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Labor's New Localism

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ABSTRACT

Millions of workers in the United States, disproportionately women, immigrants, and people of color, perform low-paid, precarious work. Few of these workers can improve their workplace standards because the National Labor Relations Act ("NLRA") does not sufficiently protect their right to form unions and collectively bargain. Lacking sufficient influence in federal and state government to strengthen labor and employment law, unions and worker centers have increasingly sought to build power in cities. The shift to local labor lawmaking has delivered local minimum wage, paid sick leave, and fair scheduling ordinances covering millions of low-wage workers, as well as groundbreaking unionization and collective bargaining agreements, including in regions of the United States historically hostile to unions. This has positioned cities as a primary staging ground for labor law reform.

This Article examines this trend as a rejuvenated labor localism and this trend's effects on state and local government law and labor and employment law. Labor localism advances the democratic values of labor and local law by channeling worker and community protests and bargaining through the direct democracy mechanisms of cities, instead of or in addition to the NLRA. While provoking fierce employer campaigns seeking state preemption of local lawmaking, labor localism can often manage these state-local conflicts by engaging in state law reform and pivoting to adjacent areas. Modest home rule reform can improve its stability and reach and, contrary to conventional wisdom, improve local accountability. Labor localism, finally, reveals the central roles of localism in enabling a bottom-up reform effort to counteract the weaknesses of federal labor law and in

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safeguarding democratic norms in the United States.

TABLE OF CONTENTS

INTRODUCTION 254
I. LABOR LOCALISM AND THE DEMOCRATIC DEFICIT IN FEDERAL AND STATE GOVERNMENT 261
A. THE DEMOCRATIC DEFICIT AT THE HEART OF WEAK WORKPLACE RIGHTS 263
B. LOCALISM AS LABOR'S RESPONSE TO THE DEMOCRATIC DEFICIT 265
II. THE NEW LABOR LOCALISM 269
A. THE NEW LABOR LOCALISM AS TRANSLOCAL AND PLURALIST 269
1. Translocalism 269
2. Pluralism 273
B. THE THREAT OF STATE PREEMPTION TO LABOR LOCALISM 276
C. STATE HOME RULE REFORM TO PROTECT AND EXPAND LABOR LOCALISM 286
III. THE EFFECTS OF LABOR LOCALISM ON LABOR LAW AND LOCAL LAW 291
A. LABOR LOCALISM STRENGTHENS WORKPLACE PROTEST AND COLLECTIVE BARGAINING BY CONNECTING LABOR LAW TO CITY POWER 291
B. LABOR LOCALISM CAN ADVANCE DEMOCRATIC VALUES REFLECTED IN LABOR AND LOCAL LAW 301
IV. LABOR LOCALISM AND LABOR LAW REFORM 305
CONCLUSION 309

INTRODUCTION

The United States is in an era of historic and deepening economic inequality,[1] with employment standards that rank near the bottom of democratic, industrialized nations.[2] Workers earning the minimum wage

1. Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSPS. 3, 13, 24 (2020); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 7–16 (2d ed. 2016); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 72–76 (2012).

2. The International Trade Union Confederation ("ITUC") ranked the United States last among the G7 in its 2021 Global Rights Index. INT'L TRADE UNION CONFEDERATION, 2021 ITUC GLOBAL RIGHTS INDEX 12–15 (2021), https://files.mutualcdn.com/ituc/files/ITUC_GlobalRightsIndex_2021_EN_Final.pdf [https://perma.cc/6WU2-U23X].

often work in poverty.[3] The United States is the only industrialized democracy in the world that does not require paid leave for sickness, pregnancy, or child care.[4] Weak labor and employment laws have made work more uncertain, low paying, and unsafe, especially for people of color, immigrants, and women.[5]

The lack of worker power and the decline of unions as a significant economic and political actor in the United States are important drivers of income inequality and low workplace standards.[6] Union membership has fallen to its lowest levels since the 1930s.[7] This is, at least in part, because of features of labor law that make it difficult for employees to join and bargain effectively in unions.[8] The National Labor Relations Act ("NLRA")[9] excludes millions of low-wage workers in the United States from its protections[10] and permits employers to respond aggressively to union protests and demands.[11] A primary benefit of labor law for unions is that unions with majority support can serve as the exclusive representatives of employees in a bargaining unit.[12] But exclusivity has been seriously weakened by state "right to work" laws that prohibit unions from requiring payment for the costs of union representation.[13]

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3. About twenty percent of working families with a worker earning the federal minimum wage live in poverty. U.S. GOV'T ACCOUNTABILITY OFF., LOW-WAGE WORKERS: POVERTY AND USE OF SELECTED FEDERAL SOCIAL SAFETY NET PROGRAMS PERSIST AMONG WORKING FAMILIES (2017), https://www.gao.gov/assets/690/687314.pdf [https://perma.cc/6N78-NK77].

4. Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave [https://perma.cc/G5EA-SE38].

5. U.S. BUREAU OF LAB. STAT., A PROFILE OF THE WORKING POOR, 2017, at 3–4 (2019), https://www.bls.gov/opub/reports/working-poor/2017/pdf/home.pdf [https://perma.cc/B8VR-AJCD].

6. *See* Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1355–57 (2021); Anna Stansbury & Lawrence H. Summers, *Declining Worker Power and American Economic Performance*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2020, at 9–10 (attributing stagnant wages to a decline in worker power).

7. Currently, only 10.8% of U.S. workers belong to a union, just over half of the rate in 1983, and only 6.3% of the private-sector workforce. U.S. BUREAU OF LAB. STAT., UNION MEMBERS—2020, at 1–2 (2021), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/M2J9-3P5Q].

8. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 89 (2014); *see also* JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS 197–98 (2016).

9. National Labor Relations Act, 29 U.S.C. §§ 151–169.

10. The NLRA excludes independent contractors, agricultural workers, and domestic workers from its definition of "employee." 29 U.S.C. § 152(3); *see also* Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 ABA J. LAB. & EMP. L. 295, 304 (2011) (finding that these exclusions take millions of low-wage workers out of coverage of the Act); Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 98 (2019).

11. *See infra* Part I.

12. 29 U.S.C. § 159(a).

13. The NLRA permits states to enact laws that provide a right to private-sector employees to refrain from membership. 29 U.S.C. § 164(b).

With the historic decline of labor unions, scholars have searched for what can replace the loss of workplace and political power. Kate Andrias proposes a resurgence of sectoral bargaining in which unions are "political actors representing workers generally," bargaining with employers and the state for work standards.[14] Another related, recent literature considers "alt-labor," or strategies to improve workplace standards outside of labor law, especially by worker centers,[15] to advance the interests of marginalized workers often excluded from the protections of labor and employment laws.[16] A third scholarship examines the "bargaining for the common good" approach of public teachers' unions joining in protests and collective bargaining with parents and students against local austerity budgets.[17]

While providing vital theoretical groundwork, these literatures have not yet accounted for the localism of these strategies.[18] This Article identifies

14. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 10 (2016).

15. Worker centers are typically not-for-profit, community-based organizations in communities where precarious work is a primary concern. *See* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 11–16 (2006). Because they seek to improve workplace conditions through public pressure campaigns and litigation rather than by seeking exclusive representation of employees and collective bargaining agreements with employers, they are generally not considered unions under federal labor law. *See* Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS. 141, 144–45 (2019); Kati L. Griffith & Leslie C. Gates, *Worker Centers: Labor Policy as a Carrot, Not a Stick*, 14 HARV. L. & POL'Y REV. 601, 606 (2019).

16. *See* Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1749 (2018) (examining worker centers that represent freelancers and Uber drivers); Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1631 (2016) (describing "alt-labor" groups representing day laborers and domestic workers); Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 837 (2014) (offering "[p]rotests against Wal-Mart, strikes against fast food restaurants, and immigration rallies by unauthorized workers" as examples); Oswalt, *supra* note 10, at 96 (defining alt-labor as referring to "organizing efforts aimed at improving working conditions primarily through avenues other than collective bargaining").

17. *See* Oswalt, *supra* note 10, at 90; Joseph A. McCartin, Marilyn Sneiderman & Maurice BP-Weeks, *Combustible Convergence: Bargaining for the Common Good and the #RedforEd Uprisings of 2018*, 45 LAB. STUD. J. 97, 105–08 (2020); Joseph A. McCartin, *Innovative Union Strategies and the Struggle to Reinvent Collective Bargaining*, *in* NO ONE SIZE FITS ALL 173–77 (Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro & Steven Pitts eds., 2018).

18. By localism, I refer to the legal and political structures of local governments and their use by and effects on local residents. It is a bottom-up view of federal, state, and local laws, with an emphasis on local government and local communities. *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008). Urban and labor studies scholars over the past decade have examined the local character of many labor-community coalitions. *See, e.g.*, Ian Thomas MacDonald, *The Urbanization of Union Strategy and Struggle*, *in* UNIONS AND THE CITY: NEGOTIATING URBAN CHANGE 2–17 (Ian Thomas MacDonald ed., 2017); Miriam Greenberg & Penny Lewis, *From the Factory to the City and Back Again*, *in* THE CITY IS THE FACTORY: NEW SOLIDARITIES AND SPATIAL STRATEGIES IN AN URBAN AGE 12 (Miriam Greenberg & Penny Lewis eds., 2017); Ruth Milkman, *Toward a New Labor Movement? Organizing New York City's Precariat*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 1–22 (Ruth Milkman & Ed Ott eds., 2014); Ruth Milkman, *Introduction*, *in* WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY 1–19 (Ruth Milkman, Joshua Bloom & Victor Narro eds., 2010). My focus is the

the channeling of social movement energy by unions, worker centers, and allied organizations into city-based strategies to strengthen and lift workplace standards, using local law instead of or in addition to federal labor law, as "labor localism," and examines its effects on labor and local law.[19] To be sure, these strategies germinated from decades of experimentation by progressive local unions and worker centers to expand the power of workers in cities.[20] But recent coalitions of tightly networked unions and worker centers have intensified their focus on local labor lawmaking, broadening and deepening its impact. Fueled by social movement energy, unions, worker centers, and allied community organizations have pooled resources across tightly networked local labor-community coalitions to fashion a political economy in cities that favors labor policy experimentation. By positioning local government as a primary site of workplace regulation, they have delivered sweeping unionization and collective bargaining agreements, and hundreds of ordinances requiring local living wage and minimum wages, paid sick leave, "ban the box" fair hiring, and fair scheduling mandates across scores of local jurisdictions, collectively covering millions of workers.[21] This explosion in local lawmaking, including in regions of the United States historically hostile to the labor movement, has positioned cities as a primary staging ground for labor law reform.

Accounting for the transformation of local law as a primary site for labor policy contestation has important implications for city power and state-local conflicts over economic rights. Many cities have broad initiative power to regulate the workplace, often without requiring special federal or state authorization despite their formally subordinate stature. Local labor lawmaking, however, has ignited fierce state-local conflict. Employer groups have challenged local labor lawmaking as impliedly preempted by state employment laws and sought to block labor localism with sweeping forms of state preemption of local economic regulation. This has limited the political opportunities, and power, of labor-community coalitions. Recent local government scholarship offers a pessimistic assessment of the future of localism in the face of state preemption.[22] While state preemption is a

implications of localism for city power and state-local conflict, and its effects on labor law and local law.

19. By "local law," I refer both to "the portion of state law that is specifically designed to define the powers of cities," as well as lawmaking by local governments. GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 3 (2008); *see also* RICHARD C. SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 139–61 (2016).

20. Progressive unions and labor activists have since the 1960s allied with community groups to connect "workplace issues with social justice issues extending beyond the traditional realm of work law." Marion Crain & Kenneth Matheny, *The 'New' Labor Regime*, 126 YALE L.J. F. 478, 479–80 (2017); *see also* VANESSA TAIT, POOR WORKERS' UNIONS: REBUILDING LABOR FROM BELOW 218–23 (2005).

21. *See infra* Part II.

22. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997.

genuine threat to local lawmaking, however, a close examination of labor localism provides some cause for optimism. Channeling protest and bargaining into city power has reoriented cities to defend local labor lawmaking in state-local conflict and has provoked labor-community coalitions to overcome the preemption threat by scaling up to state lawmaking. This account suggests that local labor-community coalitions can manage state preemption by engaging with both cities and states in these state-local conflicts and by seeking modest home rule reform to protect the stability and reach of labor localism.[23]

A rejuvenated labor localism also has important effects on labor and employment law. It permits the reawakening of mass protests, including those that might otherwise be unprotected or unlawful under the NLRA. Connecting strikes and other protests by local labor-community coalitions to translocal labor policy experimentation expands protections against employer retaliation and remedies for violations. Participation by unions and worker centers in the direct democracy mechanisms of local government to bargain for and enforce workplace standards can provide a form of worker representation to unions and worker centers outside the NLRA while also improving workplace regulation that relies on worker participation. Centering matters of local economic inequality enables subordinated groups, especially poor people, women, immigrants, and people of color, to exercise power in dynamic, inclusive protests and forms of bargaining that can advance democratic values in labor and local law.[24]

This Article's account of how labor-community coalitions have broadly advanced workplace standards and facilitated unionization and collective bargaining through local law builds on labor law scholarship that examines local law strategies by unions and worker centers,[25] and the democratic value

(2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1486 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1227 (2018).

23. *See infra* Sections II.B–C.

24. *See infra* Part III.

25. *See, e.g.*, Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502 (2008). It builds especially from the work of Scott Cummings, who has comprehensively examined local labor lawmaking in Los Angeles. *See* SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA'S PORT 17–25 (2018) [hereinafter BLUE AND GREEN]; SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES 4–8 (2021) [hereinafter EQUAL PLACE]; Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 221–45. Benjamin Sachs has discussed the role of local governments in facilitating private-sector collective bargaining with government actions unrelated to labor law, driving local law into opaque areas to promote collective bargaining despite National Labor Relations Act preemption. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1164–69 (2011). While local lawmaking can lack accountability, I draw attention to recent, transparent forms of local labor lawmaking and collective bargaining as a new form of localism.

of public sector unions.[26] While scholarship about subfederal workplace regulation has focused on federal law preemption,[27] few labor scholars have considered state preemption,[28] and this Article is the first to assess the recent calls for home rule reform to protect local labor lawmaking.[29] This Article also contributes to scholarship about the social movement transformation of law.[30] Its thick description of local legislative campaigns by translocal, federated networks of unions and worker centers offers an important example of the organizational strategies and structures developed by the labor movement to build and sustain workplace and political power.[31]

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26. *See, e.g.*, Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMPAR. LAB. L. & POL'Y J. 277, 305 (2013). Scholarship about public sector employees has most recently focused on police union opposition to officer accountability for, and citizen oversight to deter, police racism and violence. *See* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1388 (2020); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 779–80 (2017); *infra* Section II.C and notes 141, 234.

27. *See* Fisk & Oswalt, *supra* note 25, at 1526–27 (assessing impact of Employee Retirement Income Security Act preemption on alt-labor Wal-Mart site fight); BLUE AND GREEN, *supra* note 25, at 188–99 (evaluating labor-community coalition response to Federal Aviation and Administration Authorization Act preemption challenge to port regulation of truck drivers); Sachs, *supra* note 25, at 1164–69 (discussing NLRA preemption in local labor lawmaking); Andrias, *supra* note 14, at 90–93 (focusing on NLRA preemption).

28. Frug and Barron diagnose that "the most significant restrictions on local power in the United States come from state governments, not the national government." FRUG & BARRON, *supra* note 19, at 44; *see also* Andrias, *supra* note 14, at 90. Olatunde Johnson examines the benefits and risks of advancing local legislation for labor and civil rights groups in light of state preemption. She argues that given the "well-funded deregulatory effort" by employer groups to preempt local lawmaking, that state-level reform will be necessary to protect it. Olatunde C. A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 INDUS. & LAB. RELS. REV. 1179, 1196 (2021). I share this concern and offer state home rule reform to address state preemption abuse. This Article's account of labor-community coalitions scaling up to overcome employer-sponsored state preemption offers a more optimistic assessment of the ability of labor localism to overcome the state preemption threat. *See infra* Sections II.B–C.

29. The National League of Cities proposes a Model Constitutional Home Rule Article that would significantly limit state preemption of local lawmaking. NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf [https://perma.cc/SL9T-9ZQ9] [hereinafter "NLC Report"]; *see also* David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 OHIO ST. L.J. 883, 921–22 (2020) (offering a critical assessment of the NLC Report proposals).

30. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) (calling for legal scholars to examine "today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change"); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2752 (2014) (inviting inquiries that produce a "democratic understanding of how power functions in representational relationships"). As with the labor movement more broadly, the examples of labor localism in this Article satisfy Charles Tilly's definition of a social movement as a repeated, collective, and sustained challenge to power holders by people living within the jurisdiction of the power holders. *See* Charles Tilly, *From Interactions to Outcomes in Social Movements*, *in* HOW SOCIAL MOVEMENTS MATTER 253, 257 (Marco Giugni, Doug McAdam & Charles Tilly eds., 1999); *see also* Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 74 (2020) ("The definition of a social movement should be broad enough to encompass working-class people's collective defiance of workplace authoritarianism to seek redistribution of both wealth and power.").

31. *See* K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN

While recent local law scholarship seeks to engage with adjacent areas,[32] labor law is a muted area of concern among local law scholars.[33] This is surprising given that labor law and local law raise similar questions about democracy[34] and the allocation of power to prevent domination.[35] This Article contributes to the recent debate about home rule reform by offering localism as vital to advance the democratic values underlying labor and local law. Public participation in local government is also a form of local accountability that can be more effective than state supervision,[36] which can strengthen and lift workplace standards.[37] These benefits suggest durable roles for localism in reforming labor law and safeguarding democratic norms, despite the inarguably broader coverage and preemptive power of federal and state government.

This Article proceeds as follows. Part I explains the current weaknesses of labor and employment law in the United States as attributable to the lack of political influence of the nonaffluent in federal and state government. It will introduce the shift of labor-community coalitions to local government to advance labor lawmaking as a form of decentralized, direct democracy. Part II first explores the effects of labor-community coalitions channeling social movement energy into local protest and lawmaking. This has pushed labor-community coalitions to become broader and more inclusive, and to

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DEMOCRACY IN AN ERA OF CRISIS 58–59 (2019) (arguing that social movements require "organizational strategies, structures, and resources of social movement organizations" to influence democratic politics); Fisk & Reddy, *supra* note 30, at 128 (describing the institutionalization of unions as both "Achilles' heel" and "a source of power").

32. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 111 (2013) (discussing local law and firearm regulation); Su, *supra* note 18, at 1629 (discussing local law and immigration law).

33. Local law scholars Richard Schragger and David Barron both examine early forms of local labor lawmaking in the 1990s and 2000s in ways that are aligned with this Article's account of labor localism as translocal. *See* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 528–29 (2009); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2341 (2003).

34. *See* Andrias, *supra* note 14, at 77 (arguing that unions can be "an important training ground for political democracy"); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 10–12 (1999) (explaining that decentralized, local power offers a participatory forum that enhances democracy).

35. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 88–91 (2017); GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 35, 38–40 (2016) (stating that labor law addresses employer domination of employees by correcting the "democratic deficit" in workplaces); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 500 (2016); PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 110–15 (2012); FRUG, *supra* note 34, at 58.

36. *See infra* Section II.C.

