Printed in U.S.A.
Vol. 118, No. 4

CONSTITUTIONAL CLASH: LABOR, CAPITAL, AND DEMOCRACY

Kate Andrias

ABSTRACT—In the last few years, workers have engaged in organizing and strike activity at levels not seen in decades; state and local legislators have enacted innovative workplace and social welfare legislation; and the National Labor Relations Board has advanced ambitious new interpretations of its governing statute. Viewed collectively, these efforts—"labor's" efforts for short—seek not only to redefine the contours of labor law. They also present an incipient challenge to our constitutional order. If realized, labor's vision would extend democratic values, including freedom of speech and association, into the putatively private domain of the workplace. It would also support the Constitution's promise of free labor; guarantee social and economic rights to workers; expand who qualifies as an equal member of the demos; and forge a more democratic governance structure, with less power for the judiciary and more democratic control over the political economy. The potential threat has not escaped the notice of capital. Business is responding with reinvigorated arguments about the First Amendment, the Takings Clause, due process, equal protection, nondelegation, and the Dormant Commerce Clause, as well as appeals to common law concepts of managerial control and property rights.

By examining labor's efforts and business's response, this Article shows that contemporary fights about labor are also inherently fights about constitutional law—about the rights to which citizens and residents are entitled, about governmental powers and structure, and ultimately about how we constitute ourselves as a nation. The Article also offers lessons for how to engage in nonjuriscentric constitutionalism; highlights the importance of advancing an affirmative constitutional agenda; and, from the range of labor's efforts, outlines a coherent substantive alternative to both business's constitution and the post-New Deal constitutional compromise that has, in many ways, failed to guarantee a democratic and egalitarian political economy.

AUTHOR—Patricia D. and R. Paul Yetter Professor of Law, Columbia Law School. For helpful comments and conversations, I thank Nicholas Allen, Yochai Benkler, Sharon Block, Colin Bradley, Ryan Doerfler, Cynthia

Estlund, David Fontana, Joseph Fishkin, William Forbath, Monica Hakimi, Chris Havasy, Genevieve Lakier, James Pope, David Pozen, Gali Racabi, Benjamin Sachs, Ganesh Sitaraman, and Laura Weinrib. Thanks also to workshop participants at Emory University School of Law; Georgetown University Law Center; Harvard Law School; Loyola Law School, Los Angeles; University of Chicago Law School; University of Connecticut School of Law; The University of Texas School of Law; and University of Virginia School of Law. I am very grateful to Abigail Flanigan and Margaret Hassel for their exceptional research assistance and substantive engagement with the project, as well as to Josh Jacobs, Zelly Rosa, and Dov Weinryb Grohsgal, and to the editors at the *Northwestern University Law Review* for their terrific editorial work.

INTRODUCTION

For decades now, corporate profits have soared while wages have remained largely stagnant, unions have withered, and work has become increasingly precarious. Despite our nation's putative commitment to democracy, the workplace is, for most Americans, an autocratic space in which workers have little voice in the decisions that structure their daily lives.[1] Stories abound of the exploitative and oppressive conditions that characterize work for many Americans, from medical residents who work twenty-four-hour shifts with nowhere to sleep, to Hollywood actors who have had their likeness taken from them without permission,[2] from factory workers prohibited from seeking shelter during a deadly tornado, to warehouse workers forced to urinate into bottles because of lack of breaks.[3]

In the past few years, workers have begun to resist these conditions with new force. An upsurge in organizing activity has occurred across industries among both low-wage workers and higher income professionals—fast-food workers, baristas, rideshare drivers, and hotel workers, as well as graduate students, medical residents, baseball players, tech workers, and journalists.[4] In fiscal year 2022, there were 1,249 union elections, a nearly 50% increase from the year before.[5] In the first half of 2023, over 58,000 workers voted to

---

[1] *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2019). *See infra* notes 132–133, 207–208 and accompanying text.

[2] Cheyenne Roundtree, *Hollywood's Fight Against AI Puts Background Actors in the Spotlight*, ROLLING STONE (July 22, 2023), https://www.rollingstone.com/tv-movies/tv-movie-features/hollywood-actors-strike-ai-background-visual-effects-sag-aftra-1234792405/ [https://perma.cc/CM33-SBYS]; Alan Yu, *80-Hour Weeks and Roaches near Your Cot? More Medical Residents Unionize*, NPR (Mar. 23, 2023, 8:27 AM), https://www.npr.org/sections/health-shots/2023/03/23/1165539846/80-hour-weeks-and-roaches-near-your-cot-more-medical-residents-unionize [https://perma.cc/C9KK-NTLP].

[3] *See, e.g.*, Deon J. Hampton, *Factory Workers Threatened with Firing if They Left Before Tornado, Employees Say*, NBC NEWS (Dec. 14, 2021, 7:49 AM), https://www.nbcnews.com/news/us-news/kentucky-tornado-factory-workers-threatened-firing-left-tornado-employ-rcna8581?cid=sm_npd_nn_tw_ma [https://perma.cc/CG5J-DW9Z]; Michael Sainato, *14-Hour Days and No Bathroom Breaks: Amazon's Overworked Delivery Drivers*, GUARDIAN (Mar. 11, 2021, 5:00 PM), https://www.theguardian.com/technology/2021/mar/11/amazon-delivery-drivers-bathroom-breaks-unions [https://perma.cc/X6BL-AYHE].

[4] *See* Robert Combs, *Unions, on a Roll, Are Reeling in the Workers*, BLOOMBERG L. (Aug. 21, 2023), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/XA1D602G000000 [https://perma.cc/R34Y-T5V9]; Rani Molla, *How Unions Are Winning Again, in 4 Charts*, VOX (Aug. 30, 2022, 6:00 AM), https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes [https://perma.cc/AWM3-DP8U].

[5] Andrea Hsu & Alina Selyukh, *Union Wins Made Big News This Year. Here Are 5 Reasons Why It's Not the Full Story*, NPR (Dec. 27, 2022, 10:01 AM), https://www.npr.org/2022/12/27/1145090566/labor-unions-organizing-elections-worker-rights-wages [https://perma.cc/TT3X-5HPQ].

unionize, more than during the same months in the prior year.[6] Workers have won union elections in companies that have never had a union before, including at notoriously low-wage and anti-union firms like Starbucks and Amazon,[7] while those who have long been thought not to be susceptible to unionization, such as doctors-in-training, are organizing in record numbers.[8]

Along with new organizing efforts, workers are also engaging in strikes and protests at levels not seen in decades. In 2018 and 2019, teachers across the country went on strike for higher wages and more funding for education in what became known as "Red for Ed," and workers at General Motors and major hotel chains also walked off their jobs.[9] After a lull during the worst months of the pandemic, 2021 saw strikes in manufacturing, universities, health care, telecommunications, coal mining, and more.[10] Strikes in 2022 surpassed the 2021 numbers by nearly 50%, and strike activity expanded further in 2023, with some observers terming the summer of 2023 the "summer of strikes."[11] In all, more than 450,000 U.S. workers went on strike during 2023, in over 300 work actions, including throughout the auto

[6] Parker Purifoy, *Unionization Nears Record Levels as Students, Interns Organize*, BLOOMBERG L. (Aug. 24, 2023, 5:29 AM), https://news.bloomberglaw.com/daily-labor-report/unionization-nears-record-levels-as-students-interns-organize [https://perma.cc/L2TX-PLQW].

[7] Josh Eidelson, *Starbucks Union Vote Sets Up a Watershed Moment for U.S. Labor*, BLOOMBERG (Nov. 7, 2021, 11:59 AM), https://www.bloomberg.com/news/articles/2021-11-07/starbucks-union-vote-sets-up-a-watershed-moment-for-u-s-labor?embedded-checkout=true [https://perma.cc/TPH3-QXVQ]; Sarah Jaffe, *It'll Take a Movement: Organizing at Amazon After Bessemer*, NEW LAB. F. (Aug. 29, 2021), https://newlaborforum.cuny.edu/2021/08/29/itll-take-a-movement-organizing-at-amazon-after-bessemer/ [https://perma.cc/JUE2-F4GP].

[8] Purifoy, *supra* note 6.

[9] Noam Scheiber, *In a Strong Economy, Why Are So Many Workers on Strike?*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2019/10/19/business/economy/workers-strike-economy.html?unlocked_article_code=1.Tk0.Gceg.jFbSGVUg5hfP&bgrp=a&smid=url-share [https://perma.cc/Q2JX-CYMH]; *see also* Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 BERKELEY J. EMP. & LAB. L. 135, 148 (2019) [hereinafter Andrias, *Strikes, Rights, and Legal Change*] (describing how teachers and other workers are, through their strikes, "helping force a shift in the way our society conceives of labor rights and social rights—from wages to education to health care").

[10] For analysis of the strikes beginning in the fall of 2021, see Jonah Furman & Gabriel Winant, *The John Deere Strike Shows the Tight Labor Market Is Ready to Pop*, PORTSIDE (Oct. 18, 2021), https://portside.org/2021-10-18/john-deere-strike-shows-tight-labor-market-ready-pop?fbclid=IwAR3ig1k6aIuekNUnms3G5ooy2AhravS9ItjkIz1ny9lcdOJ2LRrUY0_nyhU [https://perma.cc/55WF-7WT9].

[11] Emily Peck, *Summer of Strikes Heats Up*, AXIOS (June 27, 2023), https://www.axios.com/2023/06/27/us-workers-strike-jobs-economy [https://perma.cc/3UT4-ECEL]; *Major Work Stoppages in 2021*, U.S. BUREAU OF LAB. STATS. (Feb. 23, 2022), https://www.bls.gov/news.release/archives/wkstp_02232022.htm [https://www.perma.cc/4TQC-N949] (reporting sixteen major work stoppages in 2021); *Major Work Stoppages in 2022*, U.S. BUREAU OF LAB. STATS. (Feb. 22, 2023), https://www.bls.gov/news.release/archives/wkstp_02222023.htm [https://www.perma.cc/S662-9H46] (reporting twenty-three major work stoppages in 2022); *Work Stoppages*, U.S. BUREAU OF LAB. STATS. (July 2023), https://www.bls.gov/wsp/ [https://www.perma.cc/C25M-K5E8].

industry and Hollywood.[12] Like the surge in union organizing, the recent labor strife comprises all kinds of workers in many different sectors; what they have in common is that they earn money through their labor rather than by owning capital.

Growing opposition to autocratic and oppressive working conditions is emerging through the political process as well. Over the last several years, unions, grassroots organizations, advocacy groups, and allied politicians have pushed for and won the enactment of a host of new state and local laws aimed at raising wages and enhancing worker rights. Federal legislation—the Protecting the Right to Organize (PRO) Act—has been introduced to overhaul labor law.[13] Though no one expects the PRO Act to pass in the short-term, new leadership at the National Labor Relations Board (NLRB) has begun advancing decidedly proworker interpretations of the National Labor Relations Act (NLRA).[14] Meanwhile, some unions are pushing for even more fundamental changes, seeking legal reforms at the federal, state, and local level that would guarantee bargaining rights for all workers, or at least the right to help set employment standards on a sectoral basis.[15]

This Article examines these efforts of worker movements and allied government officials—"labor's" efforts for short—arguing that they not only seek to redefine the contours of labor law but also present an incipient challenge to our constitutional order. Not unlike the efforts of workers in the early twentieth century who resisted the *Lochner*-era Supreme Court and helped bring about a constitutional revolution during the New Deal,[16] today's labor movement seeks to build a more democratic and egalitarian constitutional democracy. Labor only intermittently articulates its efforts in formal constitutional terms. But labor consistently makes claims to higher law, couching its arguments in moral rather than pecuniary terms, and it unequivocally aims to restructure the government, to change our nation's fundamental commitments, and, ultimately, to transform how we constitute

---

[12] Lauren Kaori Gurley, *Strikes Spiked in July, as Workers Seek Higher Wages to Keep Up with Inflation*, WASH. POST (Aug. 4, 2023, 5:43 PM), https://www.washingtonpost.com/business/2023/08/03/strikes-2023-summer-unions/ [https://www.perma.cc/39L5-MKYX]; Jessica Dickler, *Why So Many Workers Are Striking in 2023: 'Strikes Can Often Be Contagious,' Says Expert*, CNBC (Oct. 9, 2023), https://www.cnbc.com/2023/10/09/from-uaw-to-wga-heres-why-so-many-workers-are-on-strike-this-year.html [https://www.perma.cc/GH36-U676].

