Confronting Structural Inequality in State Labor Law

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

To build union density and political power for low-wage workers who cannot effectively access federal labor rights, such as home health care workers, fast-food workers, and app-based drivers, unions and worker centers seeking to organize these workers have, increasingly, turned to state and local law, instead of or in addition to the NLRA. Groundbreaking state and local economic and racial justice campaigns have expanded labor rights and enabled these workers to participate in state and local labor policymaking to raise their workplace standards. But the turn to state and local government does not avoid the structural problem. Employers reproduce structural inequality in state law, often by dominating state initiatives and legislative processes, in order to limit, nullify, or coopt state and local labor law. The NLRA does not preempt these employer counterstrategies, and federal constitutional challenges to them typically fail because federal courts often view these labor contests as ordinary politics beyond constitutional scrutiny.
Mapping the structural problem in state and local labor contests underscores the importance of state law to confront it, as shown in recent legal mobilization of state constitutions by unions and worker centers to reduce structural inequality and build countervailing power. Repositioning state labor law as a potential foundation for labor revitalization has practical and theoretical implications for the future of low-wage worker organizing. State labor constitutionalism, and legal and administrative designs that encourage direct worker participation in state sectoral standard-setting and in local labor policymaking, can protect state labor policymaking from employer cooptation and nullification. These prescriptions can contribute to the foundational NLRA purpose of reducing structural inequality by building countervailing power in the states.

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INTRODUCTION

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

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

4. 29 U.S.C. § 151 (granting labor rights to reduce the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”); see Estlund, supra note 1, at 437–39 (using the term “labor market power” because the term “bargaining power” is often “misunderstood or misused”); Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV. 753, 762 (1994); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 MINN. L. REV. 265, 287 (1978) (explaining that in the 1930s, “business took the Act’s rhetoric of industrial democracy seriously” as limiting managerial prerogatives).
workers to improve their workplace standards through unionism. Most workers in the United States report that they would join a union or similar form of organization if they could. But the NLRA is stunted by its weak enforcement powers, lengthy delays, inability to impose penalties, and other judicially-imposed weaknesses. The NLRA also excludes many low-wage workers, including agricultural and domestic workers and workers classified as independent contractors, from its protections. Despite recent, successful union organizing campaigns by low-wage employees in the workplaces of corporate titans like Amazon and Starbucks, few of these historic victories for organized labor have (so far) led to collective bargaining agreements. Meanwhile, private-sector union density in the United States remains at an historic low, and unions are virtually absent in many low-wage sectors.


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


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

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

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

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

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12. By legal mobilization, I mean the mobilization of law in order to achieve a social movement goal. See Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization 13–14 (1994).


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

These general trends have profound effects on state labor contests. Businesses can reproduce structural inequality by capturing state legislatures in order to nullify democratically enacted labor legislation sought by unions and worker centers.\textsuperscript{20} Companies can also reproduce structural inequality by capturing the process of state voter ballot initiatives.\textsuperscript{21} Employers in many recent state labor contests have leveraged state law and politics to (1) dismantle the power of state-regulated unions in right-to-work legislation; (2) nullify democratically enacted labor lawmaking by misleading voters in state initiatives and through gerrymandered state legislatures; (3) establish company-dominated sectoral standard-setting administrative regimes; and (4) block worker access to local lawmaking through state-law preemption.\textsuperscript{22} These strategies share the common goal of dismantling affirmative state support for collective worker access to state and local labor policymaking. While these strategies are most common in politically conservative states, business interests can capture or coopt legislative and initiative processes in politically liberal states, while unions and worker centers have built considerable countervailing power\textsuperscript{23} to engage in labor policymaking by state initiative despite politically conservative, countermajoritarian legislatures.

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

\textsuperscript{17} JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 8–9 (2022); Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1082–83 (2014).
\textsuperscript{18} GRUMBACH, supra note 17, at 12–13.
\textsuperscript{19} See id. at 10–13.
\textsuperscript{22} See infra Part I.
\textsuperscript{23} I use the term “countervailing power” in the same sense as Andrias and Sachs, as “the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth.” Kate Andrias & Benjamin I. Sachs, Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality, 130 Yale L.J. 546, 551 (2021).
and anti-democratic effects of specific employer counterstrategies in state labor contests. This project examines their common goal of reproducing structural inequality in state law. To be sure, not all employer opposition to unions and to pro-worker labor policymaking is anti-worker or anti-democratic. But employer countermobilization that dismantles state protection of collective worker participation in state and local labor policymaking can harm the economic interests and political voice of vulnerable workers and undermine state democratic processes and institutions. Nullifying popular workplace legislation by overwhelming public communication channels with misleading claims in the voter ballot initiative process, and by capturing countermajoritarian state legislatures, harms the economic interests of low-wage workers and undermines majority rule. State preemption of local labor lawmaking, likewise, subordinates the equality interests of many low-wage workers who are excluded from the NLRA, and of many residents of majority-minority cities, whose political equality hinges on local home rule power. Right-to-work legislation


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

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

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


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

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

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


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

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

34. While newly resurgent, this strategy is rooted in a Progressive Era reform tradition that seeks to protect vulnerable state residents from political domination and state democratic institutions from capture by elites. See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 13–15, 109, 114 (2013).
35. See infra Part II.B.
36. See infra Part III.A.
37. See infra Part I.B.
38. See infra Part III.B.
39. See infra Part III.C.
This descriptive account and its practical and theoretical implications offer several contributions to scholarship about labor and employment law and its intersections with legal mobilization and state and local government literatures. In examining leading types of employer state countermeasures as reproducing structural inequality in state law, this Article bridges the traditional labor law concern about employer domination of the workplace and scholarship prescribing state constitutional law to counter anti-democratic behavior in the states. It contributes to the burgeoning literature about legal mobilization of state employment statutes by showing how the success of these strategies may hinge on the institutional strength of unions made possible by state labor law reform. It builds upon law and social movement scholarship calling for law that enables countervailing power by examining recent efforts to build countervailing power as a state-level legal mobilization strategy to confront structural inequality. Finally, it contributes to scholarship about the promise and limits of new state-level labor policy innovations by offering administrative designs that can protect negotiated sectoral standard-setting as a source of democratic labor policy formation, and by proposing state constitutional constraints on, and the


41. Benjamin Sachs noted this trend over a decade ago, in which workers "rely[] on employment statutes, not only for the traditional purpose of securing the substantive rights provided by those laws, but also as the legal architecture that facilitates their organizational and collective activity—a legal architecture we conventionally call labor law." Sachs, supra note 6, at 2687. Daniel Galvin argues that, since then, reform efforts by workers and their advocates reflect the "gradual shift from labor law to employment law as the primary 'guardian' of workers' rights." Daniel J. Galvin, From Labor Law to Employment Law: The Changing Politics of Workers' Rights, 33 Stud. Am. Pol. Dev. 50, 52 (2019). Recent scholarship about the use of state employment law in labor revitalization efforts has focused on negotiated sectoral standard-setting. See Andrias, supra note 14, at 52-57; David Madland, Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States 19-24 (2021).

