cc/TLJ7-9EU7].

222. Eric Blanc, *Red for Ed: The Movement Strengthens and Continues*, 34 RETHINKING SCHS., no. 2, Winter 2019–20, https://rethinkingschools.org/articles/red-for-ed-the-movement-strengthens-and-continues [https://perma.cc/8UEB-4HLH].

223. Complaint for Declaratory Relief at 2–3, *Clark Cnty. Educ. Ass'n v. State* No. A-23-879213-C (Nev. Dist. Ct. filed Oct. 9, 2023) (dismissed as to the State but not the school district on Dec. 20, 2023) [hereinafter *Clark Cnty.* Complaint]; *see also* Stephanie Overton, *CCEA Lawsuit Challenges Nevada Law that Bans Government Employees from Striking*, 8NEWSNOW.COM (Oct. 9, 2023, 1:27 PM), https://www.8newsnow.com/news/local-news/ccea-lawsuit-challenges-nevada-law-that-bans-government-employees-from-striking.

224. *Clark Cnty.* Complaint, *supra* note 223, at 2.

225. *See* Elmore, *supra* note 4, at 1238.

challenged the law on state constitutional grounds.[226] The lower court emphasized that the law discriminated based on "an employee association's exercise of the fundamental right to organize and to bargain collectively," and that the State could not show that the rules were "narrowly tailored to further a compelling governmental interest."[227] The Missouri Supreme Court agreed, albeit on somewhat different grounds. According to the court, the legislation violated the state's equal protection guarantee because the State could show no rational basis for "exempt[ing] only public safety labor organizations."[228] In so holding, it noted that Missouri employees have a state constitutional right to bargain collectively "through representatives of their own choosing."[229]

B. A Model for Democratic Constitutionalism

The recent experience of labor unions with state constitutional law, like the experience with worker standards boards and administrative governance, offers a model that has relevance beyond the workplace.

First and foremost, labor's experience highlights the promise of focusing energy on state constitutional law; states provide important fora for contestation of rights. Even though sharply constrained by federal preemption, labor's state constitutional efforts in courts and via the amendment process have yielded both concrete and expressive benefits. That is, labor has won court victories using existing state constitutional provisions for some of the most politically powerless groups, like farmworkers; such victories are inconceivable at the federal level and had long been elusive in legislatures. In addition, by enshrining new rights in state constitutions, labor has been able to highlight the fundamental or essential nature of its claims, while also helping to ensure that legislatures do not undermine rights contrary to popular preferences and that courts do not invalidate popularly enacted labor legislation.

Second, labor's successes in the states go beyond the effective use of an alternate forum, offering a fundamentally different approach to

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226. *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indust. Rels.*, 623 S.W.3d 585, 596 (Mo. 2021) (en banc). The statute required members of unions other than public safety labor organizations 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. *See* MO. REV. STAT. § 105.505(1), (8) (2018).

227. *Mo. Corr. Officers Ass'n v. Mo. Off. of Admin.*, 662 S.W.3d 26, 38–41 (Mo. Ct. App. 2022) (holding Missouri's 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").

228. *Mo. Nat'l Educ. Ass'n*, 623 S.W.3d at 592.

229. *Id.* at 591–92.

constitutional rights. That is, labor's state constitutional law amendments and court victories support claims that the American orientation around individual rather than collective rights, and negative rather than positive rights, is not inevitable. Consistent with scholarly assessments in other contexts, labor's recent efforts underscore that constitutional rights in the United States can be conceived as collective in nature, protecting the rights of citizens as a group and empowering them collectively. They can also be positive rights, providing social benefits and protecting individuals from the excesses of private power, as well as state power.[230]

Third, labor's successes demonstrate the possibilities of using amendments as a strategy for movement building. That is, labor has used the amendment process as a way to build support for its goals and to strengthen its organization—constitutionalism as an organizing tool.