[13] *See infra* notes 136–137 and accompanying text (discussing the PRO Act).

[14] *See infra* text accompanying notes 147–162, 231–232.

[15] *See infra* Section II.D (discussing union efforts to create new administrative mechanisms that involve workers in negotiating employment standards on a sector-wide basis). *See generally* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1 (2016) [hereinafter Andrias, *New Labor Law*] (describing efforts of worker movements to achieve sectoral bargaining and to transform failed labor law).

[16] See *infra* Section I.B for a discussion of labor's constitutional vision during the early twentieth century.

ourselves as a nation.[17] Importantly, it does so through legislation and administration, in the workplace and in the public sphere, rarely pressing its claims in courts.[18] But taken collectively, labor's demands would transform the powers and obligations of government and the rights to which members of the political community are entitled, what some scholars have termed the "constitutional order" or the "small-c constitution,"[19] with implications for big-C constitutional law.

From the range of labor's actions, this Article draws out a coherent constitutional vision with four main strands.[20] First, labor seeks to protect as fundamental the rights to organize, bargain, and strike—and in so doing, it demands the extension of democratic values into the putatively private domain of the workplace. Through organizing, collective bargaining, and protesting (and, occasionally, attempts at new forms of ownership), workers

---

[17] *See* Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 21–29 (1934) (noting that only practice can demonstrate whether something is part of our Constitution and arguing that "the working Constitution is amended whenever the basic ways of government are changed"); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 239 (2011) (emphasizing that movements engage in constitutional construction when they appeal to higher law, seek to shift the basic law that structures the government, and aim to redefine our common political project); JACK M. BALKIN, LIVING ORIGINALISM 279–80 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] (identifying processes that allow people "to change the Constitution-in-practice through persuasion and sustained social and political mobilization"); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 134 (2010) ("Political actors engage in the process of construing constitutional meaning and creating institutions and practices to accomplish their objectives. They do not necessarily conceptualize what they do as operating in these terms."). For discussion of theories of small-c constitutionalism and constitutional construction, see *infra* Section I.A.

[18] For scholarship that examines constitutionalism outside the courts historically, see JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 3 (2022); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999) [hereinafter TUSHNET, TAKING THE CONSTITUTION]; and Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1043 (2004). *See also infra* Section IV.B (exploring reasons for labor's nonjuriscentric orientation).

[19] *See* Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081–84 (2013) (describing "big-C" constitutionalism and "small-c" constitutionalism); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003) (describing constitutional order as "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions" and likening it to small-c constitutionalism). For scholarship on how Americans have used statutory and administrative law, as well as popular argument, to construct constitutional meaning, see generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 20 (1991); BALKIN, LIVING ORIGINALISM, *supra* note 17, at 3–6, 69–73; WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1–2, 25 (2010); Llewellyn, *supra* note 17; Whittington, *supra* note 17, at 120–25, 134; and Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 415–26 (2007). For an empirical and comparative coding of large-C and small-c constitutions, see Adam Chilton & Mila Versteeg, Identifying Constitutional Law (Dec. 7, 2021) (unpublished manuscript), https://ssrn.com/abstract=3980207 [https://www.perma.cc/9FRJ-LRSS].

[20] *See infra* Part II.

are seeking to democratize workplaces that are currently autocracies—from locations in which those who control capital make the decisions unilaterally to spaces in which decision-making power is more equitably shared. In so doing, labor is challenging existing conceptions of rights, particularly freedom of speech and association and property rights, and attempting to give meaning to the constitutional guarantee of free labor. It is also putting pressure on the basic tenets of U.S. constitutional law that rights protect only against state action, not private action.

Second, labor, led in particular by low-wage worker movements, seeks material entitlements and dignified conditions for all workers. Through a host of legislative campaigns and workplace actions, worker movements are rejecting the extraordinary economic inequality and insecurity that define our current political economy. They make rights-based claims to livable wages and just benefits, to more equality in the distribution of corporate profits, to greater economic security for the unemployed, and to compensation for caregiving. Increasingly, they make these demands of the state (though notably not of courts), as well as of employers. And they frame their demands not in the language of efficiency or practicality but in that of moral right and dignity, and as a rejection of the legacy of slavery. Here, labor's vision again challenges not only the constitutional agenda of business; it also stands in contradistinction to constitutional law's longstanding rejection of socioeconomic rights and to the lack of robust substantive protections for workers in the United States.

Third, growing movements of workers seek to eradicate the exclusions and hierarchies that have historically characterized the U.S. labor market, wherein sectors dominated by women and people of color—from agricultural and domestic work to gig or piece work—have long been denied status as equal rights-holders and in which care work is undervalued and often unpaid. Here, labor's vision seeks to redefine who counts as "we the people" and implicitly rejects the exclusions baked into most statutory regimes. At the same time, it challenges the intent-focused approach to racial and gender discrimination that the Supreme Court has embraced, suggesting instead an antisubordination approach to problems of equal protection, one that emphasizes political rather than court-centered change.

Finally, labor seeks a more democratic government—one that both grants workers more power in policymaking and subordinates the putatively private, economic sphere to greater democratic control. That is, worker movements, particularly in the service sector, are seeking to expand the administrative state's *capacity* to deliver social welfare goods and to enforce workers' rights. They also seek to reform administration such that workers would play a larger role in shaping economic and social welfare policy

through a system of "social bargaining" or greater participation by labor in co-regulation of the economy. In so doing, labor's vision sharply conflicts with the constitutional jurisprudence emerging from the conservative Supreme Court, which would eviscerate the administrative state, increase the power of the judiciary, and limit the government's capacity to regulate in the public interest. Labor's vision is also in tension with some parts of the constitutional and administrative law settlement reached in the post-New Deal period that rejected social democratic models of co-governance by social partners in favor of a technocratic, legalistic approach by experts.

These four strands, knitted together, would redefine the boundaries of governance—what government must do, may do, and may not do—and tie these rudiments of public power and constraint to orienting moral ideas: "what interests and capacities most matter in people, which collective purposes define the role of government, and which constraints on government [and private parties] are essential to respecting individuals."[21] Although labor's efforts along these four dimensions are not new, they are occurring in combination, with far greater intensity from workers, and with more uptake from policymakers than they have in over fifty years.[22] Labor is attempting to construct a constitutional order that breaks from the one that currently reigns.

The potentially transformative nature of labor's agenda has not escaped notice of the business community. The nation's largest corporations and trade associations, along with conservative legal advocacy groups, are spending vast sums lobbying against proposed labor law reform while mobilizing anti-union consultants and new forms of surveillance to defeat the recent unionization campaigns. At the same time, business is also working to reinvigorate and extend a set of constitutional and quasi-constitutional doctrines to weaken the power of workers, lock in the power of capital, and ultimately stymie core principles of egalitarian democracy and free labor embedded in the worker vision. This Article elaborates that countervailing constitutional vision—capital's constitution.

Unlike labor, business focuses its claims on courts, including the Supreme Court. Its strategy includes the First Amendment, the Takings Clause, the Supremacy Clause, the public and private nondelegation doctrines, the Dormant Commerce Clause, and, as in the "*Lochner* era" of the early twentieth century, the Due Process and Equal Protection Clauses. And, as in the *Lochner* era, the Supreme Court's conservative majority has

[21] Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014).

[22] *See infra* Section I.B (discussing how labor's constitutional vision advanced in the early part of the twentieth century).

embraced much of business's constitutional agenda, along with a robust form of judicial supremacy that posits the Court as the sole and final authority over the Constitution.[23]

Ultimately, the constitutional clash between labor and capital is about the meaning of the Constitution's promises of democracy, equality, and freedom.[24] While business seeks to shield its power from democratic control, labor's vision is for a more social or egalitarian democracy: The aspiration is that all members stand in relation to one another roughly as political and social equals, able to act freely, without economic and social disparities that enable some individuals or groups of people to dominate others in either the public or private spheres.[25] Under this alternative constitutional vision, power is shared by everyone in the community, rather than reserved to the few.[26] To that end, structures are required that enable the articulation of conflicting interests by parties and groups with recourse to roughly similar political capacities, in ways that both channel conflict and achieve conciliation.[27] In short, the labor movement is seeking to rework the powers, structures, and obligations of government and the scope and nature of rights to create a system that subordinates the market to democratic society,

---

[23] *See infra* Part III.

[24] *Cf.* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228–29 (2013) (emphasizing employment law's social equality goals). For work examining historical efforts of social movements to make real the Constitution's promises of democracy, equality, and freedom, see generally James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor's Constitution of Freedom*], which explores the constitutional ideology of the early-twentieth-century labor movement; AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 3 (2010), which examines the efforts of U.S. social movements to imagine freedom without subordination or empire; and K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017), which recovers a Progressive Era commitment to a society without domination.

[25] This Article does not attempt to espouse a theory of democracy or to pick among the many competing theories of democracy that scholars have offered. But the labor vision has much in common with egalitarian democratic theory. *See* Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999). For a synthesis of relevant political theory, see Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 164–72 (2021). *See also* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971) (contending that the essence of democracy is "continuing responsiveness of the government to the preferences of its citizens, considered as political equals").

[26] Anderson, *supra* note 25, at 289; *see also* DAVID GRAEBER, THE DEMOCRACY PROJECT: A HISTORY, A CRISIS, A MOVEMENT 183–84 (2013) (drawing upon the idea that democracy is "just the belief that humans are fundamentally equal and ought to be allowed to manage their collective affairs in an egalitarian fashion, using whatever means appear most conducive"); DANIELLE ALLEN, OUR DECLARATION 178–82 (2014) (exploring the democratic ideal of equal access to the institutions of government); Nadia Urbinati, *Competing for Liberty: The Republican Critique of Democracy*, 106 AM. POL. SCI. REV. 607, 616–17 (2012) (noting individuals' rights to participate as equals and speak publicly on matters of state importance as key tenets of Athenian democracy).

[27] For a discussion of the theory of agonism, which stresses the inherently contested nature of democracy and the importance of power relations, see, for example, CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 5–7 (2013).

allowing workers the ability to participate in the formation of social and economic conditions.[28]

This Article's aim is in part descriptive and in part constructive. It draws out a relatively coherent constitutional vision from a variety of actions and statements by labor movement actors—and contrasts that vision with the antidemocratic and anti-egalitarian constitutional agenda of business and the Supreme Court. Examining labor's vision and the response of business holistically, rather than in doctrinal silos, illuminates the significant stakes of the emerging constitutional clash.[29] Indeed, although business's constitutional attack is by no means limited to labor—extending to the environment, consumers, students, and voters as well—because labor's project squarely challenges capital's interests, it is a useful focal point for understanding the scope of capital's constitution more broadly.

The analysis also highlights the limits of the liberal (or neoliberal) settlement that has defined constitutional law since the post-New Deal era and particularly since the 1970s. It shows that, despite the "switch-in-time," and the Court's promise that it would defer to democratic legislatures' economic judgments,[30] the Court continued to assert significant judicial supremacy to protect employer rights, particularly the common law right of property, privileging those rights over workers' collective rights. It maintained the state action distinction that denied workers protection from

[28] This approach builds on a long intellectual tradition and a historical commitment to industrial democracy. *See* Ruth Dukes, *Hugo Sinzheimer and the Constitutional Function of Labour Law*, *in* THE IDEA OF LABOUR LAW 57, 58–60 (Guy Davidov & Brian Langille eds., 2011); *see also* RUTH DUKES, THE LABOUR CONSTITUTION 3–5 (2014) (providing a framework, based on Hugo Sinzheimer's "labour constitution," for analysis of labor law and how democratic participation can serve as a means of emancipating workers). There is also considerable overlap between labor's vision and the "democracy of opportunity" agenda Forbath and Fishkin trace, which they argue includes three strands: (1) an anti-oligarchy commitment that sought to ensure that the wealthy do not exert too much power; (2) a middle-class commitment that sought to encourage a broad middle class and widespread distribution of wealth and opportunity; and (3) an inclusion commitment that sought to expand the political community to include women and minorities as equal participants in the American project. *See* FISHKIN & FORBATH, *supra* note 18, at 3.