37. Recent local law scholarship about the economic effects of local regulation has primarily engaged with agglomeration economics or the beneficial network effects of cities. *See* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 101–02 (2017); Schragger, *supra* note 33, at 521. It has not yet engaged with economics literature finding that local wage mandates are not exclusionary and can reduce the harmful effects of employer buyer market (or monopsony) power for workers. *See infra* Section III.B; ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 27–28 (2021).

advance local lawmaking translocally, or across local jurisdictions. It then considers the rise of state preemption as a threat to local labor lawmaking. It finds that labor-community coalitions have often managed this threat by engaging in state-level lawmaking and pivoting to adjacent areas. It assesses the current debate about home rule reform, concluding that labor localism advances democratic values and can improve local accountability, and requires only modest home rule reform to improve its stability and reach. Part III demonstrates how labor localism can counteract longstanding weaknesses in labor law and advance democratic values in labor and local law, without harming the institutional strength of unions or encouraging capital flight. Part IV assesses the value of a decentralized approach to labor and employment law given the primacy and broader reach of federal and state standards. It concludes that by building and channeling social movement energy into policy experimentation across cities, labor localism can revitalize federal labor law and advance the democratic values of labor and local law.

I. LABOR LOCALISM AND THE DEMOCRATIC DEFICIT IN FEDERAL AND STATE GOVERNMENT

Nearly half of workers report that they lack voice in the workplace and would join a union if they could.[38] But unions represent only about ten percent of the United States workforce and a vanishingly small number of low-wage workers in many sectors.[39] This is because the NLRA excludes millions of low-wage workers[40] and makes it exceedingly difficult for other workers to join unions and collectively bargain with employers without fear of reprisal. Private-sector employers often can hire permanent replacements for strikers,[41] lock out employees to press a bargaining position,[42] and ignore union demands to bargain for "non-mandatory" issues, such as employer decisions to close part of a business.[43] Even if an employer egregiously violates labor law, the typical remedy is the widely criticized make-whole

38. Thomas A. Kochan, Duanyi Yang, Willian T. Kimball & Erin L. Kelly, *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*, 72 INDUS. & LAB. RELS. REV. 3, 20 (2019).

39. U.S. BUREAU OF LAB. STAT., *supra* note 7, at 8 (showing that 3.5% of restaurant workers and 1.7% of workers in agricultural and related occupations are in a union).

40. *See* Milkman, *supra* note 10, at 304.

41. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938) (permitting employer to hire permanent replacement for economic strikes, with a right of recall after the strike ends as vacancies occur).

42. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 325 (1965).

43. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 672 (1981) (holding that employers may close departments without having to bargain with unions, although employers must bargain about the effects of the decision).

remedy of reinstatement and damages,[44] which is unavailable to employees who lack authorization to work.[45] The duty to mitigate in backpay awards and administrative delays in reinstating employees fired for union support often render even these remedies futile.[46]

In contrast to the deference federal labor law affords employers, the NLRA tightly constricts a union's right to protest "secondary" employers[47] and imposes far more onerous administrative duties on unions than those imposed on other entities.[48] As Catherine Fisk and Diana Reddy explain, these union restrictions can channel unions "into weaker and less disruptive activities, . . . blunting union activism."[49] States have further weakened labor law by codifying a "right to work," or the right to refrain from paying unions for the costs of representation.[50] The Supreme Court constitutionalized the right to refrain as a First Amendment right in public-sector workplaces in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[51]

For decades, labor law scholars have called for and the labor movement has sought federal law reform to address the weaknesses and gaps of the NLRA.[52] But labor law reform ultimately depends on political influence to enact it. Unions have traditionally formed the primary national interest group in the United States seeking to lift and strengthen workplace standards.[53] The political economy of the United States, however, is primarily responsive to

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44.29 U.S.C. §§ 151, 152(3), 157. *See* HUM. RTS. WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 14, 23 (2000), https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf [https://perma.cc/463L-VQ2N] (criticizing "enervating delays and weak remedies [for] invit[ing] continued violations").

45. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 160 (2002).

46. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1789–93 (1983).

47. 29 U.S.C. § 158(b)(4); *see also* Hirsch & Seiner, *supra* note 16, at 1774; Duff, *supra* note 16, at 843–45.

48. The Landrum-Griffin Act of 1959 imposes unique reporting requirements and internal democracy duties on unions. *See* 29 U.S.C. §§ 411, 431, 439, 481. Not-for-profit organizations are, by comparison, lightly regulated. Ashar & Fisk, *supra* note15, at 154.

49. Fisk & Reddy, *supra* note 30, at 124–25.

50. Twenty-seven states and Guam have right-to-work laws. *Right-to-Work Resources*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx [https://perma.cc/WV6M-543A].

51. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

52. *See, e.g.*, Rogers, *supra* note 16, at 1624–25; Benjamin Sachs, *Revitalizing Labor Law*, 31 BERKELEY J. EMP. & LAB. L. 333, 334–35 (2010). At time of writing, the Biden administration supports the Protecting the Right to Organize Acts ("PRO Act"), which passed in the United States House of Representatives in 2020. H.R. 2474, 116th Cong. (2020). Before that, the Employee Free Choice Act ("EFCA") passed in the House in 2008 and 2009. *See* H.R. 1409, 111th Cong. (2009). Both bills have not passed in the Senate. For a history and explanation of congressional inaction on labor law reform, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540 (2002).

53. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 19 (1984).

the priorities of the affluent,[54] a trend that has accelerated with the decline of the labor movement to counterbalance the representational gap in national and state politics.[55]

This Part will first explain the lack of labor rights in the United States as driven by a democratic deficit for workers. It will then describe the growth of local labor lawmaking as a response to this absence of "equality of voice,"[56] through labor-community coalitions that seek to build worker power through cities.

A. THE DEMOCRATIC DEFICIT AT THE HEART OF WEAK WORKPLACE RIGHTS

For democratic theorists, a democratic polity requires political systems that encourage the broad participation of society in decision-making over matters of everyday life.[57] Democratic reformers beginning in the Progressive Era have understood the importance of civic participation in democratic institutions, with unions as potential training grounds for democracy.[58] As K. Sabeel Rahman cautions, Progressive Era reformers did not attend, however, to the "the challenges of activating and empowering voices that might normally be marginalized."[59] Political scientists have consistently found that the affluent have disproportionate influence in politics.[60] The political inequality favoring the affluent is reflected in interest organizations lobbying the federal government.[61] With its dwindling membership and waning resources, labor unions cannot match the influence of the business lobby, particularly in securing economic rights such as labor

54. MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 5 (2012); Bartels, *supra* note 1, at 4, 113–17.

55. BARTELS, *supra* note 1, at 133–35; LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 13 (2015); SCHLOZMAN ET AL., *supra* note 1, at 322–24.

56. SCHLOZMAN ET AL., *supra* note 1, at 5.

57. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 34–35 (1970) (discussing importance of public participation in local government and workplace in political theories of John Stuart Mill and G.D.H. Cole).

58. In G.D.H. Cole's view, workplace governance advances democracy because regular people are involved to the greatest extent in relationships and spend the most time at work. *Id.* at 38. Louis Brandeis "emphasized the importance of citizen mobilization through trade unions and other groups as a form of countervailing power against monopolies and corporations," RAHMAN, *supra* note 35, at 102; *see also* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 85, 105–07, 111 (2003).

59. RAHMAN, *supra* note 35, at 108.

60. GILENS, *supra* note 54, at 160; BARTELS, *supra* note 1, at 243 (suggesting that opinions of low-income constituents are "of little or no consequence" to federal legislators); SCHLOZMAN ET AL., *supra* note 1, at 8 (finding that political influence ascends up the income ladder).

61. SCHLOZMAN ET AL., *supra* note 1, at 322–24; DRUTMAN, *supra* note 55, at 8, 13.

law reform.[62]

And while there is little evidence that interest groups can advance major federal legislation,[63] they can block federal policies they oppose.[64] This entrenches a pro-business tilt and status quo bias in federal policymaking in ways that can lack transparency.[65] The weakened state of unions and the dominance of the business lobby help to explain why there has been no significant change to federal labor law in over fifty years and to employment law since the Family and Medical Leave Act of 1993.[66] Even the federal minimum wage has remained fixed at $7.25 an hour for over a decade, the longest period without change since the Fair Labor Standards Act was enacted in 1938.[67]

While the success of the business lobby at the federal level has primarily been in preventing legislative reform, the pro-business lobby has radically transformed state law over the past decade. Forming an alliance with business groups and conservative donors through the American Legislative Exchange Council (ALEC), movement conservatives have successfully lobbied for uniform, pro-business lawmaking throughout the states,[68] enabled by opaque state governments[69] and inexperienced, underfunded legislators.[70] ALEC pioneered a form of "functional entrenchment,"[71] or the

62. SCHLOZMAN ET AL., *supra* note 1, at 87–88. As union membership has declined, the share of interest groups representing poor people, and the political activity of people in the bottom half of the income scale, have declined as well. *Id.* at 357, 361; *see also* GILENS, *supra* note 54, at 158.

63. The Trump Administration did make radical changes to labor law through NLRB rulemaking and administrative decisions. *See, e.g.*, Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184, 11,187, 11,198 (Feb. 26, 2020) (reversing *Browning-Ferris* and narrowly construing joint employer liability); SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (2019) (expanding interpretation of "independent contractor" to include most platform economy workers, such as Uber and Lyft drivers); Walmart Stores, Inc., 368 N.L.R.B. No. 24 (2019) (broadening the employer right to fire workers who participate in a series of work stoppages). These changes, however, are likely a temporary swing that will be reversed by the current Board. *See* Ian Kullgren, *New NLRB Chair Gives Roadmap for Possible Actions Under Biden*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 24, 2021, 1:51 PM), https://news.bloomberglaw.com/daily-labor-report/new-nlrb-chair-gives-roadmap-for-possible-actions-under-biden [https://perma.cc/5G8A-5J9H].

64. GILENS, *supra* note 54, at 133.

65. DRUTMAN, *supra* note 55, at 26–27; SCHLOZMAN ET AL., *supra* note 1, at 298.

66. 29 U.S.C. § 2601.

67. 29 U.S.C. § 201. At time of writing, a proposal by the Biden Administration to raise the federal minimum wage to $15 an hour failed in the Senate. Emily Cochrane & Catie Edmondson, *Minimum Wage Increase Fails as 7 Democrats Vote Against the Measure*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/us/minimum-wage-senate.html [https://perma.cc/F92T-7MBP].

68. ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 1–14, 34–55 (2019).

69. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 130–34 (2018).

70. HERTEL-FERNANDEZ, *supra* note 68, at 9–11.

71. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J.

undermining of political opposition by using law other than election law—in this case, labor law.[72] A chief accomplishment of ALEC has been a national campaign for states to enact right-to-work laws in order to disable public sector unions, a key constituent of the Democratic Party.[73] The most high-profile example of these laws was enacted in Wisconsin in 2011, causing state public sector union membership in that state to steeply decline from fifty percent to under twenty percent by 2017.[74] Hobbling unions in these states led to a parallel, successful effort in 2018, with *Janus*, to hollow out public-sector unions.[75]

In sum, the political economy of labor law reform is shaped by the dominance of the business lobby over federal and state politics, while unions have declined as a political counterweight. This has foreclosed federal reform, while undermining labor unions through state right-to-work laws. While polls consistently show that the median voter supports labor unions, raising the minimum wage, and employer-provided paid family and sick leave,[76] these economic interests are contrary to the interests of the affluent, and the nonaffluent lack the political influence to advance them.

B. LOCALISM AS LABOR'S RESPONSE TO THE DEMOCRATIC DEFICIT

Labor law exclusions and rules permitting aggressive employer responses to union elections have foreclosed unionization for many and have eroded the ability of those workers in unions to engage in effective collective bargaining or political advocacy. As Benjamin Sachs argues, blocking off a meaningful pathway for many workers to join unions and collectively bargain has the hydraulic effect of "forc[ing] open alternative legal channels."[77] One such hydraulic is to push labor unions, often in coalition

400, 402–03 (2015).

72. *Id.* at 403.

73. HERTEL-FERNANDEZ, *supra* note 68, at 178–88.

74. *Id.* at 190.

75. Since *Janus*, public sector unions have lost over 100,000 members. Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG L.: DAILY LAB. REP. (June 26, 2020, 3:15 AM), https://news.bloomberglaw.com/daily-labor-report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling [https://perma.cc/SD9U-QY4Z].

76. *See* Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, GALLUP (Sept. 3, 2020), https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx [https://perma.cc/4J9J-ZGGD] (reporting that sixty-five percent of the public supports unions, as high as any point since the 1960s); Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising Federal Minimum Wage to $15 an Hour*, PEW RSCH. CTR. (July 30, 2019), https://www.pewresearch.org/fact-tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-hour [https://perma.cc/9WJZ-VJHT]; Juliana Menasce Horowitz, Kim Parker, Nikki Graf & Gretchen Livingston, *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RSCH. CTR. (Mar. 23, 2017), https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies [https://perma.cc/E49U-AS5P].

77. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008).

with worker centers and other community organizations, toward localism. Here, "labor localism" refers to a channeling of social movement activism by unions and worker centers into local government to improve workplace standards, using local law instead of or in addition to federal labor law.[78]

Democratic reformers since the Progressive Era have viewed localism as a response to the democratic deficit in federal and state politics.[79] To counteract barriers to group mobilization that can reinforce the biases that favor the political influence of the affluent, democratic theorist Robert Dahl proposes a decentralized version of pluralism.[80] Decentralized pluralism "provide[s] a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision."[81] As Gerald Frug explains, this can advance the community-building value of local government with democratic participation, public policy experimentation, and "the energy derived from democratic forms of organization."[82]

Unions and community groups have experimented with local economic self-governance and local labor lawmaking since the Progressive Era.[83] Cities have long been influential in promoting labor peace agreements among employees and employers on municipal property, in public projects,

78. BLUE AND GREEN, *supra* note 25, at 342. Professor Johnson uses the term "labor localism" to refer to state and local lawmaking sought by labor and civil rights groups. *See* Johnson, *supra* note 28, at 1179–80. While the definitions are similar, I use the term to focus on local workplace protections that can facilitate unionization, and on collective bargaining by local public sector unions.

79. G.D.H. Cole "argued that it was only by participation at the local level and in local associations that the individual could 'learn democracy,' " PATEMAN, *supra* note 57, at 38, and for John Dewey, local government permits "citizens to contest political elites and participate in the ongoing and day-to-day routines of policy and politics," RAHMAN, *supra* note 35, at 102–05. To be sure, local law during this period was also a source of repression and social control of poor people, immigrants, and people of color. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1107–08 (1980). But progressive reformers "saw the city as a fully political, social enterprise," and sought home rule to protect local services from privatization and private control. FRUG & BARRON, *supra* note 19, at 38.

80. PATEMAN, *supra* note 57, at 8; *see also* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956); 1 JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY: THE REAL UTOPIAS PROJECT 33 (Erik Olin Wright ed., 1995).

81. DAHL, *supra* note 80, at 150.

82. FRUG, *supra* note 34, at 10.

83. During the Progressive Era, small businesses and craft workers resisted national political and economic domination in cities through local self-governance and protective local legislation. ANDREW WENDER COHEN, THE RACKETEER'S PROGRESS: CHICAGO AND THE STRUGGLE FOR THE MODERN AMERICAN ECONOMY, 1900–1940, at 1–10 (2004). One modern predecessor of the current labor localism was the "community stewards program" developed by a Teamsters local in St. Louis in the 1950s and 1960s, which engaged its members to exercise power in the workplace and in local government "as citizens concerned with broader community interests." ROBERT BUSSEL, FIGHTING FOR TOTAL PERSON UNIONISM: HAROLD GIBBONS, ERNEST CALLOWAY, AND WORKING-CLASS CITIZENSHIP 4, 85–101 (2015). It established a "community bargaining table" to bargain for improved access to city services, and, in a coalition with the NAACP, it blocked a city charter revision in 1957 that would have imposed a regressive income tax on residents and secured agreements with national employers to hire African Americans in racially segregated occupations. *Id.* at 93–110.

and in heavily regulated spaces.[84] Local government is also a major employer of union members,[85] an area in which local government has undisputed authority.[86]

These trends have gathered force since the 1980s, as progressive union locals centered cities as a site to lift workplace standards and to facilitate unionization and collective bargaining.[87] The Service Employees International Union's ("SEIU") Justice for Janitors campaign beginning in the late 1980s successfully pressured building owners and cleaning contractors in urban commercial regions to recognize and bargain with unions through community protests that garnered local public support.[88] During the same period, antipoverty organizations and immigrant rights groups established worker centers to address workplace issues in low-income neighborhoods, especially in immigrant communities.[89] Local labor-community coalitions in the 1990s and 2000s launched living wage campaigns and similar political mobilization strategies to raise workplace standards and facilitate unionization through local legislation.[90]

A rejuvenated labor localism emerged from this experimentation, propelled by two key developments. First, worker centers over the past decade developed into national, translocal federations, like unions. This

84. BLUE AND GREEN, *supra* note 25, at 6, 57–58; *see also* Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1084 (9th Cir. 2017) (holding that a city acts as market participant and is not preempted under NLRA in requiring employers in the airport they operate to agree to voluntary recognition agreements with unions); Associated Builders & Contractors v. City of Lansing, 880 N.W.2d 765, 769–70 (Mich. 2016).

85. Local public-sector employees are exempt from federal labor law, but by the 1980s, most states enacted public-sector collective bargaining statutes. Local employees have since become a large and stable source of union membership in the United States. Patrick Flavin & Michael T. Hartney, *When Government Subsidizes Its Own: Collective Bargaining Laws as Agents of Political Mobilization*, 59 AM. J. POL. SCI. 896, 898 (2015).

86. Local government has significant autonomy to shape employee hiring and collective bargaining rules. *See, e.g.*, Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067 (2017).

87. *See* Oswalt, *supra* note 10, at 89, 95–96; TAIT, *supra* note 20, at 187–88; Marnie Brady, *An Appetite for Justice: The Restaurant Opportunities Center of New York*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT, *supra* note 18, at 229.

88. Christopher L. Erickson, Catherine L. Fisk, Ruth Milkman, Daniel J. B. Mitchell & Kent Wong, *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. INDUS. RELS. 543, 547–56 (2002); Roger Waldinger, Chris Erickson, Ruth Milkman, Daniel J. B. Mitchell, Abel Valenzuela, Kent Wong & Maurice Zeitlin, *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 104–05, 114 (Kate Bronfenbrenner, Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald & Ronald L. Seeber eds., 1998).

89. *See, e.g.*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 67–111, 185–218, 299 (2005).

90. EQUAL PLACE, *supra* note 25, at 263–310; Cummings & Boutcher, *supra* note 25, at 192–93. A similar strategy developed during this time, site fights, uses local law to prevent large retailers from undercutting local workplace standards. Fisk & Oswalt, *supra* note 25, at 1506–07, 1521.

fueled the growth of local affiliate groups, including in regions of the United States historically hostile to the labor movement.[91] Second, as the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") came to embrace local worker centers and local strategies to improve workplace standards for all,[92] local unions developed networked, translocal coalitions with worker centers.[93] These progressive union locals and worker centers forged a new localism out of the rich array of local policy tools to regulate the workplace.

To be sure, local labor lawmaking and local labor-community coalitions have been durable features of progressive labor unions for decades,[94] and both coexist alongside national and statewide campaigns to improve workplace standards.[95] This Article focuses on recent examples of labor localism to emphasize its rejuvenation after single-city worker centers became national federations closely aligned with international unions and the AFL-CIO. Tracking the growth of other social movements over the past decade,[96] this galvanized the mass formation of tightly networked, federated labor-community coalitions, especially in regions where they were previously absent. Local labor lawmaking has become more ambitious as

91. According to Janice Fine, in 2006, nearly two-thirds of worker centers were unaffiliated, but by 2018, almost three-fourths were affiliated with a worker center federation. Six major worker center federations developed between 2001 and 2012, doubling worker center growth during those years. Janice Fine, Victor Narro & Jacob Barnes, *Understanding Worker Center Trajectories*, *in* NO ONE SIZE FITS ALL, *supra* note 17, at 13–14.