42. See Catherine L. Fisk, Sustainable Alt-Labor, 95 Chi-Kent L. Rev. 7, 10 (2020).

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

44. Kate Andrias theorizes from Fight for $15 experimentation with a New York wage board in 2015 a new form of labor law, "social bargaining," which positions "unions as political actors representing workers generally," in tripartite forms of bargaining between employer, worker, and state agency representatives for sector-wide or regional work standards, Andrias, supra note 14, at 10, and has also shown its origins in the early wage boards created by the Fair Labor Standards Act during the New Deal. Kate Andrias, An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act, 128 Yale L.J. 616, 650-56 (2019). César F. Rosado Marzán observes that recent experiments with wage boards in the United States have delegated too little responsibility and authority to employer and worker representatives to constitute true tripartite workplace governance. César F. Rosado Marzán, Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States, 90 U. Chi. L. Rev. 703, 709 (2023). This Article offers evidence from a home care employment standards board in Nevada that even when a board's power is only advisory, negotiated sectoral standard-setting can permit workers who are effectively
integration of local policymaking in state labor law notwithstanding, state preemption. 45

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


47. See K. Sabee, Rahim & Hollis Russen Gilman, Civic Power: Rebuilding American Democracy in an Era of Crisis 206 (2019) (criticizing democracy reform proposals focused on voter mobilization as “thin forms of civic engagement”); Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 YALE L.J. 2740, 2799 (2014). Union members can have economic interests that put them at odds with other, or even more, vulnerable groups. See, e.g., Nicole Hong & Matthew Haag, A Hotel Was Set to Become Affordable Housing. Then the Union Stepped In., N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2022/12/07/nyregion/new-york-hotel-workers-union.html.
can improve workplace conditions and build political power through state and local labor policymaking.

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

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

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

49. 301 U.S. 1 (1937).
50. Samuel R. Bagenstos, Consent, Coercion, and Employment Law, 55 HARV. C.R.-C.L. L. REV. 409, 428 (2020) (contrasting this view with more recent decisions by the Roberts Court, which assumes equality of bargaining power because employees can freely leave employment).
employers to exercise this power arbitrarily, to interfere with, or dominate, their employees.51 As Chief Justice Hughes reasoned in *Jones & Laughlin*, reducing structural inequality requires state protection of unions, which are “essential to give laborers opportunity to deal on an equality with their employer.”52

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

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

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

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

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


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

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

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

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

While NLRA weaknesses erode labor law’s capacity to reduce structural inequality for all workers, this structural problem is greatest for the many low-wage workers who are excluded, or effectively excluded, from the NLRA. NLRA exclusions—including the exclusion of agricultural and domestic workers 59 and app-based workers classified as independent contractors—create vastly unequal terrains in labor contests for workers, particularly those at the bottom of the income scale. 60 Many millions of low-wage workers are, additionally, not expressly excluded from the NLRA but cannot effectively access its protections. Fast-food employees, for example, are not exempt under the NLRA, but work in a fissured industry in which the vast majority of employees are directly employed by franchisees of the franchisor. 61 Franchise store employees cannot meaningfully bargain under the NLRA if the franchisor, which owns the fast-food brand and often determines all the key aspects of the work relationship, is not a joint employer

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

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

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


with the franchisee who owns the employee’s store. 

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

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

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


wage campaigns have lifted the wages of nearly sixteen million workers in the United States, in seven states to $15 an hour, over twice the current federal $7.25 minimum wage.\(^6\) In recent years, unions and worker centers successfully extended state collective bargaining rights to private-sector workers excluded from the NLRA,\(^6\) and participated in agency-led negotiations for improved work standards in low-wage sectors. In negotiated sectoral standard-setting, state law authorizes administrative agencies to convene negotiations between representatives of employers and employees in particular sectors for minimum sector-wide work standards, and to adopt agreed-to standards as regulations.\(^6\) App-based drivers, organized in worker centers, have sought to establish a baseline of work standards through state legislation that would classify them as employees.\(^7\) For these workers, who are exempt from or cannot effectively organize under the NLRA, it is state law, not federal, that primarily structures these labor contests.

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\(^6\) The most recent example, Assembly Bill 1228 in California, authorizes the creation of an agency-convened board including fast-food franchisors, franchisees, and employees to negotiate for binding work standards across the fast food sector, subject to agency approval. A.B. 1228, 2023-2024 Reg. Sess. (Cal. 2023). As Cynthia Estlund explains, “sectoral bargaining” is a misleading term for A.B. 1228 and similar state laws because they do not authorize “bargaining” as understood in labor law. Cynthia L. Estlund, Sectoral Solutions that Work: The Case for Sectoral Co-Regulation, 98 CHI.-KENT L. REV. 539, 544, 565 (forthcoming 2024); see also Sara Slinn, Workers’ Boards: Sectoral Bargaining and Standard-Setting Mechanisms for the New Gilded Age, 26 EMP. RTS. & EMP. POL’Y J. 191, 193 (2023). In these regimes, representatives do not exclusively represent employers and employees and do not have a duty to bargain as they would in collective bargaining, and any standards representatives agree to are subject to agency approval. But as I explain in Parts I.B and III.B, this form of state policymaking nonetheless creates the possibility of negotiated agreements between employer and employee representatives for binding sector-wide work standards despite the sweeping scope of NLRA preemption. See Slinn, supra, at 193 (calling this approach “sectoral standard-setting” to distinguish it from sectoral bargaining). For this reason, I will use the term “negotiated sectoral standard-setting.”

\(^7\) Whether app-based drivers are independent contractors or employees under the standard control-based test is an open question. Despite many years of litigation, federal courts have not answered whether app-based work, which shares features of independence and control, is appropriately classified as employment. See V.B. Dubal, Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy, 2017 Wis. L. REV. 739, 744–48.
Despite the “unquestionably and remarkably broad” forms of NLRA preemption, state-level labor contestation mostly occurs outside federal labor law. The NLRA does not preempt state regulation of the collective bargaining of most workers excluded from NLRA protections, and the Parker immunity doctrine permits states to regulate collective bargaining between companies and workers classified as independent contractors without violating antitrust law. States, accordingly, can regulate the collective bargaining rights of agricultural and home health care workers, and even app-based drivers classified as independent contractors, despite the legal controversy of whether a collective refusal to work by independent contractors is a restraint of trade under antitrust law. Unions have a first amendment right to petition government, and unions and worker centers may lobby for baseline protections higher than federal law because of the savings clauses in these federal work law protections. As laws of general applicability, these workplace protections do not implicate NLRA preemption.