[29] Prior academic work examines the efforts of business in particular doctrinal areas, including the First Amendment, the Takings Clause, and the separation of powers. *See, e.g.*, *infra* notes 116, 319–320, 360, 365, 369 (collecting sources).

[30] In 1937, in response to the Court striking down swaths of New Deal legislation and state economic regulation, President Franklin D. Roosevelt announced that he would press for legislation that would add several members to the Supreme Court. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 2–3, 292–97 (2010). The Court responded by reversing course on its restrictive interpretation of the Commerce Clause and its expansive view of the economic liberty interests barring state economic regulation, and the Court expansion plan ultimately failed in Congress. *Id.* at 429–33, 453–54, 498–500; *see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 402–03 (1937) (adopting a position of judicial restraint and deference to legislatures' judgments). For more discussion of the Court's "switch-in-time" and the legal regime it initiated, see *infra* Section I.B.

private domination and limited congressional ability to redress private civil rights violations. And it never formally repudiated its decisions that struck down New Deal statutes empowering unions to bargain with employers for wage increases and working conditions throughout an economic sector. Moreover, neither the Court nor Congress, for the most part, embraced guarantees of social and economic rights or principles of inclusion and antisubordination.

The Article begins to sketch an alternative approach emanating from the worker movements themselves. In so doing, it adds to the developing literature that argues for a more democratic and egalitarian constitutional political economy.[31] In particular, it shows that the "forgotten" tradition of constitutional political economy that such scholars as Professors Joseph Fishkin and William Forbath seek to reinvigorate is actually already emerging, at least among labor.[32] And it emphasizes the important role of social movements in constructing constitutional meaning, and relatedly, the need for scholars to root an alternative progressive constitutional vision in the efforts of social movements.[33]

---

[31] For recent work in this vein, see FISHKIN & FORBATH, *supra* note 18, at 3; GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017); Jedediah Purdy, *The Left's Guide to Reclaiming the Constitution*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/opinion/brett-kavanaugh-supreme-court-constitution-democrats-.html [https://www.perma.cc/BQQ6-N6MS]; Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119 (2018) [hereinafter Lakier, *Imagining an Antisubordinating First Amendment*]; RANA, *supra* note 24, at 343; WILLIAM J. NOVAK, A NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 1–3 (2022); RAHMAN, *supra* note 24, at 3; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 481–99 (2015); Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 10 (2018); and Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 324 (2016).

[32] *See* FISHKIN & FORBATH, *supra* note 18 (arguing that, in the past, progressive Americans believed the Constitution prohibited oligarchy and required broad distribution of wealth and political power but that this tradition has been forgotten); *see also* Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1399 (2023) (arguing for recovering "unions' lost normative vision, one which included fundamental rights at work"); *cf.* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1595 (2016) (arguing that there has been no "great forgetting").

[33] For prior work emphasizing the importance of social movements in constructing legal and constitutional meaning, see Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312–13 (2001) [hereinafter Siegel, *Text in Context*]; Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Andrias, *supra* note 32, at 1603; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 121 (2019); and Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795 (2023).

The Article also engages contemporary debates about how constitutional law should respond to rising economic inequality and faltering democracy—and how progressives should respond to the radically conservative majority on the Supreme Court.[34] It highlights the importance of advancing an affirmative constitutional vision to counter that of business and the conservative Court, challenging the claims of legal scholars who argue that constitutionalism should be abandoned—or that constitutional law's reach should be narrowed. And it offers labor's efforts as a model for how to engage in nonjuriscentric constitutionalism, while still recognizing a role for courts and judicial review—and as a coherent substantive alternative to both capital's constitution and the post-New Deal settlement.

Before proceeding, a few preliminary points: This Article does not seek to provide a comprehensive overview of the activities or ideology of the U.S. labor movement. Not all workers or unions are committed to the goals highlighted in this Article. For example, many police and corrections-officers' unions openly embrace exclusionary and racially oppressive policies.[35] Some other unions maintain a bureaucratic orientation, with little inclination for a transformation of the workplace or the political economy—or even a commitment to organizing new workers.[36] Even among the progressive worker organizing efforts, there is some disagreement about engaging the state in guaranteeing labor rights.[37] While acknowledging these debates, this Article does not plumb them. Rather, it homes in on the substantial and growing worker movements that are committed to achieving greater workplace democracy while transforming the state and its fundamental commitments to build a more democratic and egalitarian political economy. It uses the word "labor" as shorthand to refer to this subset of efforts. It focuses on this subset because that is where the alternative vision for the Constitution—for a new constitutional order—is being pressed.[38]

Similarly, the Article does not seek to offer a comprehensive account of American business. Rather, it focuses on the efforts of major corporations and their trade associations, such as the Chamber of Commerce, the National

---

[34] *See infra* Part IV.

[35] Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 38 J.L. ECON. & ORG. 1, 6 (2020); Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1336 n.11, 1343 (2020).

[36] *See* Steven Greenhouse & Harold Meyerson, *Labor's John L. Lewis Moment*, AM. PROSPECT (June 9, 2022), https://prospect.org/labor/labors-john-l-lewis-moment/ [https://perma.cc/PLT3-EFAW].

[37] *See* sources cited *supra* notes 215, 265–266. In that sense, one could argue that there are multiple versions of "labor's constitution" implicit in today's labor movements. This Article focuses on one, constructing a coherent constitutional vision from the efforts of the most progressive, ambitious, and successful movements.

[38] *See generally* TUSHNET, *supra* note 19 (examining how new constitutional orders emerge).

Manufacturing Association, and the National Restaurant Association, as well as right-wing anti-labor think tanks such as the Pacific Legal Foundation, the American Legislative Exchange Council, and the National Right to Work Foundation. Yet it is important to recognize that there are business organizations, both large and small, that do not share the ideological commitments highlighted in this paper, and some are even focused on building a more equitable political economy.[39] Used in this paper, however, "business" or "capital" refers to the corporate actors, conservative legislatures, scholars, think tanks, and lobbyists working to advance anti-worker policies, again because it is that subset's constitutional vision that most clashes with labor's.[40]

The Article proceeds as follows. Part I defines terms, unpacking what is meant by "constitutional" and exploring how constitutional meaning is constructed outside of courts. It then discusses the early-twentieth-century constitutional clash between labor and capital and the settlement that was reached following the New Deal. Part II explores the demands of contemporary worker movements and shows their coherence and potential for an alternative constitutional order by elaborating the four strands of labor's constitutional vision presented in this introduction. Part III contrasts labor's vision with corporations' antidemocratic and anti-egalitarian constitutional agenda, which opposes each element of labor's vision and which is gaining ground in the Supreme Court. Finally, Part IV explores how the labor–business constitutional clash can inform contemporary debates in constitutional law. It emphasizes the importance of advancing a robust constitutional vision to counter that of business and the conservative Court; offers a model for how to engage in nonjuriscentric constitutionalism, without abandoning courts altogether; and, ultimately, offers labor's vision as the alternative both to business's constitution and to the post-New Deal constitutional compromise that has, in many ways, failed to guarantee a democratic and egalitarian political economy.

---

[39] *See, e.g.*, *Our Vision at Main Street Alliance*, MAIN ST. ALL., https://mainstreetalliance.org/vision [https://perma.cc/P2M4-RT65] (highlighting the organization's commitment to "unlocking the leadership potential of small business owners" and "working towards a more just economy and a more inclusive society"); Posie Brien, *Meet the Owners of King Arthur Baking*, KING ARTHUR BAKING CO. (Oct. 9, 2020), https://www.kingarthurbaking.com/blog/2020/10/09/meet-the-owners-of-king-arthur-baking [https://perma.cc/42LH-2WH9] (profiling the employee-owners of a 100% employee-owned bakery); *see also* OREN CASS, THE ONCE AND FUTURE WORKER: A VISION FOR THE RENEWAL OF WORK IN AMERICA 2 (2018) (arguing that conservatives and elites should put American workers' interests first).

[40] Just as the Article does not offer a comprehensive account of labor or business, it does not cover all areas on which conflicts arise. One important area not covered, for example, is religion. For one excellent treatment, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

I. CONSTITUTIONAL CLASH OVER TIME

A. Defining Constitutionalism

Given that the core claims of this Article are that labor's contemporary organizing efforts present an incipient alternative to the existing constitutional order and that a fundamental constitutional clash is emerging between labor and capital, it is important to define more precisely what is meant by "constitutional."

Sometimes when we refer to the "constitution" in the United States, we are referring to the written document that was drafted in 1776 and has been subsequently amended through the processes laid out in Article V. On this approach, constitutional law consists of the rules that appear in, or at least clearly derive from, the text of the written U.S. Constitution: "[I]f a rule is textually grounded, it enjoys constitutional status . . . ."[41] Scholars often refer to this as "big-C" constitutional law "because of the essential role that it reserves for the written Constitution—the proper noun, with a capital 'C.'"[42] On most accounts, big-C constitutional law is entitled to privileged treatment: A big-C constitutional rule prevails when it conflicts with a nonconstitutional rule; cannot be changed through ordinary politics and legislation; and can be enforced by courts exercising the power of judicial review.

But, in fact, the big-C Constitution is only a part of how our constitution works on the ground. Numerous scholars, from Karl Llewellyn in the 1930s to Bruce Ackerman, William Eskridge, John Ferejohn, Richard Primus, Reva Siegel, Mark Tushnet, and Ernest Young, have recognized that in practice our constitution includes more than what is written in the canonical document.[43] Indeed, even committed textualists acknowledge that a certain amount of non-big-C constitutional law exists,[44] with many constitutional rules arising more from structure or precedent or another source, rather than

---

[41] Primus, *supra* note 19, at 1081–82.

[42] *Id.*; *see also* ESKRIDGE & FEREJOHN, *supra* note 19, at 5 (distinguishing between large-C and small-c constitutional rights); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 700 (2011) (noting that it is conventional among constitutional theorists to "distinguish the formal, big-C Constitution from the functional, small-c constitution" or "the constitution in practice").

[43] *See* sources cited *supra* notes 17–19.

[44] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 139–40 (1997) (describing the role of stare decisis). What counts as valid interpretation of the big-C Constitution's text is hotly debated—scholars, judges, and theorists disagree about whether interpreters should look to original meaning, subsequent historical understandings, traditional practices, ethical arguments, functional inferences from governmental structure, or other sources—but there is little disagreement that much of the Constitution requires modes of interpretation that go beyond a literal reading of the text. Whittington, *supra* note 17, at 121.

from the text itself.[45] For example, the First Amendment applies to the President even though it refers exclusively to Congress; the Fifth Amendment provides for equal protection, even though it refers only to due process; and Congress cannot "commandeer" state officials, although no language in the Constitution so declares.[46] And although the Constitution provides for amendment only through Article V procedures, in fact, understandings of the Constitution have been changed by mechanisms other than the one that the text of Article V allows.[47] Indeed, social movements have played a critical role in transforming constitutional practice and in changing interpretations of the Constitution.[48]

Thus, scholars distinguish the big-C Constitution from the "small-c" constitution, "the constitution in practice," or "the constitutional order." The small-c constitution is not limited to the written Constitution but is shaped as well by the web of documents, institutions, norms, traditions, and social relations that structure our society, defining governmental powers and obligations as well as individual rights.[49] As David Strauss puts it, the distinction between

> the small-"c" constitution—the fundamental political institutions of a society, or the constitution in practice—and the document itself . . . is imprecise, but it is both coherent and useful. . . . [T]he constitution, in practice, includes not just the text of the document, but also the settled understandings that have developed alongside the text.[50]

Small-c constitutional theory is internally diverse. Some argue that entrenchment is essential for a practice or rule to count as constitutional; others focus on whether the rule is constitutive of government or on whether it embodies the deepest values of the American people.[51] In elaborating what makes up the small-c constitution, some focus on institutional settlements that occur among governmental actors, creating a "constitution by

---

[45] Primus, *supra* note 19, at 1130.

[46] David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3–4 (2015).

[47] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2320 (2021); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59, 1505 (2001).

[48] *See supra* note 33 (collecting sources describing how social movements have shaped constitutional meaning).

[49] The idea of small-c constitutionalism is similar to the idea of the "material constitution" in the European tradition. *See* Marco Goldoni & Michael A. Wilkinson, *The Material Constitution*, 81 MOD. L. REV. 567, 568–69 (2018).

[50] Strauss, *supra* note 47, at 1459, 1505.