92. By 2013, then-AFL-CIO President Richard Trumka acknowledged that "our basic system of workplace representation is failing—failing miserably—to meet the needs of America's workers by every critical measure" and urged unions to look beyond federal labor law as a matter of survival. Michael Bologna, *Trumka Calls on Labor Movement to Adapt to New Models of Representation*, BLOOMBERG L.: DAILY LAB. REP. (Mar. 6, 2013, 9:00 PM), https://news.bloomberglaw.com/daily-labor-report/trumka-calls-on-labor-movement-to-adapt-to-new-models-of-representation [https://perma.cc/W7MU-28FV].

93. The AFL-CIO has since signed partnership agreements with the worker centers National Domestic Workers Alliance and National Guestworkers Alliance and granted a charter to the New York Taxi Workers Alliance ("NYTWA") as an AFL-CIO union; NYTWA's executive director joined the AFL-CIO's executive board. John Herzfeld, *AFL-CIO Signs Partnership Agreements with Groups for Domestic, Guestworkers*, BLOOMBERG L.: DAILY LAB. REP. (May 9, 2011, 9:00PM), https://news.bloomberglaw.com/daily-labor-report/afl-cio-signs-partnership-agreements-with-groups-for-domestic-guestworkers [https://perma.cc/JYN5-TATT].

94. *See, e.g.*, TAIT, *supra* note 20, at 163–71.

95. In the case of #RedforEd, local school reform requires teachers' unions in some states to campaign for statewide education budget increases. Alex Ebert & Genevieve Douglas, *Teachers Leverage #RedForEd Walkouts to Win Bigger Pay Boosts*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 21, 2020, 3:15 AM), https://news.bloomberglaw.com/daily-labor-report/teachers-leverage-redfored-walkouts-to-win-bigger-pay-boosts [https://perma.cc/3LVY-6ZNV]. The National Domestic Worker Alliance ("NDWA") pioneered its first domestic worker bill of rights in New York State, which became a model for umbrella groups of local affiliates in other states. *See* Hina B. Shah, *Notes from the Field: The Role of the Lawyer in Grassroots Policy Advocacy*, 21 CLINICAL L. REV. 393, 405–06 (2015).

96. Akbar et al., *supra* note 30, at 824–25 (charting the rise over the past decade of Occupy Wall Street, Movement for Black Lives, Green New Deal, and protests and organizing by "nurses, teachers, and 'rideshare' drivers").

these groups have developed broad coalitions and refashioned the law and political economy of cities to extend policy experimentation across local boundaries.

II. THE NEW LABOR LOCALISM

Local government has become a primary site of labor protest and bargaining, enabling labor-community coalitions to lift workplace standards for workers who are often outside the reach of labor law and to facilitate ground-breaking unionization and collective bargaining agreements.[97] Labor-community coalitions have done this by both building social movement energy locally—broadly diffused through labor-community coalitions—and by linking local coalitions nationally, in translocal networks that reach into regions and sectors historically beyond the reach of the labor movement.

This Part will first explore the key features of the new labor localism, translocalism and pluralism, and then assess the employer backlash of state preemption. It finds that local labor-community coalitions have successfully navigated state preemption but that modest home rule and other state law reform can protect the stability and reach of labor localism. It will respond to criticism that home rule reform will remove local accountability by offering direct democracy mechanisms in local government as a form of accountability that can be more effective than state supervision.

A. THE NEW LABOR LOCALISM AS TRANSLOCAL AND PLURALIST

This Section will explain how the new labor localism is increasingly "translocal" and "pluralist." Here, "translocalism" refers to policy experimentation across local jurisdictions, to other local (and state) governments in which there are similar networks of worker centers, unions, and allied organizations. "Pluralism" refers to the broadening of local protest and collective bargaining by building solidarity across economically and politically subordinated groups with overlapping interests.

1. Translocalism

A defining characteristic of the new labor localism is the translocal structure of its participating unions and worker centers. Unions, locally rooted but federally coordinated through international unions and labor

97. This is similar to Kate Andrias's argument that labor lawmaking positions unions as "political actors" seeking to advance the interests of workers whether or not they are union members. Andrias, *supra* note 14, at 8, 10.

federations,[98] are among the last remaining translocal organizations from the Progressive Era.[99] Worker centers in the past decade adopted the translocal federation structure of unions, spurring dramatic worker center growth over the past decade.[100] Unions and worker centers became increasingly networked and have pooled resources in local labor-community coalitions.[101] The translocal structure of these coalitions has allowed them to jointly engage in policy experimentation across local jurisdictions.[102]

As local labor lawmaking has become firmly established, its reach has broadened to include private-sector employers and standards that include minimum wage, paid sick leave, and secure scheduling ordinances, as well as "ban the box" ordinances limiting criminal record inquiries in hiring.[103] These campaigns typically begin in relatively pro-labor cities like Chicago, Los Angeles, New York City, Philadelphia, and Seattle, and then span out across local jurisdictions, including in right-to-work states that are traditionally hostile to unions.[104] Local government for translocal campaigns is a staging ground for elaboration of aspirational policies into model legislation and building popular support across local boundaries and for state and national expansion.

Fight for Fifteen, a coalition of unions and worker centers led by SEIU, exemplifies the translocalism of the new labor localism. Its strategy to obtain a $15 minimum wage and a union has centered on translocal policy experimentation by a network of locally rooted, labor-community coalitions across cities. By 2012, SEIU and allied worker centers developed into coalitions across scores of cities to increase the local and state minimum

98. Though the roughly 65,000 local unions in the United States are generally quite small, usually with 200 or fewer employees, most are part of international unions such as the Service Employees International Unions ("SEIU"). The majority of unions are affiliated with the AFL-CIO. FREEMAN & MEDOFF, *supra* note 53, at 34–38.

99. Like other voluntary organizations formed during the Progressive Era, unions have a translocally federated structure in which national federations develop from dues-paying members in local chapters. *See* SKOCPOL, *supra* note 58, at 85–87.

100. Fine et al., *supra* note 91, at 13–14.

101. The National Day Laborer Organizing Network ("NDLON"), for example, has developed a partnership with the Laborers' International Union of North American ("LIUNA") to organize the residential construction sector. Maria Dziembowska, *NDLON and the History of Day Laborer Organizing*, *in* WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY, *supra* note 18, at 152. In 2006 the AFL-CIO and NDLON agreed to permit NDLON members to affiliate with the AFL-CIO and coordinate with Central Labor Councils. *Id.*

102. *See* Josh Eidelson, *The Lessons Unions Learned from the 'Justice for Janitors' Protests*, BLOOMBERG (June 16, 2015, 2:55 AM), https://www.bloomberg.com/news/articles/2015-06-16/the-lessons-that-unions-learned-from-the-justice-for-janitors-protests [https://perma.cc/88AZ-KA38].

103. *See* Ken Jacobs, *Governing the Market from Below: Setting Labor Standards at the State and Local Levels*, *in* NO ONE SIZE FITS ALL, *supra* note 17, at 271.

104. *See, e.g.*, BARTELS, *supra* note 1, at 224 (recounting successful voter referendum in 2004 to adopt a constitutional amendment in Florida to increase the state minimum wage).

wage.[105] The 2013 voter-approved ballot measure in Sea-Tac, Washington created the first $15 minimum wage mandate in the United States.[106] This led to one-day strikes, culminating in 2015 with the largest protest by low-wage workers in United States history.[107] By focusing on cities for initial policy experimentation, Fight for Fifteen developed popular support for state-wide expansion. In Minnesota, for example, SEIU funded a coalition called Minnesotans for a Fair Economy ("MFE"), in Minneapolis and St. Paul.[108] In addition to participating in Fight for Fifteen nationwide strikes, MFE sought and ultimately persuaded city legislators to enact a paid sick leave ordinance in Minneapolis in 2016 and a $15 minimum wage ordinance in St. Paul in 2018.[109] When MFE encountered resistance to a $15 minimum wage ordinance from Minneapolis City councilmembers, it overcame this opposition by galvanizing public support through a successful voter initiative enacting the ordinance.[110]

Translocal labor-community networks have proven remarkably successful in advancing policy experimentation. By the end of 2021, Fight for Fifteen will have obtained minimum wage increases in seventy-four cities, counties, and states, including in regions historically hostile to the labor movement.[111] Most employees in the United States now live in areas with a minimum wage higher than the FLSA requires,[112] and many local

105. Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 630–31 (2016); *see also* William Finnegan, *Dignity*, NEW YORKER (Sept. 8, 2014), https://www.newyorker.com/magazine/2014/09/15/dignity-william-finnegan [https://perma.cc/P5CF-FHLB].

106. DAVID ROLF, THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA 90–164 (2016).

107. Steven Greenhouse & Jana Kasperkevic, *Fight for $15 Swells into Largest Protest by Low-Wage Workers in U.S. History*, GUARDIAN (Apr. 15, 2015, 5:40 PM), http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston [https://perma.cc/AXF7-5S9J].

108. Lucas A. Franco, *Organizing the Precariat: The Fight to Build and Sustain Fast Food Worker Power*, 45 CRITICAL SOCIO. 517, 525 (2019).

109. Frederick Melo, *St. Paul Approves Eventual Increase to $15 Minimum Wage*, DULUTH NEWS TRIB. (Nov. 14, 2018, 7:45 PM), https://www.duluthnewstribune.com/news/4529421-st-paul-approves-eventual-increase-15-minimum-wage [https://perma.cc/N97E-69LJ].

110. *Id.*; Brandt Williams, *Minneapolis Council Approves $15 an Hour Minimum Wage*, MPR NEWS (June 30, 2017, 7:03 AM), https://www.mprnews.org/story/2017/06/30/minneapolis-council-approves-15-dollar-minimum-wage [https://perma.cc/ZP8A-HWFR].

111. YANNET LATHROP, RAISES FROM COAST TO COAST IN 2021: WORKERS' WAGES WILL INCREASE IN 52 CITIES, COUNTIES, AND STATES ON JANUARY 1—MANY REACHING OR SURPASSING $15 AN HOUR—WITH ANOTHER 23 JURISDICTIONS SET TO RAISE PAY LATER IN THE YEAR 1–12 tbls.1–2 (2020) (showing that state and local minimum wage increases in 2021 during Fight for Fifteen campaigns include Alaska, Arizona, Arkansas, Florida, Montana, Ohio, South Dakota, and West Virginia), https://s27147.pcdn.co/wp-content/uploads/Raises-From-Coast-to-Coast-2021.pdf [https://perma.cc/T4XS-APC6]. Twenty-seven cities, counties, and states have a minimum wage at or above $15 an hour. *Id.* at 1.

112. Drew DeSilver, *When It Comes to Raising the Minimum Wage, Most of the Action Is in Cities and States, Not Congress*, PEW RSCH. CTR. (Mar. 12, 2021), https://www.pewresearch.org/fact-tank/2021/03/12/when-it-comes-to-raising-the-minimum-wage-most-of-the-action-is-in-cities-and-

employers have lifted their employees' wages at or above the new state or local minimum in response.[113] Local minimum wage ordinances over the past decade have expanded to include Uber and Lyft drivers, and other transportation network workers classified as independent contractors.[114] Other labor-community coalitions secured passage of scores of paid sick leave and fair scheduling ordinances.[115] Current campaigns call into question baseline assumptions about default rules in non-union workplaces, with ordinances prohibiting employers from terminating employees without just cause,[116] and lawmaking during the pandemic establishing a "right to recall" after mass layoffs[117] and requiring joint employer-employee workplace health and safety committees.[118]

Critical to these successes are the tightly networked labor-community coalitions that participate in local labor lawmaking. Unions provide deep expertise in labor law and policy and in workplace organizing, and they have capacity for sustained workplace and political campaigns. Worker centers and other community-based organizations, in contrast, are often sophisticated in their use of social media and nimble in developing coalitions with aligned local organizations. As Michael Oswalt explains, worker center social media savvy can both galvanize worker participation in strikes and protect participating workers by increasing the reputational risk of employer reprisals.[119] Worker centers are also often deeply influential within local

states-not-congress [https://perma.cc/UT3Z-YJAC] (finding that only forty percent of employees in the United States live in regions where only the federal minimum wage applies).

113. By one estimate, from 2012 to 2018, Fight for Fifteen campaigns increased the wages of twenty-two million low-wage workers and provided $68 billion in annual raises to these workers. NAT'L EMP. L. PROJECT, IMPACT OF THE FIGHT FOR $15: $68 BILLION IN RAISES, 22 MILLION WORKERS 1–2 (2018), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Impact-Fight-for-15-2018.pdf [https://perma.cc/TD6Z-E6XE] [hereinafter "NELP Report"].

114. Noam Scheiber, *Seattle Passes Minimum Pay Rate for Uber and Lyft Drivers*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/business/economy/seattle-uber-lyft-drivers.html [https://perma.cc/M27E-FQHP].

115. Jacobs, *supra* note 103, at 281 tbl.1.

116. New York City extended just cause protections to fast-food workers in 2020, and Philadelphia to parking lot employees in 2019. Kimiko de Freytas-Tamura, *'No One Should Get Fired on a Whim': Fast Food Workers Win More Job Security*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/nyregion/nyc-fast-food-workers-job-security.html?searchResultPosition=1 [https://perma.cc/XTV2-QYVR]; Juliana Feliciano Reyes, *City Council Approves 'Just-Cause,' a Cutting-Edge Worker Protection Law, for the Parking Industry*, PHIL. INQUIRER (May 16, 2019), https://www.inquirer.com/news/just-cause-firing-bill-philadelphia-parking-lot-workers-seiu-32bj-20190516.html [https://perma.cc/M3JP-AHRE].

117. Chris Marr, *Pandemic 'Recall' Laws Give Nonunion Workers Union-Style Rights*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 4, 2021, 11:11 AM), https://news.bloomberglaw.com/daily-labor-report/pandemic-recall-laws-give-nonunion-workers-union-style-rights [https://perma.cc/3VRV-DDYR].

118. *See* N.Y. LAB. L. § 27-d (2021) ("Employers shall permit employees to establish and administer a joint labor-management workplace safety committee . . . composed of employee and employer designees . . . .").

119. *See* Michael M. Oswalt, *Short Strikes*, 95 CHI.-KENT L. REV. 67, 91–95 (2020).

government and can collaborate with local officials in enforcing standards by referring complainants and by providing public education and services.[120] The translocal, networked nature of these labor-community coalitions permits unions, worker centers, and local immigrant rights, racial justice, and faith-based organizations to pool resources and draw in others, especially lawyers in national economic justice advocacy organizations to contribute policy and legal work across local boundaries.[121] These tightly bound networks of federated unions, worker centers, and affiliated local and national groups resemble a version of the federated, translocal organizations identified by Theda Skocpol as crucial to improving the political influence of the nonaffluent during the Progressive Era.[122]

2. Pluralism

Local labor-community coalitions build and sustain social movement energy through campaigns that foster solidarity among union and worker center members and affiliated groups representing low-wage workers, immigrants, women, and people of color.[123] While the formation of labor-community coalitions can begin as a temporary tactic,[124] over time the solidarity forged through broad-based campaigns can make them more inclusive and powerful, often deepening their impact and enabling more ambitious goals.[125]

Pluralism serves a number of purposes for labor-community coalitions.

120. Ben Shapiro, *Organizing Immigrant Supermarket Workers in Brooklyn: A Union-Community Partnership*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT, *supra* note 18, at 67; Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 107–10 (2018).

121. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1897–98 (2007); Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231, 249 (2013). Janice Fine and Michael Priore stress the role of these groups in the shift toward localism as "a self-conscious political strategy developed in reaction to the impasse at the national level by a network of criminal justice, labor, progressive, and feminist policy advocacy organizations." Janice Fine & Michael Priore, *Introduction to a Special Issue on the New Labor Federalism*, 74 INDUS. & LAB. RELS. REV. 1185, 1087 (2021).

122. Theda Skocpol attributes the rise of political activism during the Progressive Era to the growth of "translocal," cross-class, membership-based organizations, which advanced subfederal policy experimentation that eventually became federal law during the New Deal. SKOCPOL, *supra* note 58, at 12–13. These translocal organizations "then prospered by helping government to reach citizens with new benefits and services for millions of people." *Id.* at 70.

123. *See, e.g.*, Cummings & Boutcher, *supra* note 25, at 192–95.

124. *See, e.g.*, Shapiro, *supra* note 120, at 56–58.

125. As public sector unions sought community support for living wage laws, for example, community- and faith-based groups broadened the campaigns to include home health and childcare employees, and then other private-sector employees, to fit "their antipoverty and racial justice agendas." Jeffrey D. Broxmeyer & Erin Michaels, *Faith, Community, and Labor: Challenges and Opportunities in the New York City Living Wage Campaign*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT, *supra* note 18, at 80.

It can inject political power in local labor lawmaking and demonstrate its broad appeal to constituents of local progressive politicians, as in a Chicago paid sick leave ordinance supported by worker centers, unions, and women's rights, antipoverty, and racial justice advocacy organizations.[126] Pluralism can also build political power for union members in communities, as in local civic organizations formed by unions to hold voter registration drives and lobby local policymakers to improve local services.[127] Pluralism, finally, offers an approach for unions and worker centers to build solidarity by embracing community interests. In Detroit, for example, a retail union, with community-based organizations, launched a Supermarket Task Force to alleviate "food deserts" with unionized supermarkets and improved transit.[128] In Los Angeles, unions and immigrant rights organizations have sought to improve access to workers' compensation and driver's licenses regardless of immigration status.[129] And most recently, the Fight for Fifteen has developed a coalition with Black Lives Matter in a "Strike for Black Lives" to protest racism and demand police reform.[130]

This purpose, building solidarity by embracing community concerns, helped reframe collective bargaining by local public-school teachers to improve public schools for teachers, students, and parents. Despite high unionization rates, public teacher collective bargaining has traditionally suffered from budgets constrained by debt financing by cities. The Chicago Teachers Union ("CTU"), in advance of its contract negotiation in 2012, joined a labor-community coalition of parent groups and other community-based organizations seeking to defend public education. The group identified joint interests, including "smaller class sizes, improved facilities, and" other terms in addition to wages, hours and benefits.[131] In local demonstrations, it publicized these demands and questioned costly school financing schemes between Chicago and the financial sector. Gathering broad public support, it struck for ten days, ultimately persuading city negotiators to abandon their austerity contract demands.[132] In the 2012 Chicago teachers' strike, by

126. Michael M. Oswalt & César F. Rosado Marzán, *Organizing the State: The "New Labor Law" Seen from the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415, 468–70 (2018).

127. Stephen McFarland, *Bridging City Trenches*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT, *supra* note 18, at 187–89, 204–06.

128. McCartin, *supra* note 17, at 169.

129. *See* Chinyere Osuji, *Building Power for "Noncitizen Citizenship": A Case Study of the Multi-Ethnic Immigrant Workers Organizing Network*, *in* WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY, *supra* note 18, at 90–103.

130. Robert Combs, *Analysis: Unions Find New Leverage with Social Justice Protests*, BLOOMBERG L. (July 24, 2020, 8:58 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-unions-find-new-leverage-with-social-justice-protests [https://perma.cc/6P9Z-TMUY].