Finally, the recent experiences highlight the extent to which courts can play an important role in progressive constitutional rights articulation, particularly under a system in which they have less supremacy. In pursuing constitutional claims in states, labor has positioned courts in a dialogical role with legislatures and with the people, including through the amendment process. Court practice here offers an alternative to the current U.S. Supreme Court's commitment to extreme judicial supremacy; it also draws into question the wholesale rejection by some progressives of constitutionalism and courts.[231]

CONCLUSION: ASSESSING STATE INTERVENTIONS AND THEIR FUTURE

Although state innovation in labor policy is significantly circumscribed by preemption doctrine, and although the effect of recent state innovations on worker power, labor conditions, and broader public law is hard to measure, early indications are positive. State level reforms have resulted in significant improvements in wages and benefits for a

230. *Cf.* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 924–25 (2011) (exploring the potential for substantive, positive constitutional rights under state constitutions and the variability in development of such rights among states); Bulman-Pozen & Seifter, *supra* note 51, at 861–63 (arguing that state constitutions are more democratic, more focused on positive rights, and more committed to majoritarianism than is the Federal Constitution).

231. *Cf.* Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html (arguing against a veneration of constitutionalism).

host of workers.[232] They have also augmented worker voice in numerous states, while increasing union membership, chiefly among quasi-public workers and, more recently, farmworkers and industrial workers, albeit not yet in large numbers.[233] Reforms have also increased worker participation in democratic governance, helped reshape state administrative and constitutional practice, and served an important expressive function regarding states' fundamental commitments.

These state innovations are all the more important given recent developments at the federal level. With Donald Trump having won the 2024 presidential election, federal labor policy is likely to become markedly more anti-union and anti-worker in the coming years.[234] But even apart from the change in the executive branch, in the last few years, the Supreme Court has hamstrung federal administrative agencies' ability to govern, while at the same time employing the Constitution as a weapon against workers.

With regard to administration, the Court has usurped increasing amounts of power from both agencies and Congress. Most recently, in its 2024 decision in *Loper Bright v. Raimondo*,[235] the Court overruled the decades-old *Chevron* doctrine that instructed judges to accept an agency's reasonable interpretation of ambiguous statutory language, declaring "agencies have no special competence in resolving statutory ambiguities. Courts do."[236] Also in 2024, in *Ohio v. EPA*,[237] the Court imposed stringent judicial scrutiny on administrative processes, faulting the EPA for failing to respond to alternative proposals despite the agency's

232. *See, e.g.*, YANNET LATHROP, T. WILLIAM LESTER & MATTHEW WILSCON, NAT'L EMP. L. PROJECT, QUANTIFYING THE IMPACT OF THE FIGHT FOR $15: $150 BILLION IN RAISES FOR 26 MILLION WORKERS, WITH $76 BILLION GOING TO WORKERS OF COLOR, 10–11 (2021), https://www.nelp.org/app/uploads/2021/07/Data-Brief-Impact-Fight-for-15-7-22-2021.pdf [https://perma.cc/PZQ4-BD27]; Press Release, N.Y.C. Department of Consumer and Worker Protection, Mayor Adams Announces First Annual Increase in Minimum Pay Rate for App-Based Restaurant Delivery Workers (Apr. 1, 2024), https://www.nyc.gov/site/dca/news/018-24/mayor-adams-first-annual-increase-minimum-pay-rate-app-based-restaurant-delivery [https://perma.cc/297T-9XTP]; Nesterak, *supra* note 167.

233. *See supra* Sections II.B–C.

234. Noam Scheiber, *The White House Will Be Shedding Its Union Label*, N.Y. TIMES (Nov. 10, 2024), https://www.nytimes.com/2024/11/10/business/economy/trump-biden-labor-unions.html.

235. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

236. *Id.* at 2262, 2272–73 (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). A circuit split is now developing about whether *Loper Bright* applies to the NLRA, given caselaw that predates *Chevron* and requires deference. *See* Robert Iafolla, *Circuit Court Rift Forming on Respect for Labor Board Rulings*, BLOOMBERG L. (Aug. 22, 2024, 4:45 AM), https://news.bloomberglaw.com/daily-labor-report/circuit-court-rift-forming-on-respect-for-labor-board-rulings.

237. 144 S. Ct. 2040 (2024).

detailed response to comments.[238] And in *SEC v. Jarkesy*,[239] the Court undermined Congress's longstanding judgment that administrative law judges can adjudicate civil penalties, holding that the Seventh Amendment requires the use of Article III courts to adjudicate securities fraud disputes.[240] These cases build on a series of other recent Supreme Court cases that have limited agencies' capacity to govern, restricted Congress's ability to make reasoned judgments about how to structure agencies, and made it easier for deep-pocketed corporate litigants to challenge government action.[241] Meanwhile, conservative lower court judges have gone even further, embracing right-wing corporate arguments that longstanding agencies like the NLRB are unconstitutional because of removal protections for Board members.[242]

Alongside this evisceration of administrative capacity and congressional discretion, the Court has reshaped federal constitutional law in ways increasingly hostile to working people. Among its recent holdings, it has reversed longstanding First Amendment precedent to find a constitutional right of public sector workers not to pay union fees, threatening union funding;[243] and it has revised the Takings doctrine to invent a new property right, making union organizers' access to employer property more difficult.[244] Meanwhile, for several decades, it has undermined Congress's ability to effectuate constitutional rights under the Reconstruction Amendments, declaring repeatedly that the Court

238. *Id.* at 2053–54, 2058 (blocking the EPA from enforcing its "Good Neighbor" rule requiring twenty-three states to reduce air pollution traveling to downwind states).

239. 144 S. Ct. 2117 (2024).

240. *Id.* at 2121, 2127–39 (holding that "the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud").

241. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022) (demanding highly specific statutory authorization for an agency policy the Court deemed a "major question"); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2204 (2020) (rejecting removal protections for agency director as violation of the separation of powers); *Biden v. Nebraska*, 143 S. Ct. 2355, 2371 (2023) (invalidating the Department of Education's student debt cancellation program under the major questions doctrine); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 666 (2022) (staying the Department of Labor's COVID-19 vaccine or test mandate).

242. *Energy Transfer v. NLRB*, No. 24-cv-198, 2024 WL 3571494, at *2 (S.D. Tex. July 29, 2024); *Space Expl. Tech. Corp. v. NLRB*, No. W-24-CV-00203, 2024 WL 3512082, at *1 (W.D. Tex. July 23. 2024).

243. *Janus v. Am. Fed. of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2459 (2018).

244. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *see also* Andrias, *Constitutional Clash*, *supra* note 2, at 1046–51 (detailing the Supreme Court's anti-labor jurisprudence in recent years).

alone has the authority to define the scope of such rights.[245] More recently, it has repeatedly declined to defer to legislative efforts to limit corporate power and prevent discrimination in public accommodations under the guise of the First Amendment.[246]

These developments at the federal level make innovation at the state level even more important. To be sure, all of the labor-led state-level efforts are coming under sharp legal challenge from the same groups that pressed for federal retrenchment. That is, conservative and corporate interests are mobilizing many of the same constitutional attacks on the administrative governance at the state level that they have achieved at the federal level, while also engaging in specifically anti-worker mobilization, as discussed above. Nonetheless, the political economy analysis offered at the outset of this Essay suggests that states will continue to be a more fruitful venue for pro-labor and pro-democratic public law innovation, at least in the near term.

245. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Morrison*, 529 U.S. 598, 626–27 (2000); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 43–44 (2012); *Shelby County v. Holder*, 570 U.S. 529, 533, 557 (2013).

246. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321–22 (2023); *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018); *Harris v. Quinn*, 573 U.S. 616, 647–49 (2014); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734–35 (2011); *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476–78 (2007).

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