[51] *See* Young, *supra* note 19, at 413–14 (emphasizing entrenchment); Richard Primus, *The Constitutional Constant*, 102 CORNELL L. REV. 1691, 1691–92 (2017) (emphasizing deepest values).

convention."[52] Others focus on legislation that becomes entrenched as a "super statute"[53] or on ways that elected officials and lay actors "construct" constitutional meaning.[54] Still others focus on judicial interpretations that are non-textual, but instead draw on such modalities of interpretation as structure, ethos, and precedent.[55] Scholars also take different perspectives on the relationship between the big-C and the small-c constitution. Some argue that the small-c constitution should be relevant only when the document is silent; others believe constitutional practice should flesh out ambiguities and provide a gloss on, or even supplant, the big-C Constitution.[56]

This Article adopts a capacious understanding of "constitutional," focusing on big-C constitutional text; judicial interpretation of that text; and also the range of efforts that occur outside of courts but that aim to entrench fundamental values, constitute (or reconstitute) the government's powers and duties, and protect rights. The premise is that the small-c constitution is formed by past and present praxis and by the deeper societal context and social relations in which formal constitutional development is embedded.[57] Through praxis, prevailing interpretations and understandings of the written Constitution are shaped and reshaped.[58]

Thus, the Article's focus is on the efforts of the labor movement and its allies to transform—through collective action, legislation, administration, public discourse, and occasionally in litigation—the powers and obligations of government and the rights of workers. The argument is that those efforts can reshape understandings of the big-C Constitution—or at least reshape how we constitute the government and what rights we understand to be fundamental. By making claims to higher law, attempting to shift the basic law that structures the government, and seeking to change our nation's

---

[52] *See* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1916–17 (2020).

[53] *See* ESKRIDGE & FEREJOHN, *supra* note 19, at 5.

[54] Whittington, *supra* note 17, at 120 ("The process of constitutional construction is concerned with fleshing out constitutional principles, practices, and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution."); BALKIN, LIVING ORIGINALISM, *supra* note 17, at 3 (viewing "the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction").

[55] Primus, *supra* note 19, at 1128 (drawing from PHILIP BOBBITT, CONSTITUTIONAL FATE 90–106 (1982)).

[56] *E.g.*, Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 291 (2015) (describing the view that unwritten but obligatory constitutional customs should serve as a means for fleshing out constitutional imprecision when textual authority is ambiguous); Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1549 (2022) (discussing how the "Founders made claims through action, won rights through usage, and maintained rights through uninterrupted custom").

[57] *See* Goldoni & Wilkinson, *supra* note 49, at 569.

[58] *See* Peterson, *supra* note 56, at 1549; Llewellyn, *supra* note 17, at 21–22; BALKIN, LIVING ORIGINALISM, *supra* note 17, at 279–80.

fundamental commitments, labor is engaging in an effort at constitutional construction, even though it does not necessarily conceptualize what it is doing in these terms.[59] It is making "normative appeals about what the Constitution should be, melding what is known about the Constitution with what is desired."[60] It advocates governmental structures, practices, and policies that reflect its vision for the political economy and, by doing so, it aims to transform our constitutional order—the "institutions through which [our] fundamental decisions are made . . . and the principles that guide those decisions."[61]

The focus is also on capital's response. Business interests have long resisted the creation and entrenchment of the practices, political relations, and values that labor advocates. And courts have more often than not been allies of business. With the help of courts, and the Supreme Court in particular, capital has forged a constitutional order that privileges employers' rights over workers' collective rights and elevates private property and managerial control over democracy, equality, and liberty. Capital's constitution prioritizes formal, negative liberties over lived freedom, or context-specific, affirmative liberties, and concerns itself with preventing the democratic majority from exercising its collective will.[62] With the help of the current Supreme Court, business seems poised to entrench further its anti-egalitarian and antidemocratic vision. Against this background, labor's vision seems "off the wall"; yet as Jack Balkin has shown, constitutional ideas that once seemed "off-the-wall" can be put on the table "through acts of persuasion, norm contestation, and social movement activism."[63]

B. Labor's Constitutional Insurgency in the Gilded Age and New Deal Era

Today is by no means the first time that labor has found itself engaged in fundamental struggles over the shape of the political economy and its relationship to the Constitution. From the 1880s until the 1940s, a fierce battle raged over how the United States would constitute itself as a nation. The fight centered on the relationship between labor and capital in an era of stark inequality—on whether society would be governed by corporations and other wealthy stakeholders or democratically, with workers having control

---

[59] Whittington, *supra* note 17, at 134.

[60] *Id.* at 121.

[61] TUSHNET, *supra* note 19, at 1.

[62] Bowie, *supra* note 25, at 173–75 (discussing how American political structures sometimes act as "an herbicide to protect property from the 'excesses of democracy'" (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Ferrand ed., 1911))); Jedidiah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2164–68 (2018) (describing capital's vision of liberty and its opposition to distribution and robust democracy).

[63] BALKIN, *supra* note 17, at 12.

over their work lives and with democratically elected governments able to protect the interests of workers and consumers against the power of corporations. Many of the canonical cases taught in a first-year Constitutional Law course—*Lochner v. New York*,[64] *Adkins v. Children's Hospital*,[65] *NLRB v. Jones & Laughlin Steel Corp.*,[66] *West Coast Hotel Co. v. Parrish*,[67] and more—stem from this pitched battle between labor and capital.[68] Much of contemporary constitutional law doctrine that has governed since the New Deal is a product of it.

During this first Gilded Age, workers toiling under oppressive conditions and earning little compensation sought to transform their lives by joining unions, organizing strikes, and enacting legislation to set minimum working conditions. Their efforts were met with violent repression by corporations, private militias, and government police and military forces, as well as a sweeping array of hostile decisions from lower federal courts and the Supreme Court. Between 1880 and 1935, the courts issued more than 4,000 injunctions against workers' strikes and pickets, imprisoned numerous labor leaders, and struck down hundreds of redistributive local, state, and federal laws under the guise of the U.S. Constitution.[69] Throughout this period, labor movements were frequently crushed with government force (federal, state, and local), private force, or some combination of the two.[70] Yet labor continued to press its agenda, enacting new versions of statutes

---

[64] 198 U.S. 45 (1905).

[65] 261 U.S. 525 (1923).

[66] 301 U.S. 1 (1937).

[67] 300 U.S. 379 (1937).

[68] On the nineteenth- and early-twentieth-century clash between labor and capital, see generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) [hereinafter FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT], which describes courts' harsh repression of labor from the 1880s through the 1930s and the effect of that repression on labor's ideology. For an excellent and expansive history of progressive constitutional political economy arguments throughout U.S. history, see generally FISHKIN & FORBATH, *supra* note 18, which argues that past generations of progressives embraced a democracy-of-opportunity tradition rooted in the Constitution.

[69] CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 49–52, 61–67 (1985); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1133 n.78, 1185–95, 1237 (1989) [hereinafter Forbath, *Shaping American Labor*]; Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, *in* 1 VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 221, 221 (Hugh Davis Graham & Ted Robert Gurr eds., 1969).

[70] *See, e.g.*, SCOTT MARTELLE, BLOOD PASSION: THE LUDLOW MASSACRE AND CLASS WAR IN THE AMERICAN WEST 123–76 (2007) (describing the casualties that resulted from the labor battle between striking coal miners and the Colorado National Guard). *See generally* THE PULLMAN STRIKE AND THE CRISIS OF THE 1890S: ESSAYS ON LABOR AND POLITICS (Richard Schneirov, Shelton Stromquist & Nick Salvatore eds., 1999) (chronicling the crushing of the Pullman Strike through judicial and military intervention).

when the Supreme Court struck down a prior version and continuing to organize and strike despite repression.[71]

The battle raged for decades. Eventually, after years of social unrest and following the Great Depression and President Roosevelt's threat of court packing, the Court stood down and allowed workers to organize and legislatures to enact labor law and other social welfare legislation,[72] albeit far less transformative legislation than what the more radical movements had sought and with shameful exclusion of industries in which African Americans and women predominated.[73]

At the heart of this clash were at least two rival visions of constitutional political economy: One—from labor—sought a commitment to nondomination, democracy, and an equitable distribution of wealth and power. Within labor there were divisions. The more traditional craft unions sought to achieve this goal chiefly by protecting the right of male workers voluntarily to organize, bargain, and strike.[74] From the more radical elements of the movement—including the left-leaning industrial unions—there were also the demands for government to guarantee fair economic conditions and dignity for all workers; end deep racial and gender inequities; and ultimately to transform the economy into one subject to democratic control.[75] It is this latter, more radical vision that foreshadows the four intertwined elements of labor's nascent constitutional vision today.

Meanwhile, business's vision—frequently termed "Lochnerism"—defended a formal approach to liberty of contract and a narrow conception

---

[71] For example, in 1916, in an effort to prohibit exploitative child labor practices, Congress enacted the Child Labor Act, which the Court struck down as exceeding commerce power in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Congress responded by invoking its taxing authority and enacting the Child Labor Tax Law, which the Court struck down in *Bailey v. Drexel Furniture Co*., 259 U.S. 20 (1922). Congress then passed a constitutional amendment. The child labor amendment ultimately failed to garner sufficient support from states, but after the New Deal shift in Court jurisprudence, the Court overruled its earlier precedent disallowing the regulation of child labor. *See* FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, *supra* note 68, at 142–46 (describing labor's persistent law reform efforts to curb judicial injunctions of strikes).

[72] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 19 (1996); BARRY FRIEDMAN, THE WILL OF THE PEOPLE 217–29 (2009); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82–162 (1995); SHESOL, *supra* note 30, at 429–60.

[73] *See infra* notes 75, 220–227.

[74] *See* Forbath, *Shaping American Labor*, *supra* note 69, at 1232; VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 3–5 (1993).

[75] NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 30–35, 69–85 (2002) [hereinafter LICHTENSTEIN, STATE OF THE UNION]. On earlier, more radical components of the labor movement, such as the Knights of Labor and the Industrial Workers of the World, see ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY (2014), and DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872 (1967).

of congressional authority that disabled democratic institutions from eradicating private domination or ensuring equitable distribution of wealth and resources; at the same time, business used the power of the state to repress egalitarian worker movements and ratify market-driven distributions of wealth.[76] To be sure, like today, neither labor nor business was monolithic or internally united in its goals. Within the labor movement, many craft unions sought to protect white, male privilege and pursued the right to engage only in private collective action, without broader social transformation.[77] Meanwhile, some employers accepted the idea of workplace democracy and supported protective legislation, particularly when directed at women and children, while southern landowners were still fiercely wedded to a system of labor not far removed from chattel slavery. Still, the divide between labor and capital was deep and pronounced.

During this period, labor activists engaged in what James Pope has termed "constitutional insurgency,"[78] or, in Robert Cover's terms, in a "jurisgenerative" process in which they contested reigning constitutional meaning.[79] They advanced their own interpretation of the Constitution, asserting that they had a fundamental right to strike and picket, and ultimately to control the conditions of their work and the fruits of their labor, despite court doctrine to the contrary. They invoked the First and Thirteenth Amendments and more general notions of freedom and democratic government, merging big-C and small-c constitutional arguments when they engaged in collective activity that violated federal and state law and when they disobeyed court injunctions.[80] And they pressed the idea that democracy could not be limited to the franchise but rather required the extension of democratic rights into the workplace and the economy, as well as limits on judicial power.[81]

---

[76] *See* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 5 (1999); William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1120–27 (2011); Pope, *Labor's Constitution of Freedom*, *supra* note 24, at 941; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 12–13 (2002) [hereinafter Pope, *The Thirteenth Amendment Versus the Commerce Clause*].

[77] *See* LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 39, 66–69 (comparing the craft approach to the industrial approach).

[78] Pope, *Labor's Constitution of Freedom*, *supra* note 24, at 943–44.

[79] *See* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 25 (1983).

[80] James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 946 (1999).

[81] Nelson Lichtenstein & Howell John Harris, *Introduction: A Century of Industrial Democracy in America*, *in* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 1, 4 (Nelson Lichtenstein & Howell John Harris eds., 1993); Kate Andrias, *Labour and Democracy*, *in* OXFORD HANDBOOK OF THE LAW OF WORK (Guy Davidov, Gillian Lester & Brian Langille eds., forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575059 [https://perma.cc/WHR2-WV7W].