131. McCartin et al., *supra* note 17, at 101.

132. *Id.* at 101–02.

broadening demands to include all city residents with a stake in public education, teachers turned bargaining over a contract into "the epicenter of a social fight jointed by parents, students, and various groups combatting poverty, violence, and racism."[133]

The St. Paul and Los Angeles teachers' unions adopted the same strategy. The St. Paul teachers' unions included community members in the actual bargaining process, restructuring the normally secretive bargaining process to become more inclusive and transparent.[134] St. Paul and Los Angeles public teachers' unions drafted demands that included community concerns. The United Teachers of Los Angeles ("UTLA"), for example, sought legal assistance for immigrant families and an end to stop-and-frisk practices on school grounds. The UTLA struck for one week, ultimately accepting an agreement that included "smaller class sizes, nurses in every school, a legal helpline for immigrant families, and an end to random searches."[135]

By augmenting union-employer bargaining with a political campaign to end austerity policies that starve primary and secondary education, teachers in Chicago, St. Paul, and Los Angeles made common cause with students and parents, centering their demands for smaller class size and improved facilities in collective bargaining.[136] The network of unions and community organizations that engage in this approach calls this strategy "Bargaining for the Common Good" ("BCG").[137] It has urged public sector unions to expand the subjects of bargaining to include "affordable housing, racial justice and student debt to a bargaining table that includes employers, unions, nonunion workers and members of the community."[138] BCG offers a pluralist response to the critique that public sector unions distort democracy by becoming too powerful in local government,[139] which subordinates the interests of poor people and communities of color,[140] by including these groups as necessary stakeholders in collective bargaining.[141]

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133. Oswalt, *supra* note 10, at 108.

134. McCartin et al., *supra* note 17, at 101.

135. *Id.* at 104–05.

136. Elizabeth Todd-Breland, *Activist Teachers Aren't Just Fighting for Themselves. They're Fighting for Their Students*, WASH. POST (Sept. 3, 2018), https://www.washingtonpost.com/outlook/2018/09/04/activist-teachers-arent-just-fighting-themselves-theyre-fighting-their-students [https://perma.cc/LAU9-YUES].

137. McCartin et al., *supra* note 17, at 98, 102.

138. Sharon Block, *Go Big or Go Home: The Case for Clean Slate Labor Law Reform*, 41 BERKELEY J. EMP. & LAB. L. 167, 183 (2020).

139. Teachers' unions, in particular, have long been painted as an obstacle to education reform. *See* Levin, *supra* note 26, at 1340.

140. HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNIONS AND THE CITIES 18–19, 24–29 (1971).

141. The critique of public sector unions as bargaining in ways that can harm the public interest

These examples are pluralist in their vision of building power by seeking out opportunities for solidarity among economically and politically subordinated groups to advance aligned interests. As laid bare by the safety concerns of front-line workers during the pandemic, the interests of public sector employees and the communities they serve can conflict.[142] Rather than eliding this tension, however, the pluralism of labor localism actively seeks to reconcile it in broad, bottom-up participation in protest and bargaining in order to build local power.[143]

B. THE THREAT OF STATE PREEMPTION TO LABOR LOCALISM

The recent widespread workplace protections ushered in by labor localism has generated a fierce backlash seeking state preemption to extinguish local labor lawmaking. The political contest between employer groups and labor-community coalitions has come to dominate intergovernmental relations between state and local government.[144] State preemption of city minimum wage ordinances enacted after lobbying by Fight for Fifteen is instructive. In response to the translocal approach of seeking minimum wage increases in cities, ALEC developed a model state preemption law. In total, at least twenty-five states adopted a version of this model, preempting local governments from mandating a minimum wage for private employers.[145] Calling this "the new preemption," Richard Briffault argues that the business lobby's push for a new, more aggressive form of preemption is "aimed not at coordinating state and local regulation but at preventing any regulation at all."[146] While classic state preemption analysis sought to harmonize state policies with local additions or variations, the new state preemption entails "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local

raises difficult questions about police unions, especially after the violent police repression of Black Lives Matter protests in 2020. *See* Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER (June 18, 2020), https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses [https://perma.cc/WZJ5-NKZ2]. Because police unions are opposed to BLM's calls for police officer accountability and local control over police officer conduct, BCG has not emerged as a plausible pathway to address police violence and racism. *See id.*

142. The safety concerns of teachers, for example, can be in tension with the demands of students and parents for on-site teaching. *See* Diana Reddy, *Labor Bargaining and the "Common Good,"* LAW & POL. ECON. PROJECT (July 29, 2021), https://lpeproject.org/blog/labor-bargaining-and-the-common-good [https://perma.cc/KU8A-8DT5].

143. *See id.* (arguing that BCG "co-construct[s]" a normative vision of alignment through "broader solidarities"). This is similar to Jocelyn Simonson's "ideal of contestatory democracy," which acknowledges that "ideas cannot easily be reconciled," and "requires governance arrangements that facilitate collective contestation and, when appropriate, subject reigning ideas to direct collective resistance." Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 845–46 (2021).

144. Schragger, *supra* note 22, at 1227–28.

145. *Id.* at 1174 n.59 (collecting statutes).

146. Briffault, *supra* note 22, at 1995, 1997.

problems."[147] As state preemption has become a standard response, some states have enacted sweeping versions to extinguish all local labor lawmaking.[148] In 2015, for example, Michigan enacted the Local Government Labor Regulatory Limitation Act, or so-called "Death Star Bill," which occupies the entire field of labor and employment law, preempting local lawmaking about nearly any workplace standard. Texas, Oklahoma, and Florida have considered similar measures.

State-local preemption conflicts turn on the meaning of "home rule," or "the commitment to local lawmaking capacity codified in the constitutions and statutes of the vast majority of states."[149] All states provide some lawmaking authority to local governments.[150] Home rule reforms since the Progressive Era have banned egregious state practices, such as attacking specific cities, eliminating specific local responsibilities, or removing elected officials.[151] A second home rule reform movement in the 1950s and 1960s authorized local lawmaking about matters of local concern without requiring specific state authority.[152] Today, most states provide local governments with "initiative" power to take legislative action.[153]

State home rule powers vary widely, however. Most states broadly permit the home rule power to tax, borrow, and regulate to protect the "health, safety, and welfare of the public."[154] Other states, such as Massachusetts, specifically exempt key powers from their home rule statutes, such as the authority to levy taxes, borrow money, or enact many forms of civil and criminal law. This often leaves cities like Boston and Cambridge without power to act without specific authority by state statute.[155] These cities instead have lobbied their state for authorization to enact

147. *Id.* at 1997.

148. Local law scholars have used different terms to describe this new, aggressive form of state preemption. Schragger, *supra* note 22, at 1182 (using the term "deregulatory" preemption); Scharff, *supra* note 22, at 1469, 1486 (coining "hyper preemption"). While these terms are useful, I do not adopt them because state preemption of local labor lawmaking tends to be of a specific type and does not require a typology.

149. Briffault, *supra* note 22, at 2011; *see* FRUG & BARRON, *supra* note 19, at 38.

150. Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15 (1990).

151. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805–06 (1992).

152. The "local concern" distinction survives today in the form of judicial deference for traditional types of local lawmaking, such as land use. *See, e.g.*, Cannabis Action Coal. v. City of Kent, 351 P.3d 151, 157–58 (Wash. 2015).

153. Briffault, *supra* note 22, at 2012.

154. Wisconsin, for example, permits local government "to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public," in its home rule charter. WIS. STAT. § 62.11 (2017).

155. FRUG & BARRON, *supra* note 19, at 66–67.

minimum wage ordinances.[156] States also structure home rule power through judicial review. Some states, like Illinois, instruct courts to liberally construe home rule powers. Others call for a narrow construction.[157]

Home rule authority, and the expanding role of cities in national politics, explains the increasing use of local labor lawmaking by labor-community coalitions. In states with broad home rule powers, courts have generally upheld workplace standards as a valid exercise of home rule power. As the New Mexico Supreme Court held in *New Mexicans for Free Enterprise v. City of Santa Fe*,[158] workplace standards are consistent with local "power to provide for the general welfare of their residents by the general welfare clause" of state law.[159]

But "home rule has been far less focused on, and far less successful at, protecting local measures from state displacement."[160] Local government has limited authority in state-local conflicts to withstand state preemption claims, even in strong home rule jurisdictions. Studies of home rule doctrine in "weak" and "strong" home rule states find that this distinction has little effect on how courts determine the validity of state preemption statutes or their interpretation of preemption analysis.[161] Courts in states that require a liberal interpretation of their home rule charter do not apply a preemption analysis that is substantially different from those with weaker forms of home rule.[162]

State law can expressly or impliedly preempt local ordinances. Local ordinances are impliedly preempted if the state occupies the field or if local regulation conflicts with the state law objective.[163] In the first wave of state preemption challenges to local labor lawmaking, courts addressed whether state minimum wage laws preempted local ordinances with higher standards. A liberal construction of home rule powers can establish a presumption

156. Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 199 (2017).

157. FRUG & BARRON, *supra* note 19, at 61–69.

158. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149 (N.M. Ct. App. 2005).

159. *Id.* at 1162; *see also* Pa. Rest. & Lodging Ass'n v. City of Pittsburgh, 211 A.3d 810, 827–28 (Pa. 2019).

160. Briffault, *supra* note 22, at 2012; *see also* Schragger, *supra* note 22, at 1170.

161. *See, e.g.*, Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1986 (2006).

162. *Compare* City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 499–500 (Cal. 2013) (applying the presumption against state preemption), *with* Madden v. City of Iowa City, 848 N.W.2d 40, 49–50 (Iowa 2014) (rejecting presumption against preemption). Even in strong home rule states, courts tend to presume the validity of the state preemption statute. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. Dist. Ct. App. 2019); City of Cleveland v. State, 136 N.E.3d 466, 478 (Ohio 2019).

163. Graco, Inc. v. City of Minneapolis, 925 N.W.2d 262, 267 (Minn. Ct. App. 2019); *see also* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 982 (2019).

against implied preemption, shifting the burden to the state to show that it intends to occupy the field.[164] Consistent with *New Mexicans for Free Enterprise*, courts in these states have found that an existing state workplace standard is a "floor" that does not imply preemption of higher standards.[165] This can require an analysis of the scope of express preemption in state statutes regulating related matters, which can blur the express/implied distinction and lead to inconsistent results.[166] Many other states have narrowly interpreted home rule powers, finding that state workplace laws impliedly preempt local standards to avoid abridging state police powers. A New York appellate court, for example, found that the state's labor law was a comprehensive scheme that occupied the field, preempting local minimum wage ordinances.[167] Courts that find local work standards impliedly preempted express a preference for the uniformity of state law over local variation. The Louisiana Supreme Court in *New Orleans Campaign for a Living Wage v. City of New Orleans*,[168] for example, interpreted a state workplace law as a policy choice in favor of "consistency in the wage market," requiring preemption.[169]

And with very limited exception, courts have broadly construed a state's authority to expressly preempt local labor lawmaking.[170] Some forms of constitutional "imperio" home rule provide local governments with a stronger autonomy claim to enact ordinances about local matters despite state preemption.[171] But the line separating a matter of "statewide" and "local" concern can be impossible to demarcate. Its porousness invites

164. *See* Associated Builders & Contractors v. City of Lansing, 880 N.W.2d 765, 770 (Mich. 2016); Diller, *supra* note 86, at 1067 (identifying a subset of states that grant local legislative immunity for personnel matters).

165. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1159 (N.M. Ct. App. 2005); *see also* Graco, Inc., 925 N.W.2d at 270; Marquez v. City of Long Beach, 244 Cal. Rptr. 3d 57, 77 (Ct. App. 2019).

166. Whether a state law preempting local minimum wage ordinances preempts ordinances requiring benefits, such as paid sick leave, for example, hinges on the scope of express preemption, which courts have inconsistently analyzed. *Compare* Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425, 439–40 (Tex. App. 2018) (construing "wages" broadly and finding state preemption of local minimum wage ordinances preempts a local paid sick leave ordinance), *with* Metro. Milwaukee Ass'n of Com., Inc. v. City of Milwaukee, 798 N.W.2d 287, 311 (Wis. Ct. App. 2011) (rejecting the same preemption claim because "wage" in state "statute is defined as the hourly rate and does not consider benefits except tips, meals, and lodging").

167. Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 864–65 (App. Div. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963).

168. New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002).

169. *Id.* at 1106; *see also* Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't, 501 S.W.3d 425, 431 (Ky. 2016).

170. *See, e.g.*, Masone v. City of Aventura, 147 So. 3d 492, 495 (Fla. 2014) (holding that "municipal ordinances must yield to state statutes").

171. Diller, *supra* note 86, at 1049–50, 1101.

judicial discretion to strike down local lawmaking unless indisputably local.[172] Courts expansively interpret express state preemption to avoid a conflict with state law.

Local labor lawmaking, accordingly, even when supported by strong justifications, and in strong home rule jurisdictions, will not prevail against an express preemption claim.[173] A Florida appellate court, for instance, held that a Miami Beach minimum wage ordinance was preempted by a state preemption statute enacted in 2003 despite the implication that the statute was nullified by a state constitutional minimum wage approved by voters in the following year.[174] The only municipal minimum wage ordinance to survive express state preemption, in St. Louis, did so on the narrow ground that the state preemption statute violated Missouri's single-issue rule.[175] This victory, however, was short lived, as the state subsequently enacted new legislation preempting the wage increase.[176]

One might reasonably conclude from this summary that state preemption, like some forms of federal preemption,[177] is an existential threat to labor localism. Indeed, it has been in some states, nullifying minimum wage ordinances in eleven cities.[178] Alabama's preemption of the Birmingham minimum wage ordinance offers a troubling example. Sixteen days after Birmingham, which is majority Black, enacted an ordinance raising the minimum wage from $7.25 to $10.10 per hour, Alabama enacted a preemption statute, which was opposed by every Black state legislator. The sweeping bill, supported by a group of all-white Alabama legislators, occupies "the entire field of regulation in this state touching in any way upon . . . the wages, leave, or other employment benefits," of employees or independent contractors, without establishing its own minimum standards.[179] The Alabama NAACP filed a civil rights suit against the state, arguing that the state's preemption of the ordinance was motivated by racial animus. The

172. Scharff, *supra* note 22, at 1522; FRUG & BARRON, *supra* note 19, at 61.

173. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. Dist. Ct. App. 2019) (finding that state law expressly preempts local ordinance prohibiting polystyrene cups); City of Cleveland v. State, 136 N.E.3d 466, 478 (holding that constitutional home rule did not grant immunity from state preemption of local hiring preferences that "disfavor nonresident employees").

174. City of Miami Beach v. Fla. Retail Fed'n, Inc., 233 So. 3d 1236, 1239 (Fla. Dist. Ct. App. 2017).

175. *See, e.g.*, Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 581–82, 587 (Mo. 2017).

176. *See* David A. Graham, *How St. Louis Workers Won and Then Lost a Minimum-Wage Hike*, ATLANTIC (Aug. 29, 2017), https://www.theatlantic.com/business/archive/2017/08/st-louis-minimum-wage-preemption/538182 [https://perma.cc/2BTT-9SFM].

177. Fisk & Oswalt, *supra* note 25, at 1526–27 (describing ERISA preemption of a state law requiring improved employee health benefits as "local triumph destroyed").

178. *See* NELP Report, *supra* note 113, at 5 tbl.3.

179. ALA. CODE § 25-7-45 (West 2018).

finding of the original Eleventh Circuit panel in *Lewis v. Governor of Alabama*,[180] not disturbed by its later en banc dismissal for lack of standing,[181] was that the state preemption response was plausibly a modern version of "Alabama's historical use of state power to deny local [B]lack majorities authority over economic decision-making."[182]

In many other states, however, the new labor localism has effectively navigated these state-local conflicts. Labor-community coalitions tend to seek out localism in order to build political power despite state preemption, and state preemption can provoke engagement in state-local conflicts to protect local lawmaking. Labor-community groups in Minnesota, for example, persuaded the governor in 2018 to veto a bill that would have preempted the St. Paul and Minneapolis minimum wage ordinances.[183] Labor-community groups have also embraced pluralism in the face of state preemption, developing coalitions with environmental, health, and other interest groups to consolidate opposition to state preemption.[184] This resulted in the repeal of minimum wage preemption laws in four states in 2019.[185]

These coalitions have also sought state-level direct democracy measures to preserve and expand their lawmaking. New York's implied preemption of local minimum wage ordinances provoked Fight for Fifteen to engage in state-level reform through that state's wage board process, a 1930s provision that had not been used in decades. As Andrias explains, this provision was crucial in providing a mechanism for Fight for Fifteen to secure representation on the commission and bargain with state and business

180. Lewis v. Governor of Ala., 896 F.3d 1282 (11th Cir. 2018), *vacated, reh'g en banc*, 944 F.3d 1287 (11th Cir. 2019).

181. Lewis v. Governor of Ala., 944 F.3d 1287, 1295–96 (11th Cir. 2019).

182. *Lewis*, 896 F.3d at 1295.

183. Briana Bierschbach, *It's Locals vs. the Legislature, Round 2: The Battle over Pre-Emption Is Back at the Minnesota Capitol*, MINNPOST (Mar. 9, 2018), https://www.minnpost.com/politics-policy/2018/03/its-locals-vs-legislature-round-2-battle-over-pre-emption-back-minnesota-cap [https://perma.cc/LJC2-PYFM]. A similar bill was recently defeated in Texas. *See* Will Anderson, *Texas Cities Retain Powers to Regulate Private-Sector Hiring, Benefits*, AUSTIN BUS. J. (June 1, 2021), https://www.bizjournals.com/austin/news/2021/06/01/texas-legislature-house-passes-sb-14.html [https://perma.cc/N8JB-NP43] (discussing the defeat of Texas Senate Bill 14, which would have preempted local paid sick leave ordinances).

184. LOCAL Maryland formed as a coalition of health, environmental and labor groups to protect local lawmaking from state preemption. *See About Us*, LOCAL MD., https://localmaryland.org/about-us/#top [https://perma.cc/H772-4QQ9]; *see also* Zoe Sullivan, *Florida Groups Unite to Take on Preemption*, NEXT CITY (Aug. 7, 2019), https://nextcity.org/daily/entry/florida-groups-unite-to-take-on-preemption [https://perma.cc/2X73-DDC4].

185. LOC. SOLS. SUPPORT CTR., REPEALING PREEMPTION: DEFENDING LOCAL DEMOCRACY NOW INCLUDES A GROWING FOCUS ON RECOVERING LOST LOCAL AUTHORITY 4–10 (2019), https://www.abetterbalance.org/wp-content/uploads/2020/01/White-Paper-Repealing-Preemption-FINAL.pdf [https://perma.cc/BM8A-8JRN] (describing and assessing anti-preemption coalition's successful campaign in Colorado to repeal state preemption of local regulation of minimum wage, tobacco, and oil and gas drilling).

representatives for a state-wide standard. The state department of labor ultimately adopted its recommended phased-in $15 minimum wage for fast-food workers, which the governor later extended to all employees in the state.[186]

These coalitions have increasingly counteracted state preemption with state-level voter referenda. In Missouri, the "STL Can't Survive on $7.35" Fight for Fifteen coalition engaged in several one-day strikes in St. Louis and Kansas City, eventually winning $12 minimum wage ordinances in 2015.[187] When Missouri legislators enacted a preemption statute in 2017, the coalition responded with a "Save the Raise" campaign, which found support from local policymakers and businesses. The St. Louis mayor implemented its minimum wage ordinance, even though the state statute preempted it three months later. One hundred local businesses, after complying with the local minimum wage ordinance, pledged to continue paying the higher amount afterward.[188] Buoyed by popular support, the campaign introduced a state voter referendum for a phased-in $12 state minimum wage, which passed in 2018.[189] Like Missouri, Florida has raised its minimum wage by voter referendum, first in 2004 and again with Proposition 2 in 2020, constitutionalizing an increase in the state minimum wage to $15 by 2026.[190]

Florida also provides an example of labor localism despite state preemption. Between 2010 and 2017, labor and community groups successfully lobbied six Florida counties and one city to enact "wage theft" ordinances, which permit them to seek owed wages through local adjudications.[191] The labor-community coalition successfully protected the

186. Andrias, *supra* note 14, at 64–66; *see also* Jesse McKinley & Vivian Yee, *New York Budget Deal with Higher Minimum Wage Is Reached*, N.Y. TIMES (Mar. 31, 2016), https://www.nytimes.com/2016/04/01/nyregion/new-york-budget-deal-with-higher-minimum-wage-is-reached.html [https://perma.cc/X67Q-7CFS].