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


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

73. Id. at 383–85.

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

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


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

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

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

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

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

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

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

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

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

83. Seifter, supra note 26, at 1762.

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

85. Id. at 9–10.

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

- **Company-Dominated Sectoral Standard-Setting**: TNCs have sought to create company-dominated sectoral standard-setting administrative regimes by narrowing the range of standards to set and requiring a supermajority of TNC representatives to approve them, dominating worker representatives and, as a condition of their participation, prohibiting app-based drivers from engaging in concerted protest.

- **State-Law Preemption**: Following Fight for $15’s successful strategy of raising wage standards across fast-food franchisor brands through local minimum wage ordinances, fast-food franchisors and allies sought sweeping forms of state preemption laws. State-law preemption now forecloses local minimum wage, sick-pay, and/or other employee benefit ordinances in over half the country.

- **Legislative Nullification**: Companies have countered democratically enacted state labor and employment legislation by nullifying it, often through the state ballot initiative process. This is most prominently shown in Proposition 22, a $200 million TNC initiative to exempt app-based drivers from a California law that would classify them as employees. It passed in 2020 and became a model for TNC legislation in other states.

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92. See infra Part I.B, D.

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

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

B. State Collective Bargaining Laws

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

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

98. See Sachs, supra note 72, at 383–85; United Farm Workers of Am. v. Ariz. Agr. Emp. Rel. Bd., 669 F.2d 1249, 1257 (9th Cir. 1982); Greene v. Dayton, 81 F. Supp. 3d 747, 751 (D. Minn. 2015), aff’d, 806 F.3d 1146 (8th Cir. 2015). The only occupation that the NLRA intends to leave unregulated by federal or state labor law is supervisors. See Beasley v. Food Fair of N.C., 416 U.S. 653, 662 (1974).
100. See Sachs, supra note 72, at 383–85.
lawmaking that limits or nullifies labor rights. Right-to-work laws have the immediate effect of lowering the proportion of workers who are union members in a state. As sociologist Tom VanHeuvelen explains, the right-to-work movement also serves a longer-term goal of institutionalizing pro-business priorities in state law, which has “contributed to the decline of labor power and the rise of economic inequality” across all right-to-work states.

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

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

103. See Malin, supra note 24, at 154–64 (describing provisions of right-to-work legislation, e.g., repealing the right to bargain, limiting the scope of bargaining, curtailing interest arbitration, and permitting employers to reopen contracts for fiscal emergencies).
104. JANELLE JONES & HEIDI SHIERHOLZ, ECON. POL’Y INST., RIGHT-TO-WORK IS WRONG FOR MISSOURI 2 (2018) (“5.2 percent of private-sector workers in [right-to-work] states are union members . . . compared with 10.2 percent in non-[right-to-work] states.”).
106. 29 U.S.C. § 164(b); see Sweeney v. Pence, 767 F.3d 654, 671 (7th Cir. 2014) (interpreting Section 14(b) to include agency fees paid by nonmembers); Cynthia Estlund, Are Unions a Constitutional Anomaly?, 114 Mich. L. Rev. 169, 221–25 (2015) (discussing Sweeney dissent opinion that this holding requires stretching the term “membership” to include nonmember agency fees, and unions to provide representational services without compensation).
107. Right-To-Work Resources, supra note 87.
110. 138 S. Ct. 2448 (2018). State right-to-work lawmaking supported this litigation strategy. Brushing aside concerns that a constitutional right to refrain would create a “free rider” problem, the U.S. Supreme Court majority in Janus assured the public that this was not a problem for the “millions of public employees in the” states that prohibit agency fees. Id. at 2466.
1. Home Health Care Collective Bargaining Laws

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

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


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

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


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

2. App-Based Driver Collective Bargaining Laws

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

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


124. Estlund & Liebman, supra note 64, at 385.
125. Id. at 390–91.
126. Chamber of Com. of the United States v. City of Seattle, 890 F. 3d 769, 789 (9th Cir. 2018).
127. Estlund & Liebman, supra note 64, at 405–06.
128. 29 U.S.C. § 158(a)(2) (prohibiting employers from “dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribute financial or other support to it”); see E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 88 (1993); Electromation, Inc., 309 N.L.R.B. 990 (1992).
129. Estlund & Liebman, supra note 64, at 403–04.
in Washington in 2022. In return for independent contractor status and preemption of local laws regulating app-based drivers, the Washington law provides limited rate guarantees and nonprofit “[d]river resource center” representation of drivers whose accounts are deactivated, funded by the TNCs. In precluding collective bargaining by app-based drivers for terms higher than those already set by state law and limiting the union’s role to representation of individual, deactivated drivers, the Washington law has effectively whittled the concept of unionism to individual—not collective—representation.

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

132. Even in right-to-work states that do not extend collective bargaining rights by statute, agricultural workers have gained union representation through employment law litigation by making the employer’s voluntary recognition of the union a settlement term. See, e.g., Farm Lab. Org. Comm. v. Stein, 56 F.4th 339, 345 (4th Cir. 2022). Mobilizing employment law claims to organize low-wage workers and obtain voluntary (or card-check) recognition agreements from employers is a familiar strategy for unions to avoid employer anti-union hostility and discrimination during an election for a union seeking recognition as a bargaining representative. See Richard Michael Fischl, Rethinking the Tripartite Division of American Work Law, 28 BERKELEY J. EMP. & LAB. L. 163, 212 (2007); Sachs, supra note 6, at 2706.
133. Elmore, supra note 11, at 292–93.
C. Negotiated Sectoral Standard-Setting

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

1. Nevada Home Care Employment Standards Board

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

134. Andrias, supra note 14, at 89–92 (explaining that administrative regimes that permit employer and worker representatives to negotiate for sectoral work standards, subject to agency approval, like other laws of general applicability, do not “enter[] [into] the field of bargaining” preempted by the NLRA).
137. See Garcia, supra note 24, at 515–16. The political power of public-sector unions in Nevada is also shown by passage of S.B. 135, 80th Leg., 2019 Reg. Sess. (Nev. 2019), which, in addition to codifying collective bargaining public sector employees in the state, also responds to Janus by
creation of a Home Care Employment Standards Board to negotiate for recommended minimum wage and reimbursement rates, as well as other work standards. The Board is appointed by the Director of the Department of Health and Human Services ("DHHS Director"), with equal apportionment of three seats each for representatives of employees, employers, and home care recipients, with an additional vote for the state labor commissioner. The Board, either at the direction of the DHHS Director or a petition by fifty or more home care workers, must investigate and submit a report of its findings and recommendations to the DHHS Director within one year.