Labor sought to instantiate its constitutional vision through legislation and regulation. Both the craft unions of the American Federation of Labor (AFL) and the industrial unions that would later become the Congress of Industrial Organization (CIO) waged a multidecade campaign to restrain judicial power and create a system of industrial democracy.[82] They first won the enactment of the Norris LaGuardia Act in 1932, which limited federal courts' ability to enjoin labor action, and then the NLRA in 1935, which protected "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities."[83]

Congress made clear that the NLRA was intended to "protect[] the exercise by workers of full freedom of association."[84] Senator Robert Wagner, the author of the bill, emphasized the need for genuine equality between employers and employees to enable free choice.[85] This, in turn, required protecting workers' ability to engage in concerted activity and eliminating the atmosphere of authoritarianism and coercion that defined the workplace.[86] Many in labor went further, defending the statute using a constitutional theory rooted in the Reconstruction Amendments and the idea of free labor and equality as well as the Republican Government Clause.[87] And in 1937, the Supreme Court upheld the NLRA, retreating from its *Lochner*-era commitment to formal liberty of contract and its narrow view of congressional power.[88] Although the Court rested on a Commerce Clause theory, it gestured in the direction of labor's constitutional vision when it acknowledged that the rights to organize and bargain collectively were "fundamental."[89]

---

[82] Forbath, *Shaping American Labor*, *supra* note 69, at 1147–65, 1202–33; LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 7–8, 30–38.

[83] National Labor Relations Act, 29 U.S.C. §§ 151–69.

[84] *Id.*

[85] *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1445 (1993).

[86] *See id.*; 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 131–38 (1974). For a discussion on Wagner's conception of structural coercion and its ultimate demise, see Daniel Judt, Coercion Becomes Contingent: Labor Law and the Doctrine of Structural Coercion, 1937–1953 (unpublished manuscript) (on file with *Northwestern University Law Review*).

[87] Pope, *Labor's Constitution of Freedom*, *supra* note 24, at 942–43; Pope, *The Thirteenth Amendment Versus the Commerce Clause*, *supra* note 76, at 14, 102.

[88] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937). *But see* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 299, 311–12 (1978) (arguing that Chief Justice Charles E. Hughes preserved the freedom of contract ideal by reading the NLRA to have limited reach in abolishing private ordering of the workplace).

[89] *Jones & Laughlin Steel Corp.*, 301 U.S. at 33.

The NLRA, along with other New Deal statutes, became part of the small-c constitution or the constitutional order, "transform[ing] the American idea of economic freedom and its relationship to political freedom."[90] Taking advantage of the new statute, from 1936 to 1939, workers across the country organized at record levels while engaging in wide-ranging collective action to transform their workplaces and the economy, including some 583 sit-down strikes.[91] During this period, the CIO unions also developed broader ambitions to create a multiracial democracy. They embarked on a massive effort to organize Black workers in the South, as well as white-collar and industrial northern labor, while also seeking to create a system of constitutional governance in which workers would bargain over the shape of the political economy and in which the state would guarantee robust social welfare rights.[92] For a brief period in the 1930s and '40s, industrial unions made significant progress toward those ends.[93]

Labor's constitutional vision gained toeholds in the doctrine beyond the interpretation of the NLRA as well. As early as 1911, the Supreme Court recognized that the Thirteenth Amendment was not limited to chattel slavery but rather was intended "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."[94] In 1944, in *Pollock v. Williams*, the Supreme Court confirmed that one "undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[95] The Court reasoned that the

---

[90] *See* Luke Norris, *The Workers' Constitution*, 87 FORDHAM L. REV. 1459, 1462, 1502 (2019) (arguing that the NLRA, the Fair Labor Standards Act, and the Social Security Act are part of the small-c constitution and form a workers' constitution).

[91] Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 46 (2006) [hereinafter Pope, *Worker Lawmaking*].

[92] LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 55–66, 76–82, 100–05. According to some historians, Operation Dixie failed in part due to internal problems, including a desire of CIO leadership to defeat leftists within the unions and a failure to sufficiently engage women and Black organizers. MICHAEL GOLDFIELD, THE SOUTHERN KEY: CLASS, RACE, AND RADICALISM IN THE 1930S AND 1940S 322–30 (2020).

[93] LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 55–66, 76–82, 100–05; NELSON LICHTENSTEIN, A CONTEST OF IDEAS 79–80 (2013) [hereinafter LICHTENSTEIN, CONTEST OF IDEAS]; Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 693–706 (2019) [hereinafter Andrias, *Fair Labor Standards Act*].

[94] Bailey v. Alabama, 219 U.S. 219, 241 (1911).

[95] 322 U.S. 4, 18 (1944); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1478–79 (2010) (discussing *Pollock* and the lack of judicial standards for assessing labor rights claims under the Thirteenth Amendment); Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576–77 (1951) (discussing the applicability of the Thirteenth Amendment to strikers).

Thirteenth Amendment prohibits slavery-like institutions such as debt peonage; more broadly, it bars the creation of an underclass of workers who are compelled to labor under poor working conditions and low wages and who thereby drag conditions down for other laborers as well.[96] And in 1940, in *Thornhill v. Alabama*, the Court declared that labor speech, because it is "indispensable to the effective and intelligent use of the processes of popular government," was specially entitled to constitutional protection as it struck down a state law that criminalized labor picketing.[97] In a similar vein, in *Hague v. CIO*, the Court reasoned that the "freedom to disseminate information concerning the provisions of the [NLRA] . . . is a privilege or immunity of a citizen of the United States secured against state abridgement by § 1 of the Fourteenth Amendment."[98]

C. Capital's Constitution Endures

Despite these few instances in which the Court affirmed elements of labor's constitutional vision, by the late 1940s neither labor's doctrinal arguments nor the more radical unions' broader vision for a transformed political economy and an inclusive demos had prevailed. As soon as Congress enacted the NLRA, business mobilized against it and courts began to cut back on its transformative potential.[99] Then, in 1947, amidst anti-union backlash, Congress enacted the Taft–Hartley Act, which curtailed union rights and protections for collective action while expressly protecting employers' right to campaign against unionization.[100] By the 1950s, in the face of stiff business resistance and divisions within the labor movement, the United States had abandoned its fledgling experiments with labor's broader constitutional vision and had settled on a decentralized system of labor law characterized by firm-centered collective bargaining contracts, primarily in industries dominated by white men.[101]

---

[96] 322 U.S. at 18.

[97] 310 U.S. 88, 102–03 (1940).

[98] 307 U.S. 496, 512 (1939); *see also* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 32 (2007) (suggesting that the Court's decision not to rely on the First Amendment was a "doctrinal choice" that "lay in the perception that a more specific ruling based on labor rights was less of a departure, less controversial, than a broader First Amendment ruling").

[99] For a discussion of how business leaders mobilized against labor and social welfare rights, see generally KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL (2009). On the role of courts, see generally Klare, *supra* note 88.

[100] For further discussion of how employers campaign against unionization, see *infra* Section III.A.

[101] *See* LICHTENSTEIN, CONTEST OF IDEAS, *supra* note 93, at 79; *see also* Andrias, *New Labor Law*, *supra* note 15, at 13–20 (analyzing the role the NLRA and the Taft–Hartley Act played in cementing this system); PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 24–25 (2008) (noting the "critical hole" left in the NLRA by its

Over the course of the 1960s and '70s, unions became more inclusive of minority and women workers and organized large numbers of public-sector employees as well as some key parts of the service sector.[102] They were also instrumental in helping enact a host of social welfare legislation.[103] Yet these gains were not enough to stave off the rise of neoliberalism and economic restructuring that became hegemonic by the 1980s. Corporations moved work overseas and to the nonunion South; they vastly increased their use of contingent workers, including part-time and temporary workers and independent contractors; and hostility to unions became overt and routine.[104] The courts largely permitted these tactics,[105] even permitting the use of permanent replacements, the National Guard, and state police against

exclusion of antidiscrimination measures). On the failure to achieve freedom without subordination more generally, see RANA, *supra* note 24, at 3–4.

[102] LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 181–85, 197–200; *see also* LEON FINK & BRIAN GREENBERG, UPHEAVAL IN THE QUIET ZONE 112–28 (1989) (detailing the history of the health care union and its connection to the civil rights movement); JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 193–95 (2004) (documenting the creation of new state public sector bargaining laws and the rise of public sector unions).

[103] *See* LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 185–87, 192, 201–03 (discussing labor's role in persuading Congress to enact the Civil Rights Act and other legislation but noting internal divisions within labor and its inability to advance labor law reform); David Rosner & Gerald Markowitz, *A Short History of Occupational Safety and Health in the United States*, 110 AM. J. PUB. HEALTH 622, 626 (2020) (describing unions' role in mobilizing for and passing the Occupational Safety and Health Act).

[104] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 167–74 (2014); JAMES C. COBB, THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT, 1936–90, at 96–121, 209–28 (1993); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1527 n.1 (1996); JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA 7, 360–62 (2011); JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 362–64 (2010); JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 86–88 (2014).

[105] *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679–87 (1981) (holding that an employer had no duty to bargain over its decision to terminate a customer contract and thereby to eliminate jobs, because "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision"); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273–74 (1965) (holding that "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice"); *see also* Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 76, 101–04 (1993) (criticizing the Court's belief that "the interests of workers protected by the NLRA would ultimately be served by preserving the right of owners to make economic decisions"); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 90–91 (1988) (arguing that the *First National Maintenance* decision "signified a major retreat from the ideal of industrial democracy and shared decision making between management and labor over the terms and conditions of employment").

striking workers who sought to resist concessionary contracts.[106] Workers did not abandon the efforts for democracy at work, but their successes were few and far between.

Meanwhile, as the next Parts will underscore, the celebrated constitutional settlement achieved during the New Deal was at best a limited victory for labor.[107] Favorably for labor, the Court rejected *Lochner*'s protection of the liberty of contract and embraced a system of bifurcated review in which economic legislation would receive great deference from the courts, while legislation burdening minorities, undermining democracy, or interfering with rights protected by the Bill of Rights would merit greater review.[108] The Court also adopted a more expansive understanding of congressional power, allowing the core labor and employment statutes to survive judicial review.[109]

Yet, the settlement was only a partial and temporary victory for labor. As scholars have demonstrated, judicial enforcement of the rights contained within footnote four of *United States v. Carolene Products Co.* was almost always selective, perhaps inevitably so.[110] During the Warren Court, government was free to enact economic legislation benefitting workers, and the use of heightened scrutiny for legislation burdening minorities helped eradicate laws that expressly discriminated on the basis of race and, in subsequent years, gender.[111] Judges also, for a time, recognized rights of privacy and personal intimacy.[112] But even before the Supreme Court's recent far-right turn, judges showed hostility to protecting collective labor

---

[106] *See* ROSENFELD, *supra* note 104, at 96.

[107] For an excellent exploration of how the modern conception of civil rights emerged from labor radicalism but ultimately backfired, see LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 13 (2016).

[108] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[109] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 46–47 (1937) (upholding the Wagner Act under Congress's Commerce Power); United States v. Darby, 312 U.S. 100, 115 (1941) (upholding the Fair Labor Standards Act under the same).

[110] *See* Derrick A. Bell Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 3 (1991).

[111] *E.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding Virginia's anti-miscegenation statute unconstitutional); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (striking down a U.S. military policy that treated the spouses of women and men Air Force members differently based on "administrative convenience").

[112] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing a woman's right to an abortion grounded in the right of privacy); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating state laws criminalizing sexual activity between members of the same sex as unconstitutional); Obergefell v. Hodges, 576 U.S. 644, 670–72 (2015) (recognizing the right of same-sex couples to marry). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (overturning *Roe* by holding that the "Fourteenth Amendment does not protect the right to an abortion").

rights and more generally to recognizing rights with redistributive impact,[113] and used the First Amendment to safeguard business interests and to strike down economic legislation.[114] As Laura Weinrib has argued, "the bargain at the foundation of our modern constitutional order backfired on its pro-labor architects."[115]

Indeed, although the "Lochnerization" of the First Amendment is often dated to the emergence of the corporate speech doctrine in the 1970s, it actually first emerged against labor just after the New Deal.[116] Within just a few years of the fall of *Lochner*, employers reframed their liberty of contract arguments as First Amendment arguments, contending that the NLRB's efforts to enable workers to organize free from coercion violated employers' rights of free speech.[117] The Supreme Court accepted a version of that argument in *NLRB v. Virginia Electric & Power Co.* It drew a line between permissible employer advocacy and impermissible employer threats, but failed to recognize the coercion inherent in employer advocacy aimed at subordinate and dependent employees who are employed at will.[118] In 1947, when Congress enacted the Taft–Hartley Act, it codified that position,

[113] *See, e.g.*, Andrias, *supra* note 31, at 10–15 (describing the development of constitutional doctrine during the twentieth century that "reinforced and exacerbated the decline in workers' collective power"); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1071 (1987) [hereinafter Pope, *Labor and the Constitution*] ("During the 1950s, the Supreme Court all but withdrew constitutional protection from labor picketing and stood by while a host of lower courts resolved the 'momentous question' of the constitutional right to strike by summarily denying its existence.").