187. Annie Shields, *Fast Food Workers Strike in St. Louis*, NATION (May 9, 2013), https://www.thenation.com/article/archive/fast-food-workers-strike-st-louis [https://perma.cc/7EJV-97HY].

188. Melissa Etehad, *St. Louis Gave Minimum-Wage Workers a Raise. On Monday, It Was Taken Away*, L.A. TIMES (Aug. 28, 2017, 6:50 PM), https://www.latimes.com/nation/la-na-st-louis-minimum-wage-20170828-story.html [https://perma.cc/ZRS6-J97P].

189. *Missouri Minimum Wage: Increases Jan. 1*, GOVDOCS (Nov. 23, 2020), https://www.govdocs.com/missouri-voters-pass-new-minimum-wage-increase [https://perma.cc/F5PE-RDSS].

190. Eli Rosenberg, *Florida Votes to Raise Minimum Wage to $15 an Hour*, WASH. POST (Nov. 4, 2020), https://www.washingtonpost.com/business/2020/11/04/florida-amendment-2-minimum-wage [https://perma.cc/3PME-LY3H]. Florida is only the eighth state to raise its statewide minimum wage to $15 an hour, joining California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, and New York. Chris Marr, *States with $15 Minimum Wage Laws Doubled This Year*, BLOOMBERG L.: DAILY LAB. REP. (May 23, 2019, 3:17 AM), https://news.bloomberglaw.com/daily-labor-report/states-with-15-minimum-wage-laws-doubled-this-year [https://perma.cc/6D99-S8V6].

191. ANDREW ELMORE & MUZAFFAR CHISHTI, STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS 29 & n.133 (2018), https://www.migrationpolicy.org/sites/default/files/publications/StateLaborStandardsEnforcement_FinalWeb.pdf [https://perma.cc/4D4S-CL4J]. For an example of a local Florida wage theft ordinance, see

wage theft ordinances from inclusion in Florida's preemption of local minimum wage and paid sick leave ordinances, retaining a local forum to protest and claim unpaid wages as well as bargain with local government about enforcement strategies.[192]

This account of the labor-community coalition response to state preemption is less pessimistic than recent local law scholarship about state preemption would predict.[193] Perhaps because of the relative popularity of workplace regulation and political strength of labor-community coalitions, labor localism has avoided the most hostile and punitive forms of preemption that have attended other areas of local lawmaking.[194]

But these accounts of state-local conflict generating new, effective forms of protest and bargaining suggest that the reach of state preemption can also be contingent on the capacity and ingenuity of the local response.[195] Strengthened by popular support and imbued with social movement activism, community-labor coalitions in Florida, Minnesota, Missouri, and New York responded to the threat of state preemption by seeking state openings for direct democracy and pushing local lawmaking into adjacent areas. These groups have engaged in state-local conflict in ways that ultimately strengthen the political power of poor people, women, immigrants, and people of color to advance state and local lawmaking. This can address concerns that local labor-community coalitions are fragmented and concentrate a patchwork of regulation in politically liberal states,[196] and that preemption channels labor localism in ways that are opaque, discrete, and potentially divisive.[197] To the contrary, this account suggests that labor localism can be effective, transparent, and democratic despite state preemption, even in states that are historically hostile to unions.

State engagement by labor-community coalitions, however, can also provoke effective state employer countermeasures. Proposition 22 in

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MIAMI-DADE COUNTY, FL, CODE § 22 (2021).

192. ELMORE & CHISHTI, *supra* note 191, at 30 & n.143; H.R. 655, 2013 Leg., Reg. Sess. (Fla. 2013), 2013 Fla. Laws 1–3.

193. *See* Briffault, *supra* note 22, at 1997; Scharff, *supra* note 22, at 1486; Schragger, *supra* note 22, at 1226–27.

194. Schragger, *supra* note 22, at 1227. Texas, for example, reacted to the sanctuary city movement by calling for criminal sanction and removal from office any local official who limits the enforcement of federal immigration law. *See* Briffault, *supra* note 22, at 2002–07 (discussing S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017), 2017 Tex. Gen. Laws 7, 8–10).

195. *See* BLUE AND GREEN, *supra* note 25, at 188–99.

196. *See* Andrias, *supra* note 14, at 702; BLUE AND GREEN, *supra* note 25, at 345; Cummings & Boutcher, *supra* note 25, at 187, 245 (cautioning that local labor-community group fragmentation can stunt its ability to "promote a coherent national agenda, and . . . expand their scope and power"); *see also* Johnson, *supra* note 28, at 1184–86 (arguing that concentrating regulation in "blue" or Democratic-leaning regions is counter to the ideal of a broad, national baseline of workplace protections).

197. *See* Sachs, *supra* note 25, at 1159–60.

California is an important, recent example. Since 2014, Uber and other transportation network companies sought to prevent state challenges to their classification of drivers as independent contractors. Like ALEC, transportation network companies have focused on state government, persuading most states to enact statutes classifying drivers as independent contractors and preempt local lawmaking regulating drivers.[198] But in 2019, California enacted a broad definition of employment that would likely have extended employment protections to platform economy workers.[199] In response, these companies sponsored Proposition 22, a statewide voter referendum to exempt transportation network drivers from most state employment law coverage.[200] After spending $200 million in a campaign that combined elements of aggressive political and union-avoidance tactics,[201] the proposition passed, deeming drivers for transportation network companies as independent contractors and requiring a 7/8 vote by the legislature to override the measure.[202] At time of this writing, a California court has found that Proposition 22's limitations on the state legislature to determine the coverage of state law and pass future legislation are unconstitutional.[203] Regardless of whether that decision survives appeal, Proposition 22 has emboldened platform companies to seek gig work exemptions from the employment laws of other states.[204]

198. Gali Racabi, *State TNC and MC Legislation: Preemption and Employment Status of Drivers*, ONLABOR (Oct. 19, 2018), https://onlabor.org/state-tnc-and-mc-legislation-preemption-and-employment-status-of-drivers [https://perma.cc/FGF6-AJQ2].

199. *See* Assemb. B. 5, 2019–2020 Leg., Reg Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621); Assemb. B. 2257, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (amending AB-5 to add exceptions).

200. Graham Rapier, *Uber, Lyft, and DoorDash Have Now Spent More Than $200 Million on Prop. 22—but There's Still No Guarantee It'll Pass*, BUS. INSIDER (Oct. 30, 2020, 10:54 PM), https://www.businessinsider.in/thelife/news/uber-lyft-and-doordash-have-now-spent-more-than-200-million-on-prop-22-but-theres-still-no-guarantee-itll-pass/articleshow/78958100.cms [https://perma.cc/8W27-SCTP].

201. Uber threatened to close or radically restructure operations in the state should the measure fail to pass, and required drivers to view these possible consequences of a "no" vote before they could log in to receive customers. Uber mined its vast driver and customer lists, pushing drivers to support the measure and reporting driver responses to potential customers. Kate Conger, *It's a Ballot Fight for Survival for Gig Companies Like Uber*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/technology/uber-lyft-california-prop-22.html [https://perma.cc/Q5TY-SP5K]; Alexander Sammon, *How Uber and Lyft Are Buying Labor Laws*, AM. PROSPECT (Oct. 5, 2020), https://prospect.org/labor/how-uber-and-lyft-are-buying-labor-laws [https://perma.cc/8Q45-V7SJ].

202. Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly $200 Million to Knock Down an Employment Law They Don't Like—and It Might Work*, WASH. POST (Oct. 26, 2020, 2:19 PM), https://www.washingtonpost.com/technology/2020/10/09/prop22-uber-doordash [https://perma.cc/KKX6-GPHB].

203. Castellanos v. State, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *5–6 (Aug. 20, 2021).

204. *See* Josh Eidelson, *Election Day Gave Uber and Lyft a Whole New Road Map*, BLOOMBERG: BUSINESSWEEK (Nov. 8, 2020, 4:00 AM), https://www.bloomberg.com/news/articles/2020-11-08/prop-22-gives-uber-and-lyft-a-new-model-for-gig-economy-workers [https://perma.cc/2G2D-UJLZ]. In one high-profile example, Uber and Lyft unsuccessfully sought a New York State classification of their

Proposition 22, along with Florida's Proposition 2 and the successful public-school teacher's union campaign in Arizona for a voter-approved state tax increase to fund local public schools,[205] collectively show the benefits and dangers of voter referenda for labor localism. They offer labor-community coalitions a direct democracy mechanism to scale up campaigns and "confront the politics that make preemption possible."[206] But as with state preemption, they offer well-funded lobbying groups a means to nullify legislation that underrepresented voters "obtained through the representative system."[207] Even after a successful constitutional amendment, a state legislature can seek to weaken it with a narrow interpretation[208] or nullify it by indirectly penalizing local governments that take up local labor lawmaking.[209] And, contrary to the standard account, state-level employer countermeasures are not confined to politically conservative states. Local labor lawmaking, and state-local engagement to protect or extinguish it, are broad trends with national implications.

These trends are likely to intensify in the near term, as employers and labor-community coalitions engage in state and local lawmaking in order to reshape labor and employment law. The next Section will consider these trends in assessing a recent reform proposal by the National League of Cities to limit abusive forms of state preemption.

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drivers as independent contractors that would have preempted a New York City minimum wage ordinance for drivers. Annie McDonough, *How a Deal for Gig Workers Fell Apart*, CITY & STATE N.Y. (June 25, 2021), https://www.cityandstateny.com/policy/2021/06/how-a-deal-for-gig-workers-fell-apart/182731 [https://perma.cc/CT9M-SNPA]. At time of writing, these and other delivery network companies filed a ballot proposition in Massachusetts modeled on Proposition 22, which by one estimate would lower the guaranteed pay for drivers in that state "from $18 to as little as $4.82" an hour. KEN JACOBS & MICHAEL REICH, MASSACHUSETTS UBER/LYFT BALLOT PROPOSITION WOULD CREATE SUBMINIMUM WAGE: DRIVERS COULD EARN AS LITTLE AS $4.82 AN HOUR 1 (2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/09/Massachusetts-Uber-Lyft-Ballot-Proposition-Would-Create-Subminimum-Wage-1.pdf [https://perma.cc/6NL5-5UD7].

205. Juliana Kaplan, *Arizona Voted to Tax the Wealthy to Pay for Public Schools*, BUS. INSIDER (Nov. 6, 2020, 11:19 AM), https://www.businessinsider.com/arizona-voted-to-tax-wealthy-to-pay-for-public-schools-2020-11 [https://perma.cc/56SD-RDVE].

206. Johnson, *supra* note 28, at 1196.

207. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 24–26 (1978).

208. S.J. Res. 382, 2021 Leg., Reg. Sess. (Fla. 2021) (responding to Proposition 2 with a bill proposing to amend the state constitution to permit it to create a subminimum wage rate for employees' first six months of employment).

209. Chris Marr, *Arizona Lawsuit Highlights 'New Spin' on Wage Law Preemptions*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 13, 2021, 7:42 AM), https://news.bloomberglaw.com/daily-labor-report/arizona-lawsuit-highlights-new-spin-on-wage-law-preemptions [https://perma.cc/EQ5W-73L6] (describing Arizona legislative response to voter-approved constitutional provision permitting local minimum wage laws as seeking to impose budgetary penalties on local governments that enact them).

C. STATE HOME RULE REFORM TO PROTECT AND EXPAND LABOR LOCALISM

Important values lie behind the debate about the proper role of local government in state preemption disputes. Decentralization advances the "constitutional interest in participating in government,"[210] respects local differences and local needs, and promotes local experimentation.[211] Labor localism can advance democratic values, improve the responsiveness of local government to the interests of poor people, women, people of color, and immigrants, and improve worker participation in workplace regulation.[212] In a functional state-local relationship, statewide centralization can improve workplace regulation by coordinating with local governments in regulating and enforcing local labor standards.[213] But the new state preemption does not do this. Preemption threatens the values of decentralization by divesting local government of lawmaking authority without advancing statewide regulation.[214]

A report by the National League of Cities and the Local Solutions Support Center ("NLC Report") proposes home rule reform to curb abusive forms of state preemption.[215] The key proposals of the report recommend broad initiative power of local governments to "pursue any policy tool available to the state," and a presumption against state preemption.[216] This presumption would recognize only express—not implied—preemption. In state-local conflicts, preemption proponents would bear the burden to "articulate the substantial state interest at issue" and to show that the state preemption is narrowly tailored to that state interest.[217] While agreeing that state preemption can raise concerns, the proposal provoked strong opposition from David Schleicher. Schleicher argues that expanding home rule will decrease local responsiveness and accountability and multiply the state resources needed to strike down local lawmaking that harms the economy and poor people.[218]

While this Article is aligned with the NLC Report's rationale for

210. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1663 (2021).

211. Scharff, *supra* note 22, at 1491–92.

212. Barron, *supra* note 33, at 2336 (arguing that local government can increase public participation in governance).

213. *See* Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7, 23 (2020).

214. Briffault, *supra* note 22, at 1995.

215. NLC Report, *supra* note 29.

216. Fisk, *supra* note 213, at 24.

217. *Id.* at 26–27. In preemption disputes, this would shift the presumption of validity to a state burden to show a substantial interest in displacing local authority, and that the "state interference with local democracy is narrowly tailored." *Id.* at 26.

218. Schleicher, *supra* note 29, at 898–921.

limiting state preemption, local labor lawmaking is not as threatened by state preemption as in other substantive areas. Only modest protection to limit implied preemption and curb egregious abuses of express preemption is necessary to protect local labor lawmaking. As the previous Section explained, state preemption is not always a danger for labor-community coalitions, and there are good reasons to be skeptical of local autonomy. State preemption can be justified to prevent local laboratories of economic inequality.[219] Unchecked local power can also descend into parochialism, used by affluent suburbs to exclude poorer and minority communities.[220] Deficiencies in local decision-making and inequalities created by local autonomy in the interlocal city-suburban conflict can make decentralization a flawed forum for policymaking.[221] States have an interest in securing individual rights and in resolving inter-local conflict to deter local parochialism and corruption.[222]

But there is little evidence that uninhibited state power to preempt local labor lawmaking would either improve local accountability or create a more functional state-local relationship. Sweeping state preemption of local labor lawmaking removes workplace regulations intended to protect vulnerable workers, and it is likely to make local government less accountable by channeling local labor lawmaking into secretive arrangements to avoid preemption.[223]

Focus on top-down state supervision of local lawmaking can ignore the accountability gained from public participation in local lawmaking.[224] Proponents of statewide supervision of local economic development criticize the use of local subsidies to attract mobile capital as a regressive form of redistribution. The bidding war incited by Amazon in 2019 for local subsidies to locate its second headquarters ("HQ2") provides a recent

219. *Id.* For example, ALEC-affiliated organizations have targeted unions with campaigns for local right-to-work ordinances in a number of states. Ariana R. Levinson, Alyssa Hare & Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEGIS. 401, 403, 414 (2017) (arguing that local right-to-work ordinances are preempted by the NLRA). But to date, states have responded to local right-to-work ordinances by preempting them. *See* Denise Oas & Steven Lance Popejoy, *The Right-to-Work Battle Rages on at Both the Federal and State Levels*, 29 MIDWEST L.J. 71, 91–93 (2019) (describing state preemption of local right-to-work ordinances by New Mexico and Illinois legislatures).

220. FRUG, *supra* note 34, at 7–8.

221. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 355, 408 (1990); *see also* Barron, *supra* note 33, at 2333.

222. City of Camden v. Kenny, 763 A.2d 777, 784–85 (N.J. Super. Ct. App. Div. 2000) (rejecting home rule authority for local appointment power).

223. Sachs criticizes this "opaque" form of local lawmaking for reshaping "local politics, leaving us with a kind of politics of indirection," which "can be problematic in the long term for both civic participation and social movement dynamism." Sachs, *supra* note 25, at 1159, 1207–08.

224. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 693 (2020).

example of the destructive use of local capital to recruit mobile employers at the expense of local taxpayers and displaced residents.[225] But successful contestation of HQ2 in New York City came not from state supervision, but from local labor and community groups, which injected discipline into that city's development process. The open process by which labor and community groups successfully pressed their demands forced the city to consider the likely displacement of renters, and Amazon's hostility to unions, and Amazon's refusal to grant concessions in return for $3 billion in government incentives.[226] While the state could have secured the same result by limiting New York City's economic development authority, it did not. New York, like other states, was aligned with its cities in using economic incentives to prevail in the HQ2 interstate competition for jobs.[227] State limits on local public sector employee strikes and collective bargaining will, likewise, not necessarily improve workplace governance or city responsiveness. Historically, state collective bargaining laws prohibiting strikes have *increased*, not decreased, teacher strikes.[228] While state law reform could promote labor peace and deter abuses in collective bargaining,[229] there is no evidence that state "right to work laws" have done this.[230] These examples suggest that the local accountability sought by state supervision proponents is likely to come, instead, from local institutional designs that make "bottom-up contestation possible."[231]

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225. Schleicher, *supra* note 29, at 888.

226. Noam Scheiber, *Labor's Hard Choice in Amazon Age: Play Along or Get Tough*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/business/economy/labor-unions-amazon.html [https://perma.cc/H5CE-PXPR].

227. *See, e.g.*, Edward W. De Barbieri, *Lawmakers as Job Buyers*, 88 FORDHAM L. REV. 15, 18 (2019). Some states have since HQ2 considered participating in an interstate compact not to use tax incentives in interstate competition for jobs. *See* Michael J. Bologna, *Eleven States File Bills to Curtail Tax Incentive Poaching*, BLOOMBERG: TAX (Feb. 22, 2021), https://news.bloombergtax.com/daily-tax-report-state/eleven-states-file-bills-to-curtail-tax-incentive-poaching [https://perma.cc/4KDV-44GK].

228. Michael Finch & Trevor W. Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573, 1583–84 (1984). This historic trend mirrors recent #RedforEd strikes, many of which have occurred in states that prohibit them. *See* Oswalt, *supra* note 10, at 116; Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Era of Trump*, 40 BERKELEY J. EMP. & LAB. L. 135, 145 (2019).

229. State collective bargaining law can promote public sector workplace governance by, for example, offering interest arbitration of bargaining disputes. Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189, 190–91 (2012). The most recent calls for state collective bargaining reform have sought to deter police unions from shielding their members from accountability for racism and violence. *See* Benjamin Sachs, *Police Unions: It's Time to Change The Law and End The Abuse*, ONLABOR (June 4, 2020), https://onlabor.org/police-unions-its-time-to-change-the-law [https://perma.cc/78D8-A49A] (calling for state law reform to prevent collective bargaining from enabling police racism and violence); Levin, *supra* note 26, at 1364–65; *see also* Fisk & Richardson, *supra* note 26, at 721 (proposing amending state labor law to permit groups of police officers favoring reform to bargain with police departments in minority unions).