A review of the meeting minutes of the year-long Board established in 2022 reflects a promising role for negotiated sectoral standard-setting to permit home health care workers to collectively advance their economic interests in state law. While the Board itself is appointed by DHHS and provides recommendations to the agency, representatives of home care workers, clients, and staffing agencies set the agenda items, which roughly tracked what would be considered mandatory issues in collective bargaining (though on a sectoral, rather than enterprise-specific, basis), including pay, required training, safety, and staffing levels. Representatives discussed how to spend one-time pandemic-related supplemental reimbursements, who pays for required training, and the appropriate staffing levels for patients with greater safety needs. Because the Board sought to recommend reimbursement and minimum wage rates for approval by the state legislature, employer and employee representatives’ interests were mostly aligned.
The Board ultimately recommended an increase in the Medicaid reimbursement rate for employers in return for the first minimum wage increase for Nevada home care workers in a decade, which the Nevada Governor adopted on October 13, 2022, and included in the state budget. The SEIU local representing home health care workers in Nevada next pressed state legislators to support a minimum wage increase from $11 to $16 an hour in the final state budget, which state legislators enacted in June 2023.

2. California Fast Food Council

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

The FAST Act was unique among negotiated sectoral standard-setting

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


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

151. Id. § 1475(g).
approaches in authorizing the Fast Food Council to directly regulate the workplace conditions of fast-food stores in the state, without the need for agency approval, and in permitting local councils to recommend local standards for the Council to adopt in state labor law.\textsuperscript{152}

However, even after legislative approval, the future of the Fast Food Council remained in doubt when fast-food franchisors announced a campaign to nullify the FAST Act by referendum. This was eventually resolved by a legislative compromise, California Assembly Bill 1228.\textsuperscript{153} Enacted in September 2023, Assembly Bill 1228 establishes a state $20 minimum wage for fast-food workers and permits the state to convene a Fast Food Council, in return for appointing an additional “unaffiliated member of the public,” removing local councils, conditioning its regulatory authority on the state workforce agency finding that the proposed standard is consistent with its mandate, and rescinding a separate requirement making franchisors joint employers under state law.\textsuperscript{154} But the Council’s broad mandate survived, to develop minimum standards for “wages, conditions affecting fast food restaurant employees’ health and safety, security in the workplace, the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace.”\textsuperscript{155} The Fast Food Council convened its first meeting in March 2024.\textsuperscript{156}

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

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

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


\textsuperscript{155} CAL. LAB. CODE § 1474(h) (2024); see id. § 1475(b).


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

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

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

158. Id. §§ 1(7), 1(12), 2(c)-(e).
159. Id. § 3(a); see Estlund & Liebman, supra note 64, at 396 (discussing the Connecticut bill).
160. See Penn & Clukey, supra note 89.
161. Estlund & Liebman, supra note 64, at 397–98.
162. As Kate Andrias, Mike Firestone, and Benjamin Sachs observed at the time, “this is not a process meant to allow workers to build real collective power by organizing a democratic and autonomous union.” Kate Andrias, Mike Firestone & Benjamin Sachs, Lawmakers Should Oppose New York’s Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism, ONLABOR (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/.
163. Estlund & Liebman, supra note 64, at 392–93, 395. I will return to this theme infra Part III.B.
D. State Voter Referenda and Initiatives

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

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

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

164. Bulman-Pozen & Seifter, supra note 40, at 876.
165. Id. at 877; see also Richard Briffault, Distrust of Democracy, 63 TEX. L. REV. 1347, 1350 (1985); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 982–84 (5th ed. 2016) (explaining that initiatives can counterbalance the anti-participatory nature of the state legislative process).
169. California, Connecticut, Maryland, Massachusetts, and Washington now have a state minimum hourly wage of at least $15; Oregon and New York established a $15 or higher minimum wage in urban areas of the state; and Florida implemented a schedule to raise the minimum wage to
But employer countermobilization also uses initiatives and referenda to reproduce structural inequality by nullifying democratically enacted labor legislation. Proposition 22, sponsored by TNCs in California, is a prominent example. Unions and worker centers in California in 2019 succeeded in persuading the state legislature to enact Assembly Bill 5, which established (in an “ABC test”) a presumption that workers like app-based drivers, who do not operate an independent business separate from their employer, are employees. In 2020, TNCs responded by spending over $200 million in a state voter initiative, Proposition 22, to nullify their inclusion in Assembly Bill 5 and codify their classification of app-based drivers as independent contractors under state law. To garner voter support, TNCs saturated the state with media messages that supporting Proposition 22 would “grant drivers guaranteed earnings and health-care benefits,” while if Proposition 22 failed, “up to 90 percent of gig-work driving jobs could disappear.” This is a misleading claim. An independent study by economist Michael Reich concluded that inclusion in Assembly Bill 5 would increase app-based driver wages by one-third without causing job losses. App-based drivers mobilized a “No” campaign to “debunk the platform companies’ arguments about flexibility,” and emphasize their exemption from state labor and employment laws in, and the racial justice stakes of, Proposition 22. But the TNC’s overwhelming resource advantage dominated the public debate:


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


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

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

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

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

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


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


182. See id. In Michigan, voters may petition the legislature to adopt or reject approved petitions, provided that if the legislature rejects a petition it must submit the proposed law for a popular vote. MICH. CONST. art. 2, § 9. Popular approval in Michigan insulates initiatives from a gubernatorial veto and requires a three-fourths legislative majority to amend. Id.
undermined the union’s and worker center’s legal mobilization strategy of scaling up local policy innovations through state voter initiatives.

E. The Importance of Countervailing Power in State Labor Contests

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

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

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

II. FEDERAL AND STATE CONSTITUTIONAL CLAIMS IN STATE LABOR CONTESTS

Unions and worker centers have challenged state lawmaking to dismantle the capacity of unions to represent their members and to nullify and coopt democratic labor lawmaking on federal and state constitutional grounds. The use of state law to restrict employees’ ability to join unions and collectively bargain implicates the constitutional guarantees of freedom of
speech and association, and of equal protection. Many state constitutions, additionally, protect against voter confusion in voter ballot initiatives by limiting initiatives to a single issue, and by prohibiting legislatures from overriding initiatives by adding or removing substantive obligations.

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

A. Federal Constitutional Claims

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

183. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Supreme Court found that peaceful picketing during a strike is a matter of public concern protected by the First Amendment. Id. at 102; see Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution 443–44 (2022) (explaining that the Court in Thornhill recognized that union organizing and collective bargaining are “public and political,” rather than merely economic and private).

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

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

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

187. Civil liberties activists in the interwar years advanced a constitutional right to picket, boycott, and unionize as free speech rights. Weinrib, supra note 32, at 1–2, 4, 270–328, and
labor rights are not fundamental and union membership is not a suspect class in the U.S. Constitution, most federal courts dismiss first amendment and equal protection challenges to right-to-work legislation as ordinary politics in a rational basis review.