[114] *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–18 (2016).

[115] Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV. 1857, 1872 (2021) [hereinafter Weinrib, *Breaking the Cycle*]; *see also* WEINRIB, *supra* note 107, at 13.

[116] *See* Kessler, *supra* note 114, at 1917–18 nn.5–8 (collecting sources published from 2011 to 2016 that suggest the First Amendment has recently been "hijacked" by antidemocratic, economically libertarian interests and showing that the developments actually date to the 1930s and '40s). For scholarship examining business's use of the First Amendment to reinvigorate Lochnerism in recent years, see Jedediah Britton-Purdy, *The Bosses' Constitution*, NATION (Sept. 12, 2018), https://www.thenation.com/article/archive/the-bosses-constitution/ [https://perma.cc/D3ZU-D3Q8]; Purdy, *Neoliberal Constitutionalism*, *supra* note 21, at 197–203; Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323–24 (2016); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179–80 (2018); Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 700–01, 706 (2014); and Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135.

[117] *See* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2421–25, 2421 n.19 (2003) [hereinafter Andrias, *Robust Public Debate*]; *see also* WEINRIB, *supra* note 107 (tracing the deradicalization of the First Amendment); Judt, *supra* note 86 (showing that the rollback started at the Board, not the Court).

[118] *See* 314 U.S. at 479–80 (remanding for reconsideration by the agency).

adding a provision to the statute that protects employers' right to campaign against unionization short of threats or promises of benefits.[119]

In subsequent years, the Board and the Court did maintain important protections for employees' core rights to organize and engage in concerted activity. For example, under the longstanding doctrine established by *Republican Aviation Corp. v. NLRB* in 1945, workers cannot be prohibited from talking about the union or from soliciting union support in nonwork areas of the workplace unless necessary "to maintain production or discipline."[120] They can pass out leaflets at work while off duty; wear union insignia in most circumstances; criticize their employers' labor practices; and, with their coworkers, demand changes about their working conditions.

But over time, the Court whittled away the NLRA's more radical potential for workplace democracy by repeatedly favoring employers' speech and property rights over workers' rights to organize, bargain, and strike.[121] Under longstanding doctrine, employers control speech in the workplace: They may communicate their anti-union views, short of threats or promises, to workers whenever they want and require that employees listen as a condition of continued employment.[122] In advancing anti-union messages, employers can use company email systems, attach notes to paychecks, and engage in loudspeaker announcements; they can require workers to attend one-on-one meetings and mandatory group meetings at which anti-union messages are conveyed; they can speak without limit, and unions have no right of rebuttal.[123] And, despite the statutory protection for the right to organize, they can assert their property rights to limit the access of union organizers and sometimes their own employees. Most notably, in *Lechmere, Inc. v. NLRB*, decided in 1992, the Supreme Court held that union organizers have no right to speak to employees on company property except in very rare cases.[124] Meanwhile, the Board and Court have crafted or approved a host of restrictions on how workers can engage in collective action—including prohibitions on sit-down strikes, secondary boycotts, intermittent strikes, and picketing to induce recognition that stand in

---

[119] *See* 29 U.S.C. § 158(c).

[120] 324 U.S. 793, 794, 803 n.10 (1945).

[121] *See* Klare, *supra* note 88, at 293–310; Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 306–08 (1994).

[122] *See* Andrias, *Robust Public Debate*, *supra* note 117, at 2433–43; Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516–23 (1993).

[123] *See* Andrias, *Robust Public Debate*, *supra* note 117, at 2433–43.

[124] *See* 502 U.S. 527, 537 (1992); *see also* Estlund, *supra* note 121, at 306–08 (critiquing the Court's reasoning in *Lechmere* for reflecting "both an impoverished conception of section 7 rights and an overbroad, undifferentiated vision of employer property rights").

significant tension with other areas of First Amendment doctrine[125]—while allowing employers to permanently replace workers who engage in economic strikes. In establishing or upholding these rules, the Court interpreted the NLRA, rather than the Constitution, but it often infused its statutory reasoning with constitutional values or based its reasoning in part on principles of constitutional avoidance.[126]

As the following Parts will show, the New Deal constitutional settlement failed labor in other ways as well: The Court maintained the state action distinction that denied workers constitutional protection from private domination and limited congressional ability to redress private civil rights violations.[127] Neither the Court nor Congress, for the most part, embraced guarantees of socioeconomic rights, or, in early-twentieth-century terms, "bread for all, and roses too."[128] Individual rights continued to be privileged over workers' collective voice. Moreover, the Court adopted a narrow, formalistic approach to equal protection that asks only whether state actors *intentionally* discriminated on the basis of race or gender, rendering statutory exclusions and labor market hierarchies constitutionally permissible.[129] Finally, despite the "switch-in-time," the Court never formally repudiated its private nondelegation and due process decisions that make it difficult to require employers to bargain with unions on a sectoral basis.[130]

---

[125] For a discussion on the tension between labor speech doctrine and other areas of First Amendment law, see Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2632–47 (2011). *See also* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2076–84 (2018) (arguing that the First Amendment should protect labor rights). For an early case narrowing the right to strike, see *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), which holds that employers may discharge employees who engage in sit-down strikes.

[126] This was true, as well, when the Court ruled in favor of unions. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 583–85 (1988) (interpreting the NLRA to protect unions' handbilling); *see also* NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 67–68 (1964) (discussing the constitutional principles underlying the NLRA in narrowing the secondary boycott provisions).

[127] *See* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1246–47 (2020) [hereinafter Lakier, *The First Amendment's Real* Lochner *Problem*] (arguing that the failure of contemporary free speech doctrine is that it relies upon an almost wholly negative notion of freedom of speech).

[128] National Women's Trade Union League, *Training for Freedom*, 8 LIFE & LAB.: A MONTHLY MAG., Sept. 1918, at 189.

[129] *See infra* note 228 and accompanying text.

[130] The early New Deal statutes to this end were deeply flawed, in part because they lacked penalties for corporations that excluded unions from decision-making, but the reasoning on which they were struck down has been understood to limit the possibility of more effective and democratic models as well. *See* Andrias, *Fair Labor Standards Act*, *supra* note 93, at 657–58. It is worth noting, however, that although the Court never overruled *Carter Coal*, it has rarely invoked it. *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 980 (2014).

II. LABOR'S CONSTITUTION, TODAY

Today, a constitutional clash is emerging anew between labor and capital. The clash is nascent, and far less violent than that of the early twentieth century, but it surfaces many of the same issues. Worker movements and allied government officials are once again advancing an alternative constitutional vision, one that is more democratic and egalitarian. Though labor only intermittently articulates its efforts in big-C constitutional terms, its effort is fundamentally constitutional: it aims to change our nation's fundamental commitments, structures of government, and conceptions of rights. Importantly, it does so through protests, strikes, legislation, and administration, in the workplace and the public sphere, rarely pressing its constitutional vision in courts. And for good reason: In the context of the U.S. system of judicial supremacy and the conservative Supreme Court, bringing constitutional arguments to courts has significant risks.[131]

In this Part, I detail four ways that labor seeks to redefine our constitutional order: by making the workplace more democratic through the right to organize and to strike thereby extending constitutional norms into the private sphere; by guaranteeing socioeconomic rights of workers; by expanding the definition of worker and including those historically excluded on equal terms; and by transforming the administrative state into a responsive, democratic force with greater power over the economy.

A. Democracy in the Workplace

Most contemporary U.S. workplaces, particularly low-wage workplaces, are decidedly autocratic.[132] Workers have little influence over their wages, their schedules, their benefits, or their patterns of work; are often under surveillance or electronic monitoring, sometimes unable to take bathroom breaks; and have little ability to exit for a better alternative. Although the NLRA purports to enable workers to collectively change these conditions by protecting the right to organize, strike, and bargain, these rights are extraordinarily difficult to exercise in practice.[133]

---

[131] For further discussion of why labor eschews courts and seeks to limit judicial supremacy, see *infra* Section IV.B. *See also* Andrias, *supra* note 32, at 1592–95 (exploring reasons why labor avoids express constitutional arguments and shuns courts). As James Pope has pointed out in conversation, it is also possible that the abandonment of constitutional argument in courts can be explained by the labor movement's rightward turn in the middle of the twentieth century.

[132] ANDERSON, *supra* note 1, xix, 63.

[133] For a discussion of the failures of U.S. labor law, see, for example, KATE ANDRIAS & BRISHEN ROGERS, ROOSEVELT INST., REBUILDING WORKER VOICE IN TODAY'S ECONOMY (2018),

With renewed energy, labor seeks to transform this reality. It seeks to replace authoritarian control at work with a system of greater industrial democracy—one in which democratic norms are extended into the workplace such that workers have a voice in how the institution and their daily lives operate. Labor and its allies seek to achieve these goals primarily through winning rights to unionize, bargain, and strike, though occasionally also through new efforts at worker ownership and rights of participation on corporate boards.[134] The effort spans a wide range of industries and types of labor, from nurses and Google engineers to Amazon warehouse workers, autoworkers, and graduate students.[135]

Legislatively, labor and its congressional allies have urged Congress to enact the PRO Act, which would amend the NLRA to make it easier for workers to win union elections, bargain, and strike.[136] With its sponsors expressly invoking the First Amendment, the PRO Act would vastly strengthen workers' rights to organize, picket, and strike. It would prohibit "captive audience" meetings during which employers require employees to listen to anti-union messages as a condition of employment; enable first contract mediation and arbitration; allow secondary boycotts, in which workers picket or exercise economic pressure over employers other than their own; prohibit employers' use of permanent replacements and lockouts; and allow workers to engage in intermittent strikes.[137] In short, the PRO Act would help reduce autocracy at work, enabling workers to exercise power in determining workplace conditions. Some unions would go further; they urge

https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf [https://perma.cc/4C54-CU3J], which describes the failure of labor law to protect workers' rights, and Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983), which describes "an increasing appreciation that American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose."

[134] For a discussion of the experimentation with co-ops, see LUCERO HERRERA, BRIAN JUSTIE, TIA KOONSE & SABA WAHEED, UCLA LAB. CTR., WORKER OWNERSHIP, COVID-19, AND THE FUTURE OF THE GIG ECONOMY 27–28 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/10/UCLA_coop_report_Final-1.pdf [https://perma.cc/5PAJ-7DSZ], and Mary Josephs, *Who Says Unions and ESOPs Don't Mingle?*, FORBES (Dec. 20, 2022), https://www.forbes.com/sites/maryjosephs/2022/12/20/who-says-unions-and-esops-dont-mingle/?sh=4d8115663927 [https://perma.cc/Y4M4-W654]. *See generally* BERNARD E. HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY (2023) (exploring virtues of cooperatives and offering a political theory of "coöperism").

[135] *See supra* notes 4–13 and accompanying text.