230. Levin, *supra* note 26, at 1357–58.

231. Rahman & Simonson, *supra* note 224, at 693. As K. Sabeel Rahman and Jocelyn Simonson explain, attending to the problem of police violence, for example, will require community control over

Second, it is not clear that states that seek to stamp out rather than guide local lawmaking are more responsible and accountable than local governments. As Dahl observes, states have never been designed to be democratic and have historically been dominated "by the relatively small elites of wealth and status who were able to control one or both branches of the legislature."[232] Because of "geographic and partisan sorting, as well as strategic gerrymandering," Miriam Seifter explains, state legislatures often make countermajoritarian policy decisions that reflect "the preferences of big donors or the most affluent."[233] State preemption of local workplace regulation widely supported by state voters is a leading example.[234] Civil society and media also cannot serve as watchdogs as effectively over states, compared with federal government, which makes states vulnerable "to regulatory failures and factional influence."[235] While the possibility of local government capture also warrants caution,[236] in state-local conflicts over workplace standards, the risk of state capture by employers is the greater threat.

This is especially the case for state preemption that shows little regard for the general welfare of economically and politically subordinated groups, as when majority-white states suppress local labor lawmaking in majority-Black cities. Alabama's "rushed, reactionary, and racially polarized" response to the Birmingham minimum wage campaign demonstrates the considerable stakes in state-local conflicts.[237] As Nestor Davidson argues, these conflicts are centrally about individual rights and "questions of racial subordination and economic inequality," justifying judicial scrutiny of sweeping forms of state preemption.[238]

State preemption can ignore the traditional goals of centralization and defeat the important decentralization values of self-representation and experimentation. The NLC Report proposal that courts distinguish between state preemption that seeks to protect vulnerable residents or a comprehensive state regulatory regime, and state preemption that seeks to stamp out all regulation, is a critical intervention.[239] State courts reviewing

policing. *Id.* at 727.

232. DAHL, *supra* note 80, at 139.

233. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735–37 (2021).

234. *Id.* at 1793 (citing Florida, which preempts local minimum wage ordinances despite the fact that state voters "passed a minimum wage constitutional amendment by a supermajority vote").

235. Seifter, *supra* note 69, at 146.

236. *See* Elmore, *supra* note 120, at 123–29.

237. Lewis v. Governor of Ala., 896 F.3d 1282, 1295 (11th Cir. 2018), *vacated, reh'g en banc*, 944 F.3d 1287 (11th Cir. 2019).

238. Davidson, *supra* note 163, at 989.

239. NLC Report, *supra* note 29, at 23–27.

sweeping preemption claims should consider whether state or local power better "serves the state constitutional value of majoritarianism,"[240] and the harm of preemption to local democratic self-governance.[241] At a minimum, courts considering equal protection challenges to state preemption laws should, as in the Birmingham minimum wage ordinance, consider a state's history of using preemption to silence the political voice of people of color in majority-minority cities.[242]

While limiting express preemption is the most controversial proposal of the NLC Report, its proposals that states provide broad initiative power to local governments and curtail implied preemption are equally important. In state-local conflicts, courts should find state local labor lawmaking authority in the home rule power to provide for the general welfare.[243] Clarifying in states where courts limit the initiative power of local governments, such as New York and Massachusetts, that local governments may regulate the workplace will broaden the reach and scope of labor localism.

Limitations to labor localism through implied preemption, as the NLC Report suggests, can come primarily through judicial review of preemption challenges to local labor lawmaking, particularly in states in which home rule statutes establish a presumption against implied preemption. State employment laws that set a floor for permissible statewide conduct do not imply an intent to occupy the field, and higher local standards do not conflict with a statewide minimum. Courts should view skeptically claims of the value of uniformity of workplace regulation in state-local conflicts, unless there is evidence that employers set uniform standards absent local lawmaking, or that local variation actually harms employers.[244] Local minimum work standards advance the value of local democratic self-government, and they can be tailored to suit local needs and promote local experimentation. Courts should interpret a state law establishing a minimum work standard as a floor, not a ceiling, unless the clear legislative intent is to establish a comprehensive state regulatory regime that is incompatible with higher local standards. Concerns about spillover effects into other substantive areas can be addressed by preserving local labor lawmaking in

240. Seifter, *supra* note 69, at 55; *see also* Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 404 (2020).

241. Bowie, *supra* note 210, at 1745. Nikolas Bowie locates in the state constitutional right to assemble a right to local self-government. *Id.* at 1744–45.

242. Johnson, *supra* note 28, at 1193–96.

243. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1159 (N.M. Ct. App. 2005); *see also* Pa. Rest. & Lodging Ass'n v. City of Pittsburgh, 211 A.3d 810, 827–28 (Pa. 2019). Davidson proposes that state constitutional general welfare clauses are "a structural principle to bring values such as equity and inclusion to bear in the doctrine," which courts may interpret to address economic inequality and racial subordination in state or local government lawmaking. Davidson, *supra* note 163, at 990.

244. Johnson, *supra* note 28, at 1190–92.

state employment laws.[245]

III. THE EFFECTS OF LABOR LOCALISM ON LABOR LAW AND LOCAL LAW

This Part will consider the effects of labor localism on labor law and on local government law. Labor localism can expand remedies and the scope and goals of strikes and collective bargaining by using local law instead of or in addition to the National Labor Relations Act. It can also serve the democracy-enhancing values of labor law and local law.

A. LABOR LOCALISM STRENGTHENS WORKPLACE PROTEST AND COLLECTIVE BARGAINING BY CONNECTING LABOR LAW TO CITY POWER

The strikes of Fight for Fifteen and other labor-community coalitions ignited mass participation,[246] galvanized public support,[247] and inspired similar campaigns and mass protests by low-wage workers in other sectors.[248] While it is too early to tell whether this is a long-term trend, it has revived protest by vulnerable workers as a strategy to improve precarious work conditions.

The significant focus on cities by Fight for Fifteen has reinvigorated the NLRA Section 7 right to protest.[249] Labor law broadly protects the right of non-union employees to engage in collective work protests,[250] including political protests regarding employees' economic interests.[251] But the NLRA can insufficiently protect these rights during union organizing and elections,

245. States can amend their employment laws to add savings clauses permitting local labor lawmaking, just as many federal employment laws expressly permit subfederal variation and experimentation above the federal floor. *See, e.g.*, 29 U.S.C. § 218 (permitting higher subfederal minimum wages than the FLSA requires). In this regard, the lack of a savings clause in Florida's Proposition 2 is a missed opportunity to protect local labor lawmaking in Florida by superseding that state's preemption statute.

246. Oswalt, *supra* note 119, at 67, 70. While strikes in Wal-Mart and other worksites prior to Fight for Fifteen contributed to this trend, the wave of strikes initiated by Fight for Fifteen in 2015 generated a public consciousness about striking that did not exist before. *See* Greenhouse & Kasperkevic, *supra* note 107.

247. Brenan, *supra* note 76.

248. Rachel Lerman & Nitasha Tiku, *Amazon, Instacart Workers Launch May Day Strike to Protest Treatment During the Coronavirus Pandemic*, WASH. POST (May 1, 2020), https://www.washington•post.com/technology/2020/05/01/amazon-instacart-workers-strike [https://perma.cc/93GQ-T3PE]; Bryce Covert, *Like Uber, but for Gig Worker Organizing*, AM. PROSPECT (Mar. 30, 2020), https://prospect.org/labor/like-uber-but-for-gig-worker-organizing [https://perma.cc/9U6B-KCR3] (quoting director of Working Washington, a Seattle-based worker center describing its efforts to organize gig workers).

249. 29 U.S.C. § 157 ("Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

250. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 12–13 (1962).

251. Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978).

and it imposes a confusing and punitive array of restrictions on union protests.[252] This has contributed to a precipitous drop in striking in the United States from previous decades[253] and an attendant decline in worker power.

Viewing recent worker protest and bargaining through the prism of localism shows how crucial city power has been to building and channeling energy from social movement into workplace protests. The standard NLRA remedies of backpay and reinstatement do not address the full harm of employer reprisals that crush organizing campaigns or make elections futile, and insufficiently deter them.[254] Anti-retaliation protections in local lawmaking, along with penalties, liquidated damages, and attorneys' fees, can more effectively deter employer reprisal. The recent just-cause and right-to-recall ordinances expand beyond current NLRA remedies by eroding or displacing the at-will presumption of non-union workplaces. While unions and employers often agree to just-cause and right-to-recall provisions in a collective bargaining agreement, this comes too late to protect workers during union organizing drives and elections. By shifting these protections earlier, to the outset of organizing campaigns, local labor lawmaking can protect political and workplace mobilization at the time in which the risk of employer reprisals is highest. They can also promote voluntary recognition agreements, by taking these terms out of competition among union and non-union employers in the same sector.

These campaigns have also sought forms of worker representation outside of the NLRA, through sectoral bargaining for work standards with

252. The NLRA limits picketing by unions for recognitional and organizational purposes, 29 U.S.C. § 158(b)(7)(C), which the Board interprets to only permit picketing regarding "an unfair labor practice, to support area standards, or to advise the public," Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 288 (2015) (explaining Board interpretation of 29 U.S.C. § 158(b)(7)(C)). The NLRA also prohibits unions from engaging in secondary boycotts, or boycotting companies other than the direct employer. 29 U.S.C. § 158(b)(4)(B). Violation of these restrictions can result in large damages awards against unions, and can channel unions and their attorneys into narrower, less impactful activities. *See* Fisk & Reddy, *supra* note 30, at 118–22, 124–25.

253. The Bureau of Labor Statistics ("BLS") reports that mass strikes (defined as involving 1,000 or more employees) decreased from one hundred eighty-seven in 1980 to *five* by 2009, their lowest level, before rising to twenty-five in 2019. *Annual Work Stoppages Involving 1,000 or More Workers, 1947 – Present*, U.S. BUREAU LAB. STAT., https://www.bls.gov/web/wkstp/annual-listing.htm [https://perma.cc/9M5Y-E54R]. While mass strikes fell in 2020, *id.*, likely because of the pandemic recession, BLS reports a new rise, to twelve mass strikes from January to October 2021, Laura Bliss, *MapLab: Documenting the Real Scope of U.S. Labor Strikes*, BLOOMBERG (Oct. 20, 2021), https://www.bloomberg.com/news/newsletters/2021-10-20/the-real-scope-of-u-s-worker-strikes-mapped. The BLS exclusive focus on mass strikes omits the many walkouts by non-union employees during the pandemic for safety reasons and the current "surge" across industries of labor protests and strikes involving fewer than 1,000 employees. *Id.*

254. Weiler, *supra* note 46, at 1793 (administrative delay in reinstating union supporters is "fatal to the viability of a union organizing drive"); *see also* Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 27 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021) (finding that "under any reasonable assumption about the degree to which firing workers illegally can reduce the probability of unionization, a large number of firms have a financial incentive to do so").

employers and the state,[255] and "co-enforcement" by local government, unions, and worker centers to jointly enforce work standards.[256] By shifting the scale of protest and bargaining to the regional and sectoral level, sectoral bargaining and co-enforcement permits worker centers to bargain for regional or sectoral work standards without being deemed "labor organizations" subject to NLRA regulation,[257] and non-union employers can negotiate for them without unlawfully dominating or interfering with unions.[258] Sectoral bargaining, in which employer and employee representatives bargain for standards with the state, is virtually unknown in modern federal regulation.[259] But it is a familiar concept in workplaces in which local government is the primary regulator.[260] And though often informal and temporary,[261] co-enforcement can provide unions and worker

255. Andrias, *supra* note 14, at 35.

256. Janice Fine coined the term "co-enforcement." In a co-enforcement model, worker centers partner with government agencies to establish enforcement priorities and in the referral and resolution of cases. *See* Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REGUL. & GOVERNANCE 129, 129–30 (2017). San Francisco and Seattle have created formal co-enforcement committees with roles for alt-labor groups to coordinate their enforcement with local government, advise the enforcement agency, and report to the city council. *See* Elmore, *supra* note 120, at 107–10.

257. Duff, *supra* note 16, at 875–76. As Kate Griffith and Leslie Gates explain, worker centers are not "labor organizations" under the NLRA if they do not "actively seek to become the exclusive collective bargaining representatives of employees." Griffith & Gates, *supra* note 15, at 605.

258. 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization"); Electromation, Inc., 309 N.L.R.B. 990, 992–94 (1992), *enforced*, Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994). This prohibition restrains employers from forming employee committees to engage in firm-based bargaining outside of exclusive representative in the workplace and does not extend to bargaining for regional and sectoral standards. *See* Hirsch & Seiner, *supra* note 16, at 1764 ("As long as the employer does not recognize the group as a collective-bargaining representative and does not provide other unlawful domination or interference, there will generally be no section 8(a)(2) violation.").

259. The most prominent federal experiment in corporatism, or tripartite labor relations, was the short-lived, private code-making authority granted by the National Industrial Recovery Act ("NIRA") of 1933, which the Supreme Court struck down on separation of powers grounds in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). Tripartite commissions are common in Europe, especially in Germany and Denmark, Andrias, *supra* note 14, at 35, and in Uruguay, César F. Rosado Marzán, *Can Wage Boards Revive U.S. Labor?: Marshalling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 143–44 (2020).

260. Cities have experimented with sectoral bargaining for workers outside the boundaries of the NLRA, including taxi drivers and day laborers. In New York City, New York Taxi Workers Alliance secured a health care and disability fund from a portion of fares from fare increases, and recently established a minimum wage for platform company drivers. Mischa Gaus, *Not Waiting for Permission: The New York Taxi Workers Alliance and Twenty-First-Century Bargaining*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT, *supra* note 18, at 257, 264; Shira Ovide, *An Uber Wage Experiment Worked*, N.Y. TIMES (Oct. 1, 2020), https://www.nytimes.com/2020/10/01/technology/uber-wages-new-york.html [https://perma.cc/2QV6-PU5M]. The national federation of day laborer worker centers NDLON provides job centers for day laborers and mediates conflicts with local law enforcement and businesses. Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1627–28, 1647–78 (2011); Dziembowska, *supra* note 101, at 147–53.

261. Oswalt & Rosado Marzán, *supra* note 126, at 422.

centers with legitimacy and power.[262] In public sector bargaining with cities, Bargaining for the Common Good can overcome the limited labor law requirement that employers bargain only over "mandatory" topics, by multiplying the parties with interests in collective bargaining.[263]

Localism also permits the reawakening of mass protests in ways that the current Board has sought to protect, and that might otherwise be unprotected or illegal under the NLRA. The Strike for Black Lives brought attention to the Section 7 protection of employees who participate in political protests for racial justice like Black Lives Matter ("BLM") rallies. This has led the current Board to broadly protect worker participation in BLM protests and wearing of BLM messages at work under labor law.[264] Fight for Fifteen's shifting goals for walk-outs across the stores of different fast food franchisees can avoid the Board's currently broad interpretation of unlawful "intermittent" strikes.[265] Concerted activities by gig workers could violate federal antitrust law, since independent contractors are not employees under the NLRA.[266] Labor localism can remove this threat by making local

262. *See* Elmore, *supra* note 120, at 116; Fisk, *supra* note 213, at 24, 36.

263. Oswalt, *supra* note 10, at 102–03 (explaining the limitations of 29 U.S.C. § 158(a)(5), (b)(3), (8)(d)).

264. Robert Iafolla, *Black Lives Matter Protests Protected, Top NLRB Lawyer Says*, BLOOMBERG L.: DAILY LAB. REP. (Oct. 6, 2021, 1:38 PM), https://news.bloomberglaw.com/daily-labor-report/black-lives-matter-protests-protected-top-nlrb-lawyer-says [https://perma.cc/WYM2-N8YA]. The Board has recently issued a complaint against Whole Foods for banning BLM masks and pins at work for interfering with employees' right to engage in protected concerted activities under labor law. Josh Eidelson, *U.S. Accuses Whole Foods of Banning Black Lives Matter Masks*, BLOOMBERG (Dec. 3, 2021), https://news.bloomberglaw.com/social-justice/u-s-accuses-whole-foods-of-banning-black-lives-matter-masks [https://perma.cc/VW7Q-URWM].

265. In *Walmart Stores, Inc.*, 368 N.L.R.B. No. 24 (July 25, 2019), a majority of the Board ruled that four separate one-day strikes to protest "employees' wages, hours, benefits, and other working conditions," was an intermittent strike because of "direct evidence of a strategy [by OUR Walmart] to use a series of strikes in support of the same goal." *Id.* at *1–2. Uncoordinated walkouts with separate goals are distinguishable from the facts of *Wal-Mart*. In fissured industries, such as the fast-food sector, the intermittent strike doctrine also has less salience since, unlike Wal-Mart, fast food franchisors disclaim employer status.

266. Antitrust law contains a labor exemption that permits workers to engage in collective activities. Clayton Act § 6, 15 U.S.C. § 17. But it has typically only been applied to labor unions, Hirsch & Seiner, *supra* note 16, at 1777–78, while the broad prohibition of "restraints" in antitrust law and has been applied to collective actions by independent contractors seeking to increase pay or reduce workloads, *see* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 425 (1990). Hirsch and Seiner argue that independent contractor strikes violate antitrust law but that agreements with companies may not. Hirsch & Seiner, *supra* note 16, at 1777–79. Sanjukta Paul argues that courts should consider market power in determining whether coordination by independent contractors violates antitrust law. Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1036–41, 1047 (2016). Federal Trade Commission Chair Lina Khan has recently expressed concern about antitrust suits against transportation network and similar workers and announced that she will provide "guidance to courts on how the Clayton Act is designed to exempt worker organizing activities from antitrust." Letter from Lina M. Khan, Chair, U.S. Fed. Trade Comm'n, to Reps. David Cicilline & Ken Buck (Sept. 28, 2021) (available at https://www.ftc.gov/system/files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf [https://perma.cc/6ULC-V8DD]).

government the site of protest and bargaining rather than the employer,[267] protecting it under a First Amendment exception to antitrust law.[268] Moving the site of protest to the state can also avoid the threat of employer reprisals and economic weapons that have increasingly become the standard employer response to union elections and demands to bargain.[269] As with the minimum wage increases sought by Fight for Fifteen, unions and worker centers can press their positions without the threat of economic weapons—permitted under the NLRA—to crush their campaigns.[270]

The labor-community coalitions of labor localism can avoid NLRA-imposed limitations to pickets and boycotts. Not-for-profit organizations that do not seek to exclusively represent employees or bargain with individual employers are not "labor organizations" under the NLRA, and so they are not subject to these NLRA restrictions.[271] Boycotts and other economic pressure by worker centers and community organizations, as the Supreme Court explained in *NAACP v. Claiborne Hardware*,[272] can instead constitute political speech afforded heightened First Amendment protection.[273] Labor

267. *See* Hirsch & Seiner, *supra* note 16, at 1767–75.

268. Fisk & Rutter, *supra* note 252, at 312 & n.220 (explaining Noerr-Penington First Amendment exception to antitrust law).

269. CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, UNLAWFUL: U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS 7–8 (2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/5MWJ-524J] (finding in study of all 2016 and 2017 NLRB-supervised elections that employers were alleged to have committed unfair labor practices in over forty percent of elections, including firings, coercion, and illegal discipline).

270. In this sense, local labor lawmaking has a similar advantage to worker centers' use of litigation in lieu of union recognition to advance a position. *See* Griffith & Gates, *supra* note 15, at 606 & nn.19–20.

271. The United Farm Workers, which is not a union under federal labor law because farmworkers are excluded from the NLRA, exploited this fact by organizing boycotts against major grocery chains selling farmworker products, which would violate the NLRA secondary boycott prohibition if UFW were a union. *See* ROSENFELD, *supra* note 8, at 156–57; Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and The Role of Law in Union Organizing Today*, 8 J. BUS. L. 1, 15–16 (2005).

272. NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982) (finding that the First Amendment limits Board intervention since "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values' " (quoting Carey v. Brown, 447 U.S. 455, 567 (1980))). While *Claiborne* deems that boycotts by groups other than unions are protected political speech, union secondary boycotts are unprotected economic speech under the First Amendment even if the union calls the boycott for political reasons. *See, e.g.*, Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214, 226–27 (1982) (holding that longshoremen's boycott of cargo to or from Soviet Union to protest the Afghanistan invasion is an illegal secondary boycott). This economic/political distinction has been heavily criticized. Julius Getman calls the distinction "analytically unsound, historically inaccurate, and culturally myopic" and calls for treatment of boycotts as political speech if they are called for matters of public concern. GETMAN, *supra* note 8, at 99. Catherine Fisk and Jessica Rutter argue that the NLRA prohibitions on labor picketing violates the First Amendment. Fisk & Rutter, *supra* note 252, at 300–15. Getman posits that the secondary boycott restriction is unconstitutional on this ground as well. GETMAN, *supra* note 8, at 99.

273. *Claiborne*, 458 U.S. at 913.

localism can avoid a confrontation with the NLRA protest limitations by restricting protest participants to non-union coalition members that are not subject to the prohibition because they are not "labor organizations" under the NLRA.

The labor localism strategy of striking to advance local labor lawmaking also speaks to the debate about whether lifting standards through local labor law is in tension with the labor law goal of facilitating the collective strength of workers through unions. As Kate Andrias explains, while employment and labor law can be mutually reinforcing, they can also be in tension if the individual rights framework of employment law saps the strength of collective action under labor law.[274] In the alt-labor scholarship, Martin Malin questions the long-term impact of worker centers seeking local labor lawmaking,[275] and Catherine Fisk, similarly, cautions that worker center social movement activism is not sustainable without a legal structure—akin to exclusivity in labor law—to institutionalize it.[276] This raises the question of whether the shift to localism comes at the price of institutional power through labor law.

But labor localism can be an effective response to changes in the workplace that have placed the single-firm collective bargaining ideal of labor law out of reach for many workers. Strategies to increase worker power through firm-level bargaining must contend with recent transformations in the workplace. With the shift from an industrial to a service sector economy, the low-wage workplace in the United States is often geographically dispersed and fissured into myriad subcontracted entities.[277] Employers often have substantial buyer market (or "monopsony") power to set wages in the entire region or sector.[278] Many other companies skirt labor and employment law entirely by classifying their workers as independent contractors.[279] New approaches to worker representation are needed to address these challenges. Labor localism responds to these conditions with coalitions of networked unions and worker centers, which while seeking local labor lawmaking also often pursue unionization and collective bargaining.[280] The Fight for Fifteen strategy to secure $15 minimum wage

274. *See* Andrias, *supra* note 14, at 38.

275. Malin, *supra* note 26, at 164.

276. Fisk, *supra* note 213, at 7, 10; *see also* Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers' Rights*, 33 STUD. AM. POL. DEV. 50, 83–84 (2019).

277. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 8–9 (2014).

278. *See* POSNER, *supra* note 37, at 27–28 (summarizing economic evidence that employers with monopsony power can set wages below their workers' marginal productivity, or what their workers would earn in a competitive market).

279. *See* WEIL, *supra* note 277, at 70–73, 245.

280. *See, e.g.*, BLUE AND GREEN, *supra* note 25, at 353–54.

ordinances and unionization had an early success in Sea-Tac, Washington, where the minimum wage ordinance led to the unionization of one thousand airport workers.[281] The later minimum wage campaigns in Minnesota strengthened the labor-community network, enabling it to pivot to collaborating in successful union election campaigns for hundreds of retail janitorial workers in Minneapolis and St. Paul.[282] The new Home Care Employment Standards Board in Nevada, sought by SEIU home care employee members, will bargain for standards that will apply to all home care employees in the state, including union members.[283] In these cases, labor localism seeks out lawmaking and unionization as mutually reinforcing strategies.

In other cases, there is no tension because unionization is impossible without significant labor law reform. Domestic workers, for example, are excluded from many federal labor and employment laws, including the NLRA.[284] Since domestic workers cannot join a union, the National Domestic Worker Alliance (NDWA) has instead sought sectoral bargaining. Recently secured "bills of rights" in Seattle and Philadelphia provide for the appointment of domestic workers or worker centers to work standards boards to elaborate and enforce domestic worker protections.[285] While these boards do not provide for exclusivity, they do provide a forum for NDWA to bargain for strengthened city standards and enforcement strategies. A formal role for worker centers in the administrative design of local labor lawmaking also permits NDWA affiliates to avoid being deemed "labor organizations" under the NLRA, which can chill worker center activity.[286] Delivery workers classified by their network companies as independent contractors (rather than employees) have made similar gains with local labor lawmaking, most recently in New York City, which has set minimum pay and other standards

281. JONATHAN ROSENBLUM, BEYOND $15: IMMIGRANT WORKERS, FAITH ACTIVISTS, AND THE REVIVAL OF THE LABOR MOVEMENT 157 (2017).

282. Steven Greenhouse, *Twin Cities Janitors Declare Victory in Union Fight After 44-Month Campaign*, GUARDIAN (Oct. 13, 2016, 8:58 AM), https://www.theguardian.com/money/2016/oct/13/twin-cities-janitors-union-fight-minneapolis-equal-pay [https://perma.cc/Q5L6-JDEU].

283. April Corbin Girnus, *Nevada to Create Labor Board to Address Issues Within Home Care Industry*, NEV. CURRENT (Oct. 6, 2021, 6:43 AM), https://www.nevadacurrent.com/2021/10/06/Nevada-to-create-labor-board-to-address-issues-within-home-care-industry [https://perma.cc/U45Z-Y9GW].

284. *See* 29 U.S.C. § 152(3) (domestic worker exemption).

285. *See* SEATTLE, WASH., MUN. CODE § 14.23.030 (2018); PHILADELPHIA, PEN., CODE, Ch. 9-4500, § 9-4509 (2019); Oscar Perry Abello, *Philly Sets New Gold Standard for Domestic Worker Protections*, NEXT CITY (Nov. 7, 2019), https://nextcity.org/daily/entry/philly-sets-new-gold-standard-for-domestic-worker-protections [https://perma.cc/XS7E-QT8C].

286. Participating in setting regional standards and in the enforcement of those standards do not risk making worker centers "labor organizations" because this is not "dealing with" employers under the NLRA. *See* Griffith & Gates, *supra* note 15, at 606–07; U.S. NAT'L LAB. RELS. BD., GEN. COUNS., ADVICE MEMORANDUM: RESTAURANT OPPORTUNITIES CENTER OF NEW YORK (2006), https://onlabor.org/wp-content/uploads/2017/05/roc-ny-memo.pdf [https://perma.cc/G6AG-Z4BC].

for app-based food delivery services.[287]

In the case of fast-food workers, while unionization is an express ambition of Fight for Fifteen, the effectiveness of collective bargaining can depend on the joint employer status of franchisors, which set the key determinants of store operations.[288] Unionization has been an elusive goal for fast-food and other franchise workers, at least in part because of the Board's current, narrow joint employment definition.[289] But Fight for Fifteen has continued to function as a union would. Responding to member complaints about sexual harassment and unsafe working conditions during the pandemic, Fight for Fifteen organized strikes and coordinated systemic sexual harassment and public nuisance litigation in McDonald's stores in dozens of cities.[290] These strategies may facilitate long-run unionization efforts, as litigation brings franchisors' current exclusion from the employment relationship into closer, sustained judicial scrutiny.[291]

In sum, local labor lawmaking can advance unionization and collective bargaining. For low-wage workers outside the reach of the NLRA, there is little question that local labor lawmaking has increased their workplace and political power. The formal, independent roles for unions and worker centers in the elaboration of local standards and enforcement priorities can provide these groups with a form of worker representation outside of the NLRA.[292] The public support garnered by Fight for Fifteen has translated into minimum wage increases by state voter referenda,[293] and popular support for

287. Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html [https://perma.cc/T93V-4E42].

288. *See* Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 108 CALIF. L. REV. 104, 107 (2021).

289. *See* Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184, 11,235 (Feb. 26, 2020) (limiting joint employment to entities that "possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment," which likely excludes many franchisors).

290. Alexia Fernández Campbell, *McDonald's Workers Are Striking and Suing the Company—in the Same Week*, VOX (May 21, 2019, 5:40PM), https://www.vox.com/policy-and-politics/2019/5/21/18633995/mcdonalds-workers-strike-sexual-harassment [https://perma.cc/VM3T-EHTZ]; Lauraann Wood, *McDonald's Told to Give Ill. Workers More Virus Protections*, LAW360 (June 24, 2020, 6:04 PM), https://www.law360.com/articles/1286329/mcdonald-s-told-to-give-ill-workers-more-virus-protections [https://perma.cc/6FU6-5C85].

291. Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHI.-KENT L. REV. 245, 253 (2020); *see also* BLUE AND GREEN, *supra* note 25, at 353–54.

292. COHEN & ROGERS, *supra* note 80, at 58–59.

293. Marr, *supra* note 190; Gary Fineout, *Florida's 2020 Ballot Will Include $15 Minimum Wage Question*, POLITICO (Dec. 19, 2019, 2:14 PM), https://www.politico.com/states/florida/story/2019/12/19/floridas-2020-ballot-will-include-15-minimum-wage-question-1233568 [https://perma.cc/6JKK-6VPG]; Michael Sainato, *Fight for $15 Campaign Is a Comeback for Labor Movement's Role in Elections*, GUARDIAN (Oct. 28, 2018, 6:00 PM), https://www.theguardian.com/us-news/2018/oct/28/fight-for-15-campaign-labor-movement-midterm-elections [https://perma.cc/4353-9P3B].

an increase of the federal minimum wage to $15 an hour.[294] Sole reliance on labor law could not have achieved these outcomes.

There are few legal limitations to public participation in local labor regulation and enforcement. Participation by unions and worker centers in the standard setting and enforcement of laws of general applicability does not entail firm-based bargaining and so does not implicate NLRA preemption.[295] Separation of powers does not limit co-enforcement, since enforcement is an executive function and local agencies can properly seek public participation in enforcement to improve compliance.[296] Sectoral bargaining can implicate the nondelegation doctrine to the extent that setting standards may be considered legislative. But in most states, these constraints are no greater than those imposed on legislative grants to public agencies. In those states, reasonable grants of power for private groups to bargain for standards are permissible with adequate legislative direction and safeguards to prevent abuse.[297] Local lawmaking cannot delegate binding decision-making authority to committees without agency oversight,[298] and sectoral bargaining could not result in policymaking that overrides legislative commands.[299] But these are not substantial limitations. Sectoral bargaining satisfies these requirements with final agency approval and the availability of judicial review.[300] While some state constitutions with stronger nondelegation doctrines may impose greater limits on sectoral bargaining and co-enforcement,[301] even in those states, courts favorably view reasonable delegations to representative groups. Inclusion of "all stakeholders promotes competence and fairness,"[302] and ensures the participation of those with the greatest stake in the policy. For this reason,

294. Erik Wasson & Katia Dmitrieva, *Biden Urges More than Doubling Minimum Wage to $15 an Hour*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 15, 2021, 3:55 AM), https://news.bloomberglaw.com/daily-labor-report/biden-seeks-to-lift-minimum-wage-to-15-an-hour-in-stimulus-plan [https://perma.cc/758G-Y2RN]; Sheryl Gay Stolberg & Jeanna Smialek, *House Passes Bill to Raise the Minimum Wage to $15, a Victory for Liberals*, N.Y. TIMES (July 18, 2019), https://www.nytimes.com/2019/07/18/us/politics/minimum-wage.html [https://perma.cc/S38A-LK47].

295. Elmore, *supra* note 120, at 130–31 (analyzing NLRA preemption of co-enforcement); Andrias, *supra* note 14, at 91–92 (sectoral bargaining).

296. Elmore, *supra* note 120, at 135.

297. *See, e.g.*, Monsanto Co. v. Off. of Env't Health Hazard Assessment, 231 Cal. Rptr. 3d 537, 551 (Ct. App. 2018).

298. County of Riverside v. Pub. Emp. Rels. Bd., 200 Cal. Rptr. 3d 573, 579 (Ct. App. 2016).

299. Amica Life Ins. v. Wertz, 462 P.3d 51, 58 (Colo. 2020); *see* Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 197, 261 (2018).

300. Elmore, *supra* note 120, at 137.

301. Texas, for example, is skeptical of permanent, formal delegations to private groups that have an interest in the regulation. Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 473–75 (Tex. 1997).

302. City of Houston v. Hous. Firefighters' Relief & Ret. Fund, 502 S.W.3d 469, 477 (Tex. App. 2016).

no state has struck down a representative committee formed to set sectoral standards subject to final agency approval and judicial review.

But collective bargaining by workers classified as independent contractors can be considered an unlawful restraint under antitrust law, requiring further consideration.[303] Local laws that restrain commerce may be permissible under the *Parker* state action immunity exception,[304] so long as the ordinances follow "clearly articulated and affirmatively expressed . . . state policy" and are "actively supervised" by the state.[305] The Ninth Circuit in *Chamber of Commerce v. City of Seattle*,[306] however, narrowly interpreted these elements. The Ninth Circuit struck down an ordinance in Seattle that sought to extend collective bargaining rights to platform economy workers such as Uber and Lyft drivers. The court found that the state had not expressly authorized the ordinance, and municipal approval of exclusive representatives and collective bargaining agreements were not sufficient to qualify for *Parker* immunity.[307]

Chamber of Commerce has been criticized for adopting an overly narrow view of state authorization and supervision, opening "the door to municipal Lochnerism"[308] in which courts use antitrust law as a statutory liberty of contract. But while the Ninth Circuit disregarded established precedent finding that the *Parker* immunity state supervision requirement can be met by local government supervision,[309] it is also a narrow holding. Cities are entitled to *Parker* immunity under *Chamber of Commerce* if accompanied by state authorization and supervision.[310] And, importantly, even after *Chamber of Commerce*, co-enforcement is not susceptible to antitrust challenges. Courts that have considered *Chamber of Commerce* in challenges to local regulation have limited its applicability where there is no significant delegation to private parties.[311] The lack of any true delegation distinguishes co-enforcement from the Seattle hiring hall in *Chamber of Commerce* and entitles co-enforcement to *Parker* immunity. Seattle can, for

303. Clayton Act § 6, 15 U.S.C. § 17; Paul, *supra* note 266, at 977–79.

304. Andrias, *supra* note 14, at 92 n.485 (discussing Parker v. Brown, 317 U.S. 341 (1943)).

305. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

306. Chamber of Com. v. City of Seattle, 890 F.3d 769, 790 (9th Cir. 2018).

307. *Id.* at 782–90.

308. *Sherman Act—State Action Exemption—Ninth Circuit Holds Collective Bargaining Ordinance Not Entitled to State Action Immunity.*—Chamber of Commerçe v. City of Seattle, *890 F.3d 769 (9th Cir. 2018)*, 132 HARV. L. REV. 2360, 2365 (2019).

309. While municipalities do not receive the same deference as states under antitrust law, unlike private arrangements, the Supreme Court in *Town of Hallie v. City of Eau Claire* instructed that state supervision is unnecessary because municipalities generally act in the public interest. 471 U.S. 34, 45–47 (1985).

310. *Chamber of Com.*, 890 F.3d at 776.

311. *See, e.g.*, Meyberg v. City of Santa Cruz, No. 19-cv-00700, 2020 U.S. Dist. LEXIS 81662, at *13 (N.D. Cal. May 8, 2020).

instance, use co-enforcement to enforce its minimum wage ordinance covering ride-hailing drivers classified as independent contractors since state law contemplates local wage standards and enforcement of them.[312]

B. LABOR LOCALISM CAN ADVANCE DEMOCRATIC VALUES REFLECTED IN LABOR AND LOCAL LAW

Workplaces and neighborhoods are principal sites of fortuitous, involuntary associations, where strangers meet in daily life for common purpose. Labor law and local law, as a result, share a similar vision of democracy. Labor law, built upon a normative foundation of freedom of association, can enhance workplace democracy,[313] while local law enables community building through public democratic deliberation.[314] For most of the twentieth century, however, the separation of work and community created a "split in the practical consciousness of American workers between the language and practice of a politics of work and those of a politics of community."[315] Separate consideration of work and neighborhoods has isolated discussion of these values in labor and local law scholarship.

With local government as the site of protest and bargaining, labor localism joins the democracy-enhancing values of labor law and local law.[316] In building diverse coalitions of poor people, women, immigrants, and people of color, labor-community coalitions can make local government more responsive to these economically and politically subordinated groups.[317] As local labor lawmaking has become a vital form of city power, cities have opened local offices to engage with these groups in their regulation and enforcement of local work standards.[318] This has positioned

312. *See, e.g.*, Green Sols. Recycling, LLC v. Reno Disposal Co., 359 F. Supp. 3d 960, 971 (D. Nev. 2019), *aff'd*, 814 F. App'x 218 (9th Cir. 2020).

313. DAVIDOV, *supra* note 35, at 39.

314. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1367–68 (2020); *see also* FRUG, *supra* note 34, at 20–22 (arguing that cities can advance "public freedom" or the "ability to participate actively in the basic societal decisions that affect one's life").

315. IRA KATZNELSON, CITY TRENCHES: URBAN POLITICS AND THE PATTERNING OF CLASS IN THE UNITED STATES 194 (1981).

316. Recent mobilizations involve "alliances among worker-oriented and place-based groups in which there is a link between 'workplace' and 'community' issues . . . [that] usher[s] in new forms of social movements and contentious politics." Greenberg & Lewis, *supra* note 18, at 12–13.

317. John Blake, *The Fight for $15 Takes on the 'Jim Crow Economy,'* CNN (Apr. 13, 2018, 6:26 PM), https://www.cnn.com/2018/04/13/us/fight-for-15-birmingham/index.html [https://perma.cc/EQ97-EKKK]; Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 6 (2009) (arguing that minimum wage laws are "central to antidiscrimination projects").

318. New York City, for example, created the Office of Labor Policy & Standards in 2016, which "enforces key municipal workplace laws, conducts original research, and develops policies" related to workers. *Office of Labor Policy & Standards*, NYC CONSUMER & WORKER PROT.,

cities as key workplace regulators and the primary defenders of local labor lawmaking in litigation challenges.[319] It has also transformed the relationship of the National League of Cities to these groups. While in the 1970s NLC was best known for fighting the federal regulation of labor and hours of city employees,[320] today it criticizes state preemption as "a threat to local democracy and city success."[321] By aligning the interests of labor-community coalitions and cities in local labor lawmaking, labor localism can make local government more inclusive as "the political link between the city and these special populations."[322]

Labor localism also serves democratic values by offering these groups direct democracy mechanisms to participate in local workplace regulation. Local governments often encourage public participation in local decision-making as a means to legitimate city power.[323] Proposals for city growth, for example, are often contingent on community support. Local governments seek community representatives to stand in for the community to determine the direction and scope of local government growth policies.[324] Labor localism, similarly, facilitates public participation in elaborating and

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https://www1.nyc.gov/site/dca/about/office-of-labor-policy-standards.page [https://perma.cc/3D7C-EC3T]. That office recently announced its first resolution of a just cause ordinance investigation. *See Justice for Two Brooklyn Fast Food Workers in City's First "Just Cause" Case*, NYC CONSUMER & WORKER PROT. (Dec. 14, 2021), https://www1.nyc.gov/site/dca/media/pr121421-Subway-First-Just-Cause-Settlement.page [https://perma.cc/XZR4-A8B9].