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

The Farm Labor Organizing Committee (“FLOC”), a farmworker union in North Carolina, recently found that this deferential mode of analysis also applies to right-to-work legislation targeting private-sector workers. FLOC boycotts by civil rights groups can be afforded first amendment protection as political speech. See NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982). But the Supreme Court has since then embraced a value-neutral free speech principle in first amendment jurisprudence, Weinrib, supra note 32, at 293, and minimized union-called boycotts as unprotected economic speech even if they raise matters of public concern. Elmore, supra note 11, at 143-44.

188. 705 F.3d 640 (7th Cir. 2013).
189. Id. at 642-43.
190. Id. at 645.
193. See, e.g., In re Hubbard, 803 F.3d 1298, 1313 (11th Cir. 2015); Okla. Corrs. Pro. Ass’n v. Doerflinger, 521 F. App’x 674, 679 (10th Cir. 2013).
challenged a North Carolina statute prohibiting growers from entering into agreements with unions that require the employer to accept card-check recognition or a union dues checkoff for union members.194 FLOC argued that the state law burdened the freedom of association of itself and its members by impairing timely payment of dues, which is necessary “to organize collectively to achieve safe working environments, fair wages, and meaningful workplace grievance procedures.”195 But the Fourth Circuit in FLOC v. Stein196 tracked the analysis of Walker in rejecting FLOC’s argument that the state singled its members out for discriminatory treatment. While the Court conceded that FLOC is the only farmworker union in the state, the law “treats all farmworker unions and agricultural producers alike.”197 Noting that loss of payroll deductions might “economically burden” FLOC, the Fourth Circuit nonetheless minimized the constitutional significance of the prohibition because it did not “prevent the union or its members from engaging in speech and therefore was not subject to strict scrutiny review.”198

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

195. Id. at 345.
196. 56 F.4th 339 (4th Cir. 2022).
197. Id. at 350.
198. Id. at 350–51.
200. See, e.g., Lewis v. Governor, 896 F.3d 1282, 1295–96 (11th Cir. 2018) (finding that allegations in equal protection claim that white state legislators sought to deprive residents of a majority-Black city of “full and equal participation in the social, economic, and political life of the state,” by preempting a local minimum wage ordinance sufficed to allege a discriminatory motive (quoting Dillard v. Crenshaw Cnty., 640 F. Supp. 1347, 1360 (M.D. Ala. 1986)), rev’d in part on other grounds on reh’g en banc, 944 F.3d 1287 (11th Cir. 2019).
201. See FLOC, 56 F.4th at 351–53.
exclusions of farmworkers from basic labor protections, and the utter lack of Latinx representation in the legislature that enacted [the law].

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

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

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

202. Id. at 351.
203. Id. at 354.
204. Okla. Corrs. Pro. Ass’n v. Doerflinger, 521 F. App’x 674, 679 (10th Cir. 2013); see also Walker, 705 F.3d at 649–54, 664 (considering and rejecting unions’ argument that Act 10 is a “façade” for viewpoint discrimination).
206. Id. at 806 (quoting Walker, 705 F.3d at 649).
207. Id.
208. 715 F.3d 956 (6th Cir. 2013).
209. Id. at 960.
this line of cases is to sap the institutional strength of unions, especially unions that criticize state elected leaders. In states without collective bargaining laws like North Carolina, it permits right-to-work legislation that would sharply restrict freedom of association in unions for agricultural workers and other workers excluded from the NLRA.

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

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


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


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

214. For evidence supporting this claim, see Henry S. Farber et al., Unions and Inequality over the Twentieth Century: New Evidence from Survey Data, 136 Q.J. ECON. 1325, 1344–55 (2021);
speech and association is crucial to resist the freedom of contract assumptions often underlying anti-regulatory constitutional theories and judicial deference to employer managerial and property interests. But to date, this scholarship has not attended to current instances of state labor constitutionalism, in which unions and worker centers have mobilized state constitutional law, affirmatively, to build countervailing power. The next Section will assess the legal mobilization of state constitutional claims, and conclude that, despite setbacks and varied outcomes, these claims have had important pro-movement effects.

B. State Constitutional Protections of Initiatives

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

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


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

216. Cal. Const. art. II, § 8(d); Mass. Const. art. XLVIII, § 3.
v. Massachusetts, the companies’ petitions included an unrelated provision for tort claims by third-party customers alongside an exemption of app-based drivers from state employment law. The Massachusetts high court held that the initiative was vaguely worded and violated the single-issue rule. In Castellanos v. State, in contrast, an intermediate court struck down part of Proposition 22 on separation of powers grounds, but upheld most of the initiative, finding that it had a single purpose, to create “a new balance of benefits and obligations for app-based drivers” even as it reached across a number of state labor and employment law statutes to do this.

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

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

217. 188 N.E.3d 510 (Mass. 2022).
218. Id. at 516.
220. Id. at 738.
222. Id. at 15, 30, 33.
223. Id. at 15.
goal of the legislation.”225 The Castellanos intermediate court reversed on this point, because “voter confusion and logrolling are not standalone bases for invalidating an initiative.”226 But these arguments were more persuasive for this court in a separation of powers challenge. The court struck down the restriction on future lawmaking about collective bargaining on separation of powers grounds because it purported to restrict the legislature from regulating an area (collective bargaining) that the law itself did not prohibit.227 Castellanos has been appealed.

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

These recent challenges to employer countermeasures reveal important pro-movement effects despite their varying outcomes. Social movement literature stresses the importance of law in collective-action frames.234 Here,
cause lawyers, organized labor, and allied civil rights groups framed the TNCs’ and Michigan legislature’s behavior as harmful to two different collective identities—low-wage workers and left-leaning voters—inviting these groups into a broad coalition to oppose these employer countermeasures. Cause lawyers in these cases successfully persuaded numerous courts, including the Massachusetts high court, to find within technical arguments about the single-issue rule and the legislature’s role in initiatives a value-laden one about the threat of misuse of the state initiative right to vulnerable workers and democratic state processes. In so doing, movement lawyers advanced a potent pro-worker, pro-democracy collective-action frame.

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

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

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

236. While the Idaho Supreme Court in Reclaim Idaho v. Denney, 497 P.3d 160 (Idaho 2021), found that state interference with the initiative and referendum powers in the state constitution is subject to strict scrutiny because these are fundamental rights reserved to the people, id. at 184, most other state courts have upheld limitations on ballot initiatives ranging from requiring that signatures fit on a single sheet of paper (requiring petitioners to use tiny type and gigantic sheets) to striking down the initiative process altogether. See Miriam Seifter, State Institutions and Democratic Opportunity, 72 DUKE L.J. 275, 317–18 (2022).
237. Davalos & Eidelson, supra note 179.
Proposition 22 and the Michigan legislature’s adopt-and-amend strategy as anti-democratic behavior. The plaintiffs in *Castellanos* framed the harms of Proposition 22 in ways that enabled unions and worker centers to anticipate and respond to similar TNC campaigns in other states, such as in Massachusetts. In Michigan, the worker center seeking to abolish the tip credit in the state minimum wage has mobilized its membership through *Mothering Justice*, now at the state supreme court, including by advancing a new petition for a $15 minimum wage state voter ballot initiative. A legislative strategy is, moreover, now plausible in Michigan after an independent commission redrew its political map to improve the democratic responsiveness of the state legislature.