[136] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

[137] *Id.*

a new system of sectoral bargaining or "unions for all,"[138] and insist on a fundamental right to strike.[139]

1. The Right to Organize

Although there is little chance the PRO Act will be enacted in the near term, and labor law preemption doctrine makes it impossible to enact similar legislation at the state level,[140] workers are increasingly asserting the rights it would protect with success. In public opinion polls, support for unions is higher than it has been in decades, with more than seventy percent of Americans supporting unions.[141] When workers at two Starbucks stores in Buffalo, New York won union elections at the end of 2021—a first at the intensely anti-union corporate chain—they captured the attention of news outlets across the country, who declared the event a "watershed."[142] According to the workers, their primary concerns were not only dangerous COVID-19 conditions and economic terms but also the desire for a "seat at the table" to "democratically" decide working conditions.[143] Since the victories in Buffalo, and in the face of an intense backlash by Starbucks, employees in over 300 stores have won union elections, organizing with the same labor group as the New York workers: Workers United, affiliated with the Service Employees International Union (SEIU).[144] Workers have also

[138] *See generally* Andrias, *New Labor Law*, *supra* note 15 (describing the labor movement's effort to transform labor law to include union rights for all and sectoral or social bargaining); Andrew Wallender, *SEIU Debuts 'Unions for All' Campaign, Calls for New Labor Laws*, BLOOMBERG L. (Aug. 21, 2019), https://www.bloomberglaw.com/product/blaw/bloombergterminalnews/bloomberg-terminal-news/PWLLM06JIJUP [https//perma.cc/PW3M-CVRX] (explaining the Service Employees International Union's launch of the "Unions for All" campaign).

[139] UAW (@UAW), X (Sept. 28, 2023, 8:01 AM), https://twitter.com/UAW/status/1707364996294844803 [https://www.perma.cc/M9AG-9VEL] ("Striking to fight for a better life is a sacred right.").

[140] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

[141] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/TUP4-VBX4]; *Working People Want a Voice at Work*, ECON. POL'Y INST. (Apr. 21, 2021), https://www.epi.org/publication/working-people-want-a-voice/ [https://perma.cc/T4ZW-BPQ7].

[142] *See* Joanna Slater & Greg Jaffe, *Starbucks Workers in Buffalo Win Watershed Union Vote*, WASH. POST (Dec. 9, 2021), https://www.washingtonpost.com/nation/2021/12/09/starbucks-union-buffalo-vote/ [https://perma.cc/9VGZ-KCUF]; *see also* Noam Scheiber, *Union Wins Election at a Second Buffalo-Area Starbucks.*, N.Y. TIMES (Jan. 10, 2022), https://www.nytimes.com/2022/01/10/business/starbucks-union-election-buffalo.html [https://perma.cc/6VJW-NC2K] (describing the union victory in Buffalo and subsequent filings for union elections by workers at other Starbucks stores across the country).

[143] Errol Schweizer, *Why Are Starbucks Workers Unionizing?*, FORBES (Oct. 26, 2021), https://www.forbes.com/sites/errolschweizer/2021/10/26/why-are-starbucks-workers-unionizing/?sh=32b60e396151 [https://perma.cc/PNC8-M5JM].

[144] Matt Bruenig, *The Starbucks Union Has Now Won 300 Elections*, PEOPLE'S POL'Y PROJECT (May 11, 2023), https://www.peoplespolicyproject.org/2023/05/11/the-starbucks-union-has-now-won-300-elections/ [https://perma.cc/UG6R-GYWG].

recently organized, or are attempting to organize, at a range of other institutions, including Amazon and Apple; media outlets such as the *New York Times*, the *New Yorker*, and *Vox*; universities, including Columbia, Harvard, Bates College, and the University of Pittsburgh; a host of health care institutions; and tech companies, including Google's Alphabet contractor.[145] Remarkably, Amazon workers in Staten Island won a union election despite an extraordinarily aggressive anti-union campaign; they did so without affiliating with any national union, instead forming their own, Amazon Labor Union.[146]

During all of these campaigns, workers demand a collective voice at work and they assert fundamental speech and association rights: the right to talk about the union at work, to wear union insignia, to collectively demand changes in their working conditions, and to use company email systems and company spaces to engage in this speech and associational activity, with the ultimate goals of greater freedom, equality, and democracy in their workplaces. They seek to bring constitutional principles into the putatively private sphere of the workplace.

During the Biden Administration, the NLRB has begun to take up these claims for free speech and association rights at work. Soon after being appointed, the General Counsel of the Board announced her intention to "vigorously protect the rights of workers to freely associate and act collectively to improve their wages and working conditions."[147] She issued a roadmap outlining doctrines the agency would reconsider, focusing on rules that limit workers' speech and organizing rights. These include: the legality of employer handbook rules that may chill organizing activity; the permissibility of employer confidentiality provisions that limit workers' ability to talk about working conditions; whether employees can use company email systems for organizing activity; and whether majority

[145] Kenneth Quinnell & Aaron Gallant, *Vote Union Yes: Worker Wins*, AFL-CIO (Oct. 25, 2021), https://aflcio.org/2021/10/25/vote-union-yes-worker-wins [https://perma.cc/89GT-PQ4V]; German Lopez, *I Was Skeptical of Unions. Then I Joined One*., VOX (Aug. 19, 2019), https://www.vox.com/policy-and-politics/2019/8/19/20727283/unions-good-income-inequality-wealth [https://perma.cc/2C9R-J7Z8]; *Worker Wins: Successful Union Drives in Fall 2021*, UNIONTRACK (Jan. 21, 2022), https://uniontrack.com/blog/union-drives-fall-2021 [https://perma.cc/85N9-RNR8]; Josh Eidelson, *Google Fiber Staff Seek Union Vote, Contract Talks with Alphabet*, BLOOMBERG L. (Jan. 4, 2022), https://news.bloomberglaw.com/daily-labor-report/google-fiber-staff-seek-union-vote-contract-talks-with-alphabet [https://perma.cc/WUB5-SXDQ].

[146] Alina Selyukh & Giulia Heyward, *Amazon Loses Bid to Overturn Historic Union Win at Staten Island Warehouse*, NPR (Jan. 11, 2023, 8:16 PM), https://www.npr.org/2023/01/11/1125205641/amazon-warehouse-union-staten-island [https://perma.cc/EZ57-6QUW].

[147] *General Counsel Jennifer Abruzzo Releases Memorandum Presenting Issue Priorities*, NLRB (Aug. 12, 2021), https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue [https://perma.cc/5LAF-QF7Z].

support for unionization can be demonstrated through signing cards instead of through an election when employers violate the law.[148] She also urged the Board to limit employers' use of electronic surveillance and algorithmic monitoring tools that might dissuade workers from engaging in concerted activity.[149] And she has taken up workers' claims that captive audience meetings—meetings at which employers force workers to listen to anti-union messages—are per se illegal under the NLRA,[150] arguing that they "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech."[151] In short, rather than treating free speech rules formalistically, she has urged the Board to consider "'inequality of bargaining power' between individual employees and their employers as well as employees' economic dependence on their employers."[152]

---

[148] *Id.*

[149] NLRB Gen. Couns. Mem. 23-02, Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights 1 (Oct. 31, 2022).

[150] *See, e.g.*, Jeffrey Dastin, *Amazon's Captive Staff Meetings on Unions Illegal, Labor Board Official Finds*, REUTERS (May 6, 2022), https://www.reuters.com/business/retail-consumer/amazons-captive-staff-meetings-unions-illegal-us-labor-director-finds-2022-05-06/ [https://perma.cc/C4SA-TTG3] ("Last month, the NLRB's top lawyer, Jennifer Abruzzo, asked the board to ban businesses from making workers attend anti-union meetings, calling them inconsistent with employees' freedom of choice. In a future case, Abruzzo said she would ask the board to overturn the precedent that the meetings are legal."); NLRB Counsel for the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision at 28, 33, Amazon.com Services, LLC, Case No. 29-CA-280153 (NLRB Mar. 31 2023) (arguing that the Board should find captive-audience meetings per se illegal). Several states have recently enacted statutes prohibiting captive audience meetings on any political or religious matters. Chris Marr, *Hochul Signs New York Law Banning Mandatory Anti-Union Meetings*, BLOOMBERG L. (Sept. 6, 2023, 9:59 AM), https://news.bloomberglaw.com/daily-labor-report/hochul-signs-new-york-law-banning-mandatory-anti-union-meetings [https://perma.cc/8RWN-FW6L] ("[New York] joins Connecticut, Maine, Minnesota, and Oregon in banning what labor unions commonly call 'captive audience' meetings, which employers use as an opportunity to discourage employees from joining or forming unions.").

[151] NLRB Gen. Couns. Mem. 22-042, The Right to Refrain from Captive Audience and Other Mandatory Meetings 1 (Apr. 7, 2022).

[152] *Id.* (citations omitted); *see also* Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 34–35, Cemex Constr. Materials Pac., LLC, Case No. 28-CA 230115 (NLRB Apr. 11, 2022) (arguing that the Board should place the burden on *employers* to prove that threats of plant closure in light of unionization were *not* disseminated to the workforce, since workers may be hesitant to testify due to economic dependence on their employers); *cf.* Lakier, *Imagining an Antisubordinating First Amendment*, *supra* note 31 (offering an antisubordination theory of the First Amendment). Several states, including Connecticut, Maine, Minnesota, New York, and Oregon, have also recently enacted bans on captive-audience meetings or have imposed limits on them. Seth Kaufman & Henry Thomson-Smith, *New York, Maine and Minnesota Ban Captive Audience Meetings*, SOC'Y FOR HUM. RES. MGMT. (Aug. 21, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/banning-captive-audience-meetings.aspx [https://perma.cc/9UKX-FWEG].

Meanwhile, the General Counsel has supported workers' efforts to gain protection for their speech about social justice issues. In one case, the General Counsel is prosecuting Whole Foods for terminating a worker for wearing Black Lives Matter insignia.[153] She argued that seeking racial justice in the workplace is protected activity and that workers have the right to say, "We're about a broader movement, but that broader movement flows into our smaller workplace universe."[154]

The full Board has begun to embrace the free speech and democracy arguments advanced by labor and the General Counsel. In an August 2022 decision, *Tesla, Inc.*, the Board overruled a Trump-era precedent and held that any employer attempts to restrict display of union insignia are presumptively unlawful absent special circumstances that justify such a restriction. In so ruling, the Board noted that wearing union insignia, whether a button or a t-shirt, is a critical form of protected communication.[155] In December 2022, the Board rejected the rule that property owners can prohibit off-duty contract workers from entering the property to engage in union-related communication or concerted action, without a legitimate business reason.[156] In so doing, the Board emphasized that the workplace is the best place for workers to communicate with one another about their collective goals and that "the fundamental tenet of property law that property owners have a right to exclude does not exist in a legal vacuum where no other countervailing rights exist."[157] The Board also recently overruled the Trump-era doctrine that made it much easier for employers to establish facially neutral work rules, such as nondisparagement, nonsolicitation, and social media policies, that have the effect of discouraging concerted action among employees.[158] It also expanded the circumstances when worker activity

[153] Whole Foods Mkts. Inc., No. 01-CA-263079 (NLRB July 15, 2020), https://www.nlrb.gov/case/01-CA-263079 [https://perma.cc/PQF6-EMRE]; *see also* Josh Eidelson, *Whole Foods' Battle Against Black Lives Matter Masks Has Much Higher Stakes*, BLOOMBERG (Aug. 15, 2022), https://www.bloomberg.com/news/features/2022-08-15/biden-lawyer-battles-whole-foods-over-black-lives-matter-masks [https://perma.cc/FWP9-J3CT] (exploring the implications of the legal battle between Whole Foods and the NLRB).

[154] *Id.* The administrative law judge hearing the case rejected the argument, *Whole Foods Markets, Inc.*, JD(SF)-39-23 (A.L.J. Dec. 20, 2023); the case is now under appeal with the NLRB. The NLRB also recently updated its standard on the protection of profane speech that takes place during protected activity, protecting such speech even when it contains controversial statements. *See Board Returns to Traditional Standards for Evaluating Employee Misconduct During Protected Concerted Activity*, NLRB (May 1, 2023), https://www.nlrb.gov/news-outreach/news-story/board-returns-to-traditional-standards-for-evaluating-employee-misconduct [https://perma.cc/Y4Q9-TDXZ].

[155] Tesla, Inc., 370 N.L.R.B. No. 88, at 6–7, 15 (Aug. 29, 2021) (overruling Wal-Mart Stores, Inc., 368 N.L.R.B. No. 146 (Dec. 16, 2019)).

[156] Bexar Cnty. Performing Arts Ctr. Found., 372 N.L.R.B. No. 28, at 3, 15 (Dec. 16, 2022).

[157] *Id.* at 6–7.