319. *See, e.g.*, Graco, Inc. v. City of Minneapolis, 925 N.W.2d 262, 274 (Minn. Ct. App. 2019), *aff'd*, 937 N.W.2d 756 (Minn. 2020) (Minneapolis successfully defended minimum wage ordinance from implied state preemption claim); City of Miami Beach v. Fla. Retail Fed'n, Inc., 233 So. 3d 1236, 1240 (Fla. Dist. Ct. App. 2017) (Miami Beach unsuccessfully defended minimum wage from express state preemption claim).

320. Nat'l League of Cities v. Usery, 426 U.S. 833, 836–37 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (challenging application of FLSA to state and local employees under the "constitutional doctrine of intergovernmental immunity"); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 784 (2008).

321. NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 1 (2018), https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf [https://perma.cc/DGC4-5PNL].

322. FRUG, *supra* note 34, at 117–20. Evidence of city alignment with diverse coalitions extends well beyond labor lawmaking, to Florida cities joining civil rights groups in challenging that state's "anti-riot" law and North Carolina cities extending workplace discrimination protections to the LGBTQ community. Mary Ellen Klas, *Florida Cities Sue State Over 'Anti-Riot' Law*, TAMPA BAY TIMES (Nov. 16, 2021), https://www.tampabay.com/news/florida-politics/2021/11/16/florida-cities-sue-state-over-anti-riot-law [https://perma.cc/FC5J-M5AW]; Chris Marr, *North Carolina Anti-Bias Laws Sprout as 'Bathroom Bill' Era Ends*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 22, 2021), https://news.bloomberglaw.com/daily-labor-report/north-carolina-anti-bias-laws-sprout-as-bathroom-bill-era-ends [https://perma.cc/MYL3-9NGU].

323. Frugg, *supra* note 79 1067–73 (arguing that city power can encourage local participation); Davidson, *supra* note 163, at 975 (describing "democratic participation and local political engagement" as one justification for localism).

324. JEFFREY M. BERRY & DAVID F. ARONS, A VOICE FOR NONPROFITS 115–16 (2005).

enforcing workplace standards. After labor-community coalitions succeed in local labor lawmaking, worker centers and unions act as watchdogs for government enforcement, and they collaborate with local agencies to train employers and workers and enforce these standards.[325] Bargaining for the Common Good offers another way to promote democratic values, with the formal inclusion of communities in collective bargaining with public sector unions and cities. These direct democracy mechanisms offer real power to unions, worker centers, and affiliated community organizations.[326]

This democratic impulse of labor localism is aligned with calls of local law scholars for more inclusive local governments.[327] As Richard Briffault explains, interlocal competition for taxpayers and businesses, especially between cities and suburbs, often causes the suburbs to use local power to preserve and reinforce existing economic inequalities.[328] Zoning and redevelopment policies have a powerful impact on the allocation of resources,[329] which local governments have historically used to exclude poor people and people of color.[330] Cities historically responded to the threat of interlocal competition by taxing residents to subsidize the recruitment and retention of businesses in order to avoid capital flight.[331] Use of city resources to develop commercial centers instead of pursuing redistributionist policies,[332] again, often occurs at the expense of poor people and people of color.[333]

This account suggests that, contrary to the standard account of city powerlessness limiting public freedom,[334] city power can expand public freedom by channeling the social movement energy generated by labor

325. Elmore, *supra* note 120, at 102–13.

326. This account of local government mechanisms to exercise political power is similar to the community control proposal by K. Sabeel Rahman and Jocelyn Simonson of local administrative designs in which communities "exercis[e] real power" in local government. Rahman & Simonson, *supra* note 224, at 727.

327. FRUG, *supra* note 34, at 173.

328. Briffault, *supra* note 150, at 3–4.

329. *Id.*

330. California municipalities and New York City used zoning law in the 1880s to drive out immigrants from gentrifying neighborhoods. By the 1920s the federal government popularized zoning as a local policy tool to attract investment by excluding undesirable development. FRUG, *supra* note 34, at 143–45.

331. Schragger, *supra* note 33, at 495–97. In a Tiebout model, assuming that capital is mobile, competition by local governments for development results in an efficient allocation of development among cities. *Id.* at 496.

332. FRUG & BARRON, *supra* note 19, at 28.

333. Cities primarily spent federal urban renewal money from 1949 to 1988 on commercial projects, which transformed the economies of central cities but eliminated 400,000 low-income dwellings in the process. The increase in jobs primarily went to commuters, not to poor people. FRUG, *supra* note 34, at 146–47.

334. *Id.* at 20–21.

localism into broad and expansive local labor lawmaking. This is similar to Richard Schragger's description of site fights and living wage laws in the 2000s as a form of "economic localism."[335] But in contrast to the temporary tactic of targeting a single employer in a national campaign, the new labor localism is broader and deeper, extending, lifting, and strengthening work standards over time, across entire regions or sectors. This can foster a dynamic process, in which the broad economic redistribution from local lawmaking to economic and politically subordinated groups can inspire these groups to sustain longer-term campaigns to ratchet up local standards, and to scale up and undertake more ambitious goals.

The primary objection to the claim that labor localism serves democratic values is that local labor lawmaking might harm communities by driving out mobile capital. The capital mobility critique is a version of the interlocal competition concern that surrounding local jurisdictions will respond to local labor lawmaking in a neighboring city by luring businesses away from the city.[336] Capital flight from local labor lawmaking could harm poorer communities by driving away businesses and reducing local employment.[337] As Richard Schragger notes, capital flight is unlikely if businesses are place dependent or receive agglomeration benefits that exceed the cost of economic legislation.[338] If capital cannot easily exit cities because it is "sticky," economic localism that targets sticky capital is a form of city power that can redistribute for welfarist ends without risking capital flight.[339] But this defense of local economic legislation would not justify expansive local labor lawmaking that applies employment mandates to all local businesses, whether or not they are theoretically mobile.[340]

Studies of the economic effects of minimum wage ordinances over the past fifteen years, however, have consistently found that local wage mandates do not have a harmful effect on labor markets.[341] This suggests

335. SCHRAGGER, *supra* note 19, at 181–88.

336. *See* FRUG & BARRON, *supra* note 19, at 16–19 (describing this critique).

337. Schleicher argues that exclusionary zoning regulation can make housing less affordable and harm local economies. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1676 (2013). This critique can be extended to local labor lawmaking if lifting work standards drives employers out of the jurisdiction. *See* Schleicher, *supra* note 29, at 908 ("Commercial zoning can be about exclusion, jurisdictions too good for Dollar Stores or Wal-Marts keeping them and their low-priced goods away (and thus excluding the poor and middle-class shoppers).").

338. Agglomeration refers to a localized economy in which companies and workers benefit from the proximity, such as technology firms and programmers in Silicon Valley, or film studios and actors in Los Angeles. Schleicher, *supra* note 37, at 99–102.

339. Schragger, *supra* note 33, at 539.

340. Translocalism in this regard can stand in for regional cooperation, which is often limited by local government law. FRUG & BARRON, *supra* note 19, at 9.

341. *See, e.g.*, Doruk Cengiz, Arindrajit Dube, Attila Lindner & Ben Zipperer, *The Effect of Minimum Wages on Low-Wage Jobs*, 134 Q.J. ECON. 1405 (2019) (examining 138 minimum wage

that the capital mobility critique overestimates the extent to which wage mandates drive employer decisions about entering and exiting a labor market. The assumption of competitive labor markets animating the capital mobility critique, additionally, overlooks the possibility of employer monopsony power over hiring.[342] Since employers with monopsony power can often raise wages without laying off employees, local labor lawmaking can raise these workers' wages without causing job losses.[343] While the precise reasons that local labor lawmaking has not had an adverse effect on labor markets is open to debate, these studies leave little doubt that local labor lawmaking is not exclusionary.

The economic debate, moreover, should not distract from the democratic values advanced by labor localism. Enabling subordinated groups to engage in direct democracy mechanisms to improve workplace governance enlarges public freedom. This justifies the use of city power for local labor lawmaking, notwithstanding its efficiency.

IV. LABOR LOCALISM AND LABOR LAW REFORM

As a strategy to strengthen and lift workplace standards, labor localism begs the question of what values localism serves in workplace regulation that are not better served by state or federal law reform. This question has come to the fore in the current era of renewed federal interest in raising workplace standards.[344] In our federalist labor and employment law, federal and state

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increases between 1979 and 2016 and finding no change in the number of low-wage jobs); Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945, 962 (2010) (comparing contiguous counties that straddle a state border and finding no adverse employment effect from local differences in minimum wage policies); Arindrajit Dube, Suresh Naidu & Michael Reich, *The Economic Effects of a Citywide Minimum Wage*, 60 INDUS. & LAB. RELS. REV. 522, 522 (2007) (examining effects of San Francisco minimum wage increases in 2004 and 2007 on restaurant industry, finding that they "increased worker pay and compressed wage inequality, but did not create any detectable employment loss among affected restaurants").

342. *See* POSNER, *supra* note 37, at 27–28 (reviewing literature and concluding that "there is little doubt that the traditional model of competitive labor markets is wrong, that monopsony or monopsonistic competition is pervasive, that many labor markets are highly concentrated, and that labor monopsony, as theory would predict, pushes wages below the competitive rate"); *see also* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 553–54 (2018).

343. *See* POSNER, *supra* note 37, at 124. *See generally* José Azar, Emiliano Huet-Vaugh, Ioana Marinescu, Bledi Taska & Till von Wachter, *Minimum Wage Employment Effects and Labor Market Concentration* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26101, 2019).

344. At time of writing, President Biden has signed an executive order requiring federal contractors to pay a $15 minimum wage and called on Congress to enact a federal $15 minimum wage and federal labor law reform. *See* Noam Scheiber, *Biden Orders $15 Minimum Wage for Federal Contractors*, N.Y. TIMES (Apr. 27, 2021), https://www.nytimes.com/2021/04/27/business/economy/biden-minimum-wage-federal-contractors.html [https://perma.cc/CGF3-369T]; Alex Gangitano, *Biden Calls for Passage of PRO Act, $15 Minimum Wage in Joint Address*, HILL (Apr. 28, 2021, 9:52 PM), https://thehill.com/homenews/administration/550845-biden-calls-for-passage-of-pro-union-pro-act-and-15-minimum-wage [https://perma.cc/YY7V-5EBA].

governments permit local government to regulate the workplace cooperatively, while preempting forms of local lawmaking that conflict with federal and state policy. This implies a limited role for local government during periods of expansive federal regulation. That labor-community coalitions can seek policy experimentation in local government, and prevail in state-local conflicts, does not necessarily challenge this view.[345] Local labor lawmaking can still be a second-best, less effective alternative to federal or state reform, primarily useful when significant federal and state reform is impossible.[346]

This Article locates the value of labor localism in its advancement of the democratic values underlying labor law and local law. Central to this claim, as was well understood by the New Deal architects of labor law,[347] is the interdependence of political and economic democracy.[348] Labor localism as a safeguard of democratic norms in the United States[349] is different from defenses of localism grounded in the assertion of local interests to federal and state government, a tradition of local regulation, or tailoring regulation to local needs.[350] It is instead rooted in the "local democracy, community, and participation" that justify city power.[351] As described in this Article, labor localism can encourage participation by economically and politically subordinated workers in concerted activities, collective bargaining, and in the elaboration and enforcement of work laws. Doing so within and alongside local government can deliver immediate benefits to participants and foster deeper collective commitments beyond a single collective bargaining agreement or ordinance. Participation in sustained collective activities, with bigger and longer-term goals, can alter how participants see

345. As Heather Gerken explains, in the new federalism, local governments are additional battlegrounds in polarized contests between "highly networked national interest groups" across state and local jurisdictions. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1720 (2017).

346. *See* Johnson, *supra* note 28, at 1184–86 (explaining that reformers would ideally want national-level reform to avoid variation in civil rights and workers' rights).

347. In enacting the NLRA in 1935, Congress sought "to create a more equitable political economy and a more robust political democracy by protecting workplace democracy." Ashar & Fisk, *supra* note 15, at 187. The chief sponsor of the NRLA, Robert Wagner, "had an all-consuming commitment to collective bargaining as an integral component of political democracy in the age of mass production." Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1410 (1993). For Senator Wagner, at stake in the right to collectively bargain was "the heart of the struggle for the preservation of political as well as economic democracy in America." Joseph A. McCartin, *Rejoinder*, 14 LAB.: STUD. WORKING-CLASS HIST. 61, 66 (2017).

348. *See supra* Section I.A; Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 562–73 (2021).

349. McCartin, *supra* note 347, at 66.

350. *See, e.g.*, Su, *supra* note 18, at 1637–38 (proposing that localism enables local government to assert local interests in immigration law to federal and state agencies); Blocher, *supra* note 32, at 111 (arguing that firearm localism is rooted in "history and tradition").

351. Davidson, *supra* note 163, at 959.

themselves and their own power. It is within this "thick action of concerted" activities, as Lani Guinier and Gerald Torres explain, that regular people can "discover and legitimize the principles on which our democracy presumably rests."[352]

While these activities could occur at the federal and state levels, the direct democracy mechanisms necessary to build and channel social movement energy into workplace governance often originate in cities. Social movements often begin, and build, with local protest and legislative experimentation in local social movement organizations.[353] Successful local innovations spread across state and local boundaries and can create legislative models with built-in constituencies for federal experimentation.[354] To be sure, a national reform effort rooted in localism is contingent on its ability to counter political opposition and spread.[355] But in this bottom-up view, asking whether localism is preferable to national reform can obscure the extent to which national reform begins with, and is sustained by, the social movement energy and policy experimentation of localism.

Labor law itself is a product of this dynamic. During the Progressive Era, unions with small businesses controlled local wages and prices in cities, facilitated by local lawmaking.[356] As the pace and scale of industry expanded at the turn of the century, unions centralized and shifted to regional and national strategies to collectively bargain with national employers.[357] The city-wide price and wage controls of the Progressive Era became an available model for national economic stabilization for New Deal reformers in the enactment of the National Industrial Recovery Act (NIRA), which conferred code-making authority on unions and industry associations.[358] After the Supreme Court struck down the private code-making authority granted by

352. Guinier & Torres, supra note 30, at 2749, 2790 (describing the "broader mobilization effort[s]" of the United Farm Workers as focused on "alter[ing] the way farmworkers viewed themselves and their own power within the system" rather than on a specific change to "the legal reality of the farmworkers").

353. EQUAL PLACE, *supra* note 25, at 7–8; *see also* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 854 (2021) ("[G]rassroots contestation at the local level is central to the shape of law and legal entitlements."); Andrias & Sachs, *supra* note 348, at 596–97; Guinier & Torres, *supra* note 30, at 2757–58.

354. Andrias & Sachs, *supra* note 348, at 632.

355. Johnson, *supra* note 28, at 1186 ("To be viable practically as well as consistent with democratic ideals depends on empirical assumptions that positive laws and regulations for workers will spread.").

356. Christopher L. Tomlins, *The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism*, 39 INDUS. & LAB. RELS. REV. 19, 21 (1985).

357. *See* Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 676–77 (1987) (reviewing CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985)).

358. *See* COHEN, *supra* note 83, at 265 ("New Deal industrial policies originated in the construction sites and garages, storefronts, saloons, and union halls of cities like Chicago.").

NIRA as an unconstitutional legislative delegation,[359] New Deal reformers turned to the national trade agreement model in the NRLA by protecting the right to collective bargaining in unions.[360] Recent labor history mirrors this pattern,[361] and suggests a similar pathway for a national $15-an-hour minimum wage, paid sick leave, and labor law reform today.[362] One sees in the examples of labor localism offered in this Article a bottom-up reform effort with national aspirations, fueled by local social movement energy and policy experimentation.

Whatever its immediate impact on federal law reform, moreover, labor localism has advanced the more durable and transformative goal of democratizing workplaces and communities. By joining the democratic values of labor and local law, labor localism builds the power of subordinated groups through collective participation in labor-community coalitions. Our current moment, in which political and economic democracy have come under severe stress,[363] eroding democratic norms in the United States,[364] underscores the urgency of this power shift.

In asserting the value of labor localism for economic and political democracy, I do not cast doubt on the primacy or desirability of federal and state workplace regulation.[365] While decentralized workplace regulation is not necessarily at odds with federal and state reform,[366] it is both narrower

359. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding that the codemaking authority conferred by Section 3 of the Recovery Act was an unconstitutional legislative delegation).

360. For an analysis of the relative merits of NIRA and the NLRA for unions, see Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 601–07 (2007).

361. This is similar to Catherine Fisk's argument that local hiring halls can form "the base from which sectoral representation could grow." Fisk, *supra* note 213, at 30. This has been borne out in recent state and local sectoral bargaining regimes for minimum wages and other work standards in Seattle, Philadelphia, and Nevada, and a California bill proposed to create a fast-food board to promulgate wage and hour and safety and health standards. Corbin Girnus, *supra* note 283 (describing sectoral bargaining for home health workers in a Home Care Employment Board in NEV. S.B. 340); A.B. 257, 2021–2022 Reg. Sess. (Cal. 2021) (proposing Fast Food Sector Council).

362. At time of writing, the United States House of Representatives passed the Build Back Better Act ("BBB"), which would include a federal right to four weeks of paid family and medical leave and authorize the NLRB to issue penalties for unfair labor practices. H.R. 5376, 117th Cong. (2021). BBB, however, faces an uncertain future in the Senate. *See* Ewan Quayle, *Future of Build Back Better Package Uncertain After Manchin Refuses to Back It*, NEWSWEEK (Dec. 20, 2021, 3:43 AM), https://www.newsweek.com/joe-manchin-build-back-better-biden-live-updates-1660977 [https://perma.cc/9D6A-P57Q].

363. *See supra* Section I.A; Andrias & Sachs, *supra* note 348, at 562–73.

364. RAHMAN & GILMAN, *supra* note 31, at 69; McCartin, *supra* note 347, at 66.

365. State-level minimum wage and sectoral bargaining laws have far greater reach than local lawmaking. *See* NELP Report, *supra* note 113, at 4 (finding that Fight for Fifteen state minimum wage campaigns lifted the wages of nearly sixteen million workers, while local minimum wage ordinances covered only about two million workers). Likewise, an increase of the federal minimum wage would broadly cover employees nationally notwithstanding current state and local minimum wage laws.

366. Local workplace regulation can complement, and strengthen, workplace regulation by federal

than state or federal reform and has limitations that preclude its use in many sectors.[367] But, as explained in Section I.A, many weaknesses in labor and employment law that labor localism seeks to address are entrenched, longstanding features of federal and state law. Labor localism aims to counteract these weaknesses by building political and workplace power through cities. Its durable achievement is its transformation of how subordinated groups view their own power to improve their lives, in their workplaces and communities, through the democratic power of collective action.

CONCLUSION

Economic inequality and weak labor and employment laws are entrenched features of federal and state politics that are primarily responsive to the interests of the affluent. Reversing the longstanding trend of declining union membership and workplace rights will require worker participation in a social movement that can overcome these barriers by building political and workplace power. There are some signals that this has begun, fueled by labor-community coalitions that seek out protests and bargaining in local government. Decentralized workplace governance advances democratic values and permits labor-community coalitions to engage the legal and political structures of cities that facilitate public participation in local lawmaking. Labor localism has increased the political power of and delivered lasting economic gains to low-wage workers, immigrants, women, and people of color. This Article has illuminated the positive and normative implications of labor localism for state and local government law, as well as for labor and employment law. It concludes that labor localism, in spite of the preemption threat, is a principal staging ground for labor law reform and a vital safeguard for economic and political democracy.

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and state governments by developing local on-the-ground expertise and directing federal and state capacity to meet local needs. *See* Fisk, *supra* note 213, at 23.

367. States regulate the collective bargaining rights of state and local employees, and often set education budgets, making state government a necessary site for #RedforEd advocacy. Oswalt, *supra* note 10, at 113–17.