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

### III. Confronting Structural Inequality in State Labor Law

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

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


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

A. State Labor Constitutionalism

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

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

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


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

246. Marshfield, supra note 244, at 911–15 (finding that nineteenth-century state conventions reflected a “growing popular concern about workers’ rights as well as elite capture of state government”).

247. See Fla. Const. art. I, § 6 (“The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.”); Haw. Const. art. XIII; Ill. Const. art. I, § 25(a) (“Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work.”); Mo. Const. art. I, § 29 (“Employees shall have the right to organize and to bargain collectively through
in these states to (1) successfully challenge disfavored treatment in right-to-work lawmaking; and (2) extend unionism as a source of countervailing power to low-wage workers excluded from the NLRA.

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

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

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

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

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

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

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

253. Id. at 593.
255. Id. at 108.
256. N.Y. CONST. art. I, § 17.
258. Id. at 802–03 (holding that state constitutional right to organize and collectively bargain “is a fundamental right, and that any statute impairing this right must withstand strict scrutiny”), see also George Harms Constr. Co. v. N.J. Tpk. Auth., 644 A.2d 76, 87 (N.J. 1994) (recognizing that the right to collective bargaining “should be accorded the same stature as other fundamental rights” (internal citations omitted)); Coastal Fla. Police Benevolent Ass’n v. Williams, 838 So. 2d 543, 548 (Fla. 2003) (same).
259. Hernandez, 99 N.Y.S.3d at 801–03.
261. See Coastal Fla. Police Benevolent Ass’n, 838 So. 2d at 547, 552 (rejecting argument that deputy sheriffs are “managerial level employees” who cannot engage in collective bargaining); Coal. of Graduate Workers v. Curators of Univ. of Mo., 585 S.W.3d 809, 813–15 (Mo. Ct. App. 2019).
In this analysis, state labor constitutionalism can protect unions and their members from adverse treatment in right-to-work lawmaking and prod state legislatures to extend state labor law protections to low-wage workers excluded from the NLRA. The Workers’ Rights Amendment, affirmed by Illinois voters as Amendment 1 in 2022, illustrates how a modern state constitutional amendment enables workers excluded from the NLRA to build countervailing power in state labor law. Illinois’s Amendment 1, widely supported by organized labor in the state, provides that:

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

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

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263. ILL. CONST. art. I, § 25(a).

264. See City of Tallahassee v. Pub. Emps. Relns. Comm’n, 410 So. 2d 487, 491 (Fla. 1981) (finding that the constitutional right to collective bargaining prevents the state legislature from setting pension benefits unilaterally), State v. Fla. Police Benevolent Ass’n, 613 So. 2d 415, 419 (Fla. 1992) (“The constitutional right of public employees to collectively bargain . . . guarantee[s]
than statutory reform, popular constitutional reform is not immune to legislative tampering.\footnote{265}

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

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

\footnote{266}{See, e.g., Sharon Block, \textit{Go Big or Go Home: The Case for Clean State Labor Law Reform}, 41 \textit{BERKELEY J. EMP. \\& LAB. L.} 167, 181-85 (2020).}

\footnote{267}{Elmore, \textit{supra} note 11, at 297-99; Sachs, \textit{supra} note 6, at 2687; Galvin, \textit{supra} note 41, at 52; Andrias, \textit{supra} note 14, at 52-57; MADLAND, \textit{supra} note 41, at 19-22.}


\footnote{269}{\textit{Union Members Summary}, U.S. \textit{BUREAU OF LAB. STATS.} (Jan. 23, 2022), https://www.bls.gov/news.release/union2.nr0.htm.}

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

\footnote{271}{Id.}

\footnote{272}{See Fischl, \textit{supra} note 24, at 40-41; Fisk \\& Malin, \textit{supra} note 24, at 1860–75; Andrias, \textit{supra} note 14, at 25; Sachs, \textit{supra} note 24, at 1076.}
Given this history, law, and the structural inequalities that state labor law reproduces in many states, state labor law would seem to be a poor foundation for labor renewal.

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

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

273. Sachs, supra note 71, at 1164.
274. ZACKIN, supra note 34, at 141.
275. Id. at 142.
276. State constitutional law, of course, would not protect state statutes from federal constitutional claims, but as Zackin explains, at the time state constitutional due process challenges were seen as the more pressing threat. Id.
278. Id. at 140–43.
279. Id. at 165; HAW. REV. STAT. § 377-1 (2023) (defining employee as “any person, other than an independent contractor, working for another for hire in the State, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise”).
state. Hawai'i later constitutionalized the rights of public- and private-sector employees to join unions and collectively bargain, and currently has the highest union membership rate among the states in the country.

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

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

280. Jung, supra note 277, at 143.
283. The ILWU’s sustained commitment to interracial organizing, which enabled it to organize Filipino/a immigrants hired by plantation owners to break the ILWU’s Great Sugar Strike of 1946, and its historical context, just after suspension of martial law and before passage of the Taft-Hartley Act, were key reasons for the rapid unionization of Hawai'i plantation workers in the 1940s despite overwhelming employer opposition. Jung, supra note 277, at 144–84.
284. State labor lawmaking extending labor rights to agricultural workers has not, thus far, significantly increased union membership outside of Hawai'i. See Knapp, supra note 69, at 468 (explaining that fewer than two percent of agricultural workers belong to a union, at least in part because of the organizing challenges in agriculture, a seasonal industry with a transnational workforce, in which workers must cross state lines throughout the growing season).
286. See Fisk, supra note 42, at 10–11 (cautioning that social movement activism by worker centers requires a legal structure, akin to labor law, to institutionalize it).
weakened by *Harris*, was a crucial foundation for this strategy, as it enabled home health care workers to join a union and collectively lobby for the Home Health Employment Standards Board, and then lobby for state legislators to adopt its recommendations. In Nevada home health care organizing, state labor law was a key element of the union’s strategic use of negotiated sectoral standard-setting to build countervailing power in state law.

**B. Implications for Negotiated Sectoral Standard-Setting**

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

1. **The Democratic Potential of Negotiated Sectoral Standard-Setting**

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

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

\(^{288}\) Andrias, *supra* note 24, at 58–68.

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


\(^{291}\) Emerson, *supra* note 29, at 172 (attributing the democratic deficit in rulemaking to “the background information and opportunity costs faced by members of the public and all but the best-funded and most well-connected public interest groups”).
STRUCTURAL INEQUALITY IN STATE LABOR LAW

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

The Board hearings also enabled Black and Latinx women home health care worker representatives to implement the Board’s authority to inquire into “[t]he impact of systemic racism and economic injustice on home care employees,” by pressing the state to acknowledge that their poor workplace conditions are a result of systemic racism that the state has an obligation to redress. In the words of one worker representative: “[S]ystemic racism is at the heart of why we are so underpaid for our essential work and why we have no healthcare, paid time off, or other benefits . . . . Because we’re majority women and people of color, we’ve been exploited, undervalued, underpaid, and held down for so long.” The Board created a Subcommittee on Systemic Racism and Economic Injustice and tasked it with bringing forward responsive proposals to the Board. The subcommittee proposed, and the Board recommended, that the agency acknowledge “that poverty wages paid to home care workers and low
investment in these essential services is a historic product of systemic racism,” which creates a “moral imperative” to increase the minimum wage and reimbursement rate in home care.\(^2^9^7\) In addition to enabling home health care workers to voice their lived experience of workplace racial and gender subordination in a deliberative setting, the Board generated a new, equality-based justification for the minimum wage increase for the Nevada agency and legislature.\(^2^9^8\) The Board also concluded that the misclassification of home health care employees as independent contractors by staffing agencies depresses work conditions in the home health care sector.\(^2^9^9\) This resulted in a recommendation that the agency refuse Medicaid funding to staffing agencies that classify their home health care workers as independent contractors.\(^3^0^0\) These examples suggest that the Board succeeded in generating democratic power and creating a forum for workers often excluded from policymaking to identify and pursue racial, gender, and economic justice goals.

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

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

\(^2^9^7\) Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Minutes, (Oct. 4, 2022), https://dhhs.nv.gov/uploadedFiles/dhhsnvgov/content/Programs/HCESB/HCESB%2010.4.22%20Meeting%20Minutes.pdf. The Board Chair Cody Phinney reported to the Nevada legislature that the Board recommended “an industry-wide investigation… [to] develop[] policy solutions to systemic racism in the field, such as annual reporting by employers to safeguard against discrimination.” Phinney June 2022 Letter, supra note 144.

\(^2^9^8\) Nev. Dep’t of Health & Hum. Servs., Home Care Employment Standards Board Subcommittee on Systemic Racism and Economic Injustice Meeting Minutes (Sept. 19, 2022), https://dhhs.nv.gov/uploadedFiles/dhhsnvgov/content/Programs/HCESB/HCESB%20SREI%20Su b%209.19.22%20Meeting%20Minutes.pdf (reporting that seventy-seven percent of surveyed Nevada home care workers are women, and sixty-one percent are people of color.).

\(^2^9^9\) HCES June 2022 Board Minutes, supra note 143.

\(^3^0^0\) Id. While members considered recommending a presumption of employment status for all home health care workers, the Board rejected this idea after workers hired directly by patients (and not by staffing agencies) raised concerns that patients would not hire them as employees. Id.
unless accompanied by popular participation. In this account, negotiated sectoral standard-setting is only likely to check employer domination if it permits low-wage workers to develop a collective identity and build countervailing power within its process of negotiating sectoral standards.

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

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


franchisees in the Fast Food Council is a further check on franchisor domination of the Council’s policymaking process.\textsuperscript{305}

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

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

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

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

312. The Harvard Law School Labor and Worklife Program proposes sectoral bargaining as a pillar of labor law reform and provides specific recommendations about thresholds of employee support to create a sectoral bargaining panel, "triggers" for bargaining rounds, selecting employee and employer representatives, and voting rights. See Sharon Block & Benjamin Sachs, Harv. L. Sch., Clean Slate for Worker Power: Building a Just Economy and Democracy 3 (2020); Clean Slate for Worker Power, Harv. L. Sch., Principles of Sectoral Bargaining 14-20 (2021). Veena Dubal critiques TNC-sponsored versions of sectoral standard-setting for "limit[ing] democratic worker participation and voice in the conditions created through bargaining and risk[ing] turning collective representation into an instrument of management control," and cautions that "democratic organizing and agitation" should drive these law reform efforts. See Dubal, supra note 92. The contribution of this Section is to offer specific legal and administrative design proposals enabling unions and worker centers to build countervailing power in the standard setting process in order to check employer domination.


314. Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 19–24 (2010) (stating that insulation can provide an "extra buffer against
democratic accountability of agencies necessary for complex, value-laden determinations, and cannot protect against employer cooptation of worker representatives. Public participation measures, in contrast, can reduce the risk of regulatory capture by providing public transparency in agency determinations, and by empowering unions and worker centers to serve as watchdogs for regulatory compliance.\textsuperscript{315}

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

\textit{a. Agency Insulation}

Agency insulation is a standard protection against obvious forms of interest group domination.\textsuperscript{316} Agencies could, for example, impose internal democracy requirements on representatives and forbid employer-funded groups, such as IDG, from representing app-based drivers.\textsuperscript{317} The NLRA bans a broad range of employer-dominated worker organizations on the ground that employer domination of employee representation can cleave the interests of worker representatives from employees and subordinate the interests of employees who would otherwise seek an independent union.\textsuperscript{318}

For this reason, an agency could safely conclude that the risk of employer domination of the Nevada Board is lower than an analogous board for app-based drivers, to the extent that the union representing home health care interest group pressures that might harm relatively weaker political interests, including the collective public interest of the general electorate or a vulnerable subgroup\textsuperscript{\textquotedblright}).

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

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

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

\textsuperscript{318} Barenberg, \textit{supra} note 4, at 773, 780, 803–04, 806–08, 820–21 (explaining the NLRA’s concern with even non-coercive forms of employer control over unions as “illegitimate domination that potentially infect[s] collaborative relationships under conditions of asymmetric power in the workplace and elsewhere”).
workers under state collective bargaining law adequately represents those workers’ interests on the Board.

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

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

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

319. Placing a floor on negotiated sectoral standard-setting in this manner mirrors the current California Fast Food Council approach of establishing a $20 an hour wage rate floor in conjunction with negotiated sectoral standard-setting. See Miranda, supra note 154.
address these complex questions and can erode its democratic value by limiting the scope of public participation.320

b. Public Participation

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

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

320. For a discussion of the tension between agency insulation and democratic accountability, see Barkow, supra note 314, at 19 (arguing that “one person’s political pressure is another person’s democratic accountability”).
321. Andrias, supra note 44, at 624.
322. The California Fast Food Council, for example, requires a threshold of worker signatures in order to convene. CAL. LAB. CODE § 1475(a)(1)–(E) (2024).
323. Id. § 1476(a).
325. Transparency that can be equally accessed by the public can be misused by the regulated community to clog up information channels and dominate administrative fora. Nicholas Bagley, The Procedure Fetish, 118 Mich. L. Rev. 345, 396 (2019); Wendy E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1324 (2010).
funding unions and worker centers to survey workers and report on their work standards and priorities. Agencies could also create an oversight role for unions and worker centers as watchdogs, by funding them to attend board meetings and review negotiated sectoral standard-setting proposals, which agencies would consider in their assessment of whether to approve a board-recommended standard. Applied to the TNC proposals for app-based drivers, app-based drivers could form committees to hold worker representatives accountable for their positions. Agency-funded watchdogs could closely monitor negotiated sectoral standard-setting for evidence of employer domination, which it could report directly to workers. Workers could themselves reject bargaining proposals after reaching a conclusion that they are too weak or are the product of employer domination. This would multiply the sites of labor contestation, making it less likely that employer representatives could dominate all of them.

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

326. These recommendations are similar to those of Kate Andrias and Benjamin Sachs, in proposing law that expressly protects the right to engage in collective organizing for greater rights in the future. Andrias & Sachs, supra note 23, at 592–93.
329. Id.
negotiated sectoral standard-setting to hold worker representatives accountable to them.

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

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

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

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

332. See Dubal, supra note 89.

333. See Andrias & Sachs, supra note 23, at 628.
C. Implications for Labor Localism

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

While strategic labor localism is shaped by the existing rules of NLRA preemption and state-law preemption, businesses, unions, and worker centers have contested and changed these boundaries over time. Unions and worker centers have overcome state-law preemption in some states by pivoting to new policy areas and scaling up to state-level reform.337 Repositioning cities as defenders of democratic labor policymaking has, additionally, aligned many cities with unions and worker centers in seeking to preserve local authority against employer attacks on city power.338

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


336. Id.

337. Id. at 199–204


339. State and local government law scholars drafted a set of principles for the National League of Cities in favor of expanding home rule powers and protecting them from abusive forms of state
To date, however, sweeping state-law preemption has enabled employer-backed groups to successfully block local labor lawmaking as a legal mobilization strategy in roughly half the states.1256 To date, however, sweeping state-law preemption has enabled employer-backed groups to successfully block local labor lawmaking as a legal mobilization strategy in roughly half the states.1256 Twelve cities and counties have approved local minimum wage laws only to see them invalidated by state preemption statutes.1257 State-law preemption, as in other areas of state law detailed in Part I, permits employers to reproduce structural inequality in order to prevail in labor contests, in ways that can be anti-democratic and harmful to low-wage workers, especially in majority-minority cities in states with countermajoritarian legislatures.1258 For example, shortly after the majority-Black city of Birmingham, Alabama approved a minimum wage ordinance in 2017 to $10.10 an hour, an all-white majority of Alabama state legislators enacted a state preemption law to extinguish it.1259

In Lewis v. Alabama,1260 federal constitutional litigation by organized labor and civil rights groups challenging Alabama’s preemption statute, an Eleventh Circuit panel refused to dismiss plaintiffs’ equal protection claim.1261 In its decision, the panel relied on the complaint’s allegations that state preemption harmed “Birmingham’s poorest black residents,” through a “rushed, reactionary, and racially polarized” legislative process, which drew from “Alabama’s historical use of state power to deny local black majorities authority over economic decision-making.”1262 While the Eleventh Circuit ultimately dismissed the suit en banc for lack of standing, it did not disturb the panel’s finding that these allegations sufficed to allege a discriminatory motive behind Alabama’s preemption of the Birmingham ordinance.1263

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


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

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

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

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350. Id. at 1238.
351. Id. at 1239–40.
352. Id. at 1240.
353. The independent commission that drew Michigan’s political map came as a result of a successful voter initiative amending the state constitution to create it in 2018. See *2018 Michigan Election Results*, Mich. Dep’t of State (Nov. 6, 2018, 2:47 PM), https://michiganelections.gov/election/results/2018GEN_CENR.html. State voter initiatives are among the few remaining means to reduce the partisan gerrymandering of state legislatures since the Supreme Court ruled in 2019 that partisan gerrymandering is a political question beyond the reach of federal courts. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). But see *Grisham v. Van Soelen*, 539 P.3d 272, 293 (N.M. 2023) (applying intermediate scrutiny to equal protection challenge to partisan gerrymandering under state constitution).
354. This approach is aligned with Olatunde Johnson’s caution that preserving labor localism will require “confront[ing] the politics that make preemption possible.” Johnson, *supra* note 24, at 1196. In Michigan, for example, the state senate’s labor committee in September 2023 voted to advance bills to repeal a sweeping 2015 state preemption statute—nicknamed the “Death Star” bill—that preempts all local labor standards. See *Kyle Davidson*, *Senate Panel Votes to Repeal*
likewise, protect labor localism by countering efforts to gerrymander state judiciaries.\textsuperscript{355} This may allow judicial candidates to strike down legislative maneuvers to preempt popular forms of local labormaking without courting legislative attack.\textsuperscript{356} More broadly, in states where the median voter supports home rule authority for their local governments, state-wide judicial elections may encourage candidates who are protective of the equality and democracy values advanced by local labor policymaking in state-law preemption disputes.\textsuperscript{357}

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

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

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

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

\textsuperscript{357} Id. at 989–90 (proposing that courts “help translate the values underlying those commitments” to localism, including “addressing questions of racial subordination and economic inequality”).

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

\textsuperscript{359} A.B. 257, 2021–2022 Reg. Sess. (Cal. 2022) (proposing to amend CAL. LAB. CODE §§ 1471(h)–(i)).
adoption by the state-wide Fast Food Council. Because the FAST Act only permitted local hearings and recommendations, this model of state-local coordination does not require local government to engage in lawmaking. State labor law can also integrate localism in other ways, by requiring paid leave for employees who participate in local policymaking and protecting them from employer retaliation for organizing.\textsuperscript{360} Cities, likewise, can provide or subsidize child care and transportation, make available virtual and physical spaces for organizing,\textsuperscript{361} and fund the projects of local unions and worker centers that organize workers excluded from NLRA protections.\textsuperscript{362} Because these activities do not require home rule authority, state preemption statutes do not prohibit them.

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

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

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

\textsuperscript{360} See Andrias & Sachs, supra note 23, at 592–623.

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

\textsuperscript{362} See Andrias & Sachs, supra note 23, at 606 (proposing “government funding of social-movement organizations as a supplement to self-funding and charitable donations”).
This Article’s focus on the states should not cast doubt on the primacy of federal law in labor contests and the desirability of federal labor law reform to reduce structural inequality. But federal labor law excludes many low-wage workers from its protections and does very little to stem state democratic backsliding in the states. And a view of federal labor law supremacy that ignores subfederal labor policymaking misses the critical role of state law in all labor contests, and the unique features of state law that can reproduce, or reduce, structural inequality. Sustained focus on the shift of labor contests to the mobilization of state and local law is in order.

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

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