[158] Stericycle, Inc., 372 N.L.R.B. No. 113, at 11–12 (Aug. 2, 2023).

would be considered concerted, warranting protection under the Act.[159] And even more significantly, in August 2023, the NLRB issued an opinion on bargaining orders that makes it easier for workers to win unions and harder for employers to undermine their efforts.[160] Under the new doctrine, if a majority of workers sign cards indicating their support for the union, the employer can either promptly recognize the union or ask the NLRB for an election to be held.[161] But if the employer frustrates the election process by engaging in unfair labor practices in the run-up to the election, the NLRB will immediately certify the union, rather than calling for a new election.[162]

Together, these changes substantially protect employee speech and association rights. They advance labor's constitutional vision for a more democratic workplace in which basic constitutional rights are protected against private incursion, as well as state incursion, creating conditions for more "free" labor. But as discussed in Part III, they are under fierce attack by employers.[163]

2. The Right to Strike

Workers are also increasingly claiming the right to strike as a fundamental right, even when the law does not protect it. Since 2018, and especially in 2023 with the Hollywood and auto strikes, among others, workers have walked off the job at rates not seen since the 1980s.[164] Though many of the strikes were protected under the NLRA, others were not, with workers instead claiming protection from higher law.

In particular, the hundreds of thousands of public school teachers who have struck in the last few years have done so largely without legal protection.[165] Public sector work occupies an ironic spot in labor and constitutional law. Government employers, unlike private employers, are technically state actors and therefore constrained by the Constitution. Yet the doctrine holds that when the government acts as an employer, it ought to be treated like a business in a lot of ways: it can restrict its workers' rights

---

159 *See* Miller Plastic Prods., 372 N.L.R.B. No. 134, at 3–4 (Aug. 25, 2023).

160 Cemex Constr. Materials, 372 N.L.R.B. No. 130, at 1, 25–27 (Aug. 25, 2023) (overruling *Linden Lumber* and reinstating a version of the *Joy Silk* standard).

161 *Id.* at 25.

162 *Id.* at 26.

163 *See infra* Section III.A.

164 *See supra* notes 9–12 and accompanying text.

165 *See* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON & POL'Y RSCH., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 8–9 (2014), http://cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/FY7A-4LRE] (describing state laws prohibiting public employee strikes, including by teachers).

heavily, in a way that it cannot restrict its citizens' rights.[166] The antidemocratic norms that govern the private sphere can thus permeate the public sphere—precisely the opposite of labor's constitutional vision, which would extend democratic norms into the private sphere.

Moreover, because public sector workers are excluded from the NLRA, many actually have fewer statutory protections than private sector workers. Indeed, the Supreme Court has held that the Constitution permits states to deny public sector workers the right to strike and even the right to bargain collectively.[167] Most states prohibit strikes among public sector workers.[168] Numerous other states also prohibit collective bargaining among public sector workers.[169] Against this background, and given the declining power of unions generally, it is not surprising that, for many decades, strikes among public sector workers were rare.[170]

Yet in 2018 and 2019, in what came to be known as "Red for Ed," more than 100,000 public school teachers withheld their labor in states across the country, including in states with no bargaining rights such as Arizona, Colorado, Kentucky, North Carolina, Oklahoma, and West Virginia.[171] In so doing, the teachers appealed to a conception of fundamental rights, claiming that there is no such thing as an "illegal strike."[172] Their actions rejected the existing statutory and judge-made constitutional law, instead offering an

---

[166] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (articulating the test for public school teacher speech as "balanc[ing] between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of . . . services it performs through its employees"); Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (holding that speech by government employees made in their official capacity is not protected by the First Amendment and not subject to *Pickering* balancing).

[167] The Court recognized a constitutional right to join a union in *Thomas v. Collins*, 323 U.S. 516, 533–34 (1945), but not a right to bargain or to process grievances through a union. *See* Smith v. Arkansas State Highway Emps., Local 1315, 441 U.S. 463, 464–65 (1979); *see also* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 883 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971) (emphasizing that there is no constitutional right to strike).

[168] *See* SANES & SCHMITT, *supra* note 165 (describing state laws on public employee bargaining and strikes).

[169] For example, Texas prohibits both striking and collective bargaining by public sector employees. *See* TEX. GOV'T CODE ANN. §§ 617.002–.003(b). Notably, it creates an exception in the collective bargaining prohibition for local fire and police departments. *See* TEX. LOC. GOV'T CODE ANN. § 174.023; Jefferson Cty. v. Jefferson Cty. Constables Ass'n, 546 S.W.3d 661, 665 (Tex. 2018).

[170] *See* Josh Eidelson, *Could Wildcat Teachers' Strikes Spread to Other States?*, BLOOMBERG (Mar. 6, 2018), https://www.bloomberg.com/news/articles/2018-03-06/could-west-virginia-s-wildcat-teachers-strike-spread/ [https://www.perma.cc/QM7T-H9B4]. For a history of public sector unions, see SLATER, *supra* note 102. On the history of teacher unionism, see MARJORIE MURPHY, BLACKBOARD UNIONS: THE AFT & THE NEA, 1900–1980 (1992).

[171] Alexia Fernández Campbell, *Thousands of Oakland School Teachers Just Went on Strike. They Want More Than a Pay Raise.*, VOX (Feb. 21, 2019), https://www.vox.com/2019/2/21/18233377/oakland-teachers-strike-2019 [https://perma.cc/HSM5-BPMF].

[172] Andrias, *Strikes, Rights, and Legal Change*, *supra* note 9, at 146.

alternative vision of constitutional rights—and of how we should constitute ourselves as a nation.[173] They echoed efforts of past generations of workers who, as James Pope has shown, engaged in conscious, collectively organized rule creation and enforcement through sit-down strikes in a form of lawmaking-through-lawbreaking from below.[174]

Other workers excluded from the NLRA are also attempting to redefine the right to strike as fundamental through work stoppages and protests. For example, workers who are considered independent contractors (such as, until recently, nearly all gig economy workers) are excluded from the NLRA's protections; they not only lack the legal right to strike but could even face antitrust liability for engaging in concerted action to raise wages.[175] Yet groups of workers at Instacart, Doordash, Uber, Lyft, and elsewhere have still organized numerous strikes and protests over the last few years,[176] successfully drawing attention to poor labor conditions.[177]

Employees covered by the NLRA have also increasingly exercised the right to strike in ways that push against or even defy existing law's boundaries, again insisting on strikes as fundamental rights, essential to a system of free labor, freedom of speech, and democracy. Although the NLRA formally protects the right of statutory employees to strike, it prohibits secondary boycotts; offers only limited protection for politically focused strikes; and restricts mass picketing, recognitional picketing, and intermittent strikes.[178] It also disallows a host of partial-strike activity; limits

---

[173] *Id.*; *see also* The Real News Network, *West Virginia Teachers Strike Redefines Teacher Unionism*, YOUTUBE, at 02:00 (Feb. 27, 2018), https://www.youtube.com/watch?v=hesEvKAKufc [https://perma.cc/2ZWU-STCK] (interviewing the president of the teachers' union about why he believes the strike should not be considered illegal and why the teachers were risking legal sanction).

[174] Pope, *Worker Lawmaking*, *supra* note 91, at 48.

[175] *See* Andrias, *New Labor Law*, *supra* note 15, at 92 n.485; Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977 (2016); Cynthia Estlund & Wilma B. Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP. LAB. L. & POL'Y J. 371, 372–73 (2021); *see also* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 489–93 (2016) (discussing how courts have analyzed whether Uber and Lyft drivers are employees or independent contractors). *But see infra* note 232 and accompanying text (discussing a new NLRB ruling, *Atlanta Opera*, which makes it harder for employers to classify employees as independent contractors).

[176] *See, e.g.*, Gloria Oladipo, *'It's a Sweat Factory': Instacart Workers Ready to Strike for Pay and Conditions*, GUARDIAN (Oct. 15, 2021), https://www.theguardian.com/business/2021/oct/15/instacart-workers-strike-pay [https://perma.cc/P55M-7PDM]; Michal Lev-Ram, *This Is Why Rideshare Drivers Are Going on Strike*, FORTUNE (May 7, 2019), https://fortune.com/2019/05/07/rideshare-drivers-strike-lyft-uber/ [https://perma.cc/8SDD-B3XJ].

[177] Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html?unlocked_article_code=1.Tk0.vKqH.op4n2CE1a1K0&bgrp=a&smid=url-share [https://perma.cc/F58M-JP7E].

[178] 29 U.S.C. § 158(b)(4), (b)(7).

the subjects over which workers can bargain to impasse to a set of "mandatory" subjects of bargaining; allows employers to shut down their operations in response to concerted action; and permits employers to permanently replace workers who strike for economic reasons.[179]

Despite these limitations, unions and worker groups have recently been engaging in more work stoppages and protests, even when the actions' legal status is contested or proscribed. During the United Auto Workers (UAW) strikes against the Big Three auto companies, Shawn Fain, the union president, repeatedly described the right to strike as "sacred," "fundamental," and constitutionally protected.[180] Meanwhile, numerous groups of Walmart, McDonalds, and Amazon workers have engaged in short and repeated strikes; they have also targeted both legislators and employers with their demands.[181] Other recent strikes have involved workers joining together across workplace and professional boundaries, sometimes engaging in sympathy and even secondary actions, the latter of which the NLRA prohibits.[182]

3. Workplace Democracy and Constitutional-Rights Talk Outside of Courts

In short, labor's effort to obtain organizational, bargaining, and strike rights represents a challenge to the existing constitutional order: an emphasis on redefining organizational and strike rights as constitutionally protected; and ultimately an effort to extend democratic values into the putatively

---

[179] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938). On the Supreme Court's role in eroding the right to strike and more detailed discussion of the doctrine, see generally Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21 [hereinafter Andrias, Janus*'s Two Faces*]; James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); and JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS (2016).

[180] UAW, FACEBOOK (Sept. 28, 2023), https://www.facebook.com/watch/?v=1807744619670515 [https://perma.cc/B5LJ-SQSS]; *see also supra* note 139.

[181] Daniel Weissner, *NLRB Says Walmart's Firing of Workers Involved in Union-Backed Strike Were Legal*, REUTERS (July 26, 2019), https://www.reuters.com/article/labor-walmart/nlrb-says-walmarts-firing-of-workers-involved-in-union-backed-strike-were-legal-idUSL2N24R1QY [https://perma.cc/4UN4-5XZB]; *McDonald's Workers in US Strike Again over Sexual Harassment*, BBC (Oct. 26, 2021), https://www.bbc.com/news/business-59055359 [https://perma.cc/XX6L-B8Q8]; Katie Tarasov, *How Amazon Is Fighting Back Against Workers' Increasing Efforts to Unionize*, CNBC (Aug. 22, 2019), https://www.cnbc.com/2019/08/22/how-amazon-is-fighting-back-against-workers-efforts-to-unionize.html [https://perma.cc/FEX9-Q9XX].

[182] *See* Alia Wong, *The Ripple Effect of the West Virginia Teachers' Victory*, ATLANTIC (Mar. 7, 2018), https://www.theatlantic.com/education/archive/2018/03/west-virginia-teachers-victory/555056/ [https://perma.cc/HMY8-RRQB]; Amanda Novello, Richard D. Kahlenberg & Andrew Stettner, *The Chicago Teachers Strike Is a Fight for the Common Good*, CENTURY FOUND. (Oct. 28, 2019), https://tcf.org/content/commentary/chicago-teachers-strike-fight-common-good/ [https://perma.cc/9P2H-G4M7].

private domain of the workplace in ways that, as Part III will explore, are at the center of a clash with business's constitutional vision.

Notably, labor has not brought its constitutional vision for greater workplace democracy to court. It is well aware of both the doctrinal hurdles and the courts' longstanding hostility toward labor rights.[183] But outside the courtroom and where no threat of judicialization exists, the labor movement and its allies frequently locate their movements' claims for workplace democracy, particularly the rights to organize and strike, in the Constitution. They invoke the First Amendment as well as more general principles of free speech, assembly, and democracy; they also exclaim against involuntary servitude, occasionally invoking the Thirteenth and Fourteenth Amendments in their speeches, tweets, and writings.

For example, when the federal government shut down in the winter of 2018–2019, forcing numerous federal workers to work without pay for over a month, those workers had little recourse, at least legally. They not only lack the right to strike but can face a lifetime ban from federal employment if they do so.[184] They nonetheless resisted: some called in sick, while labor leaders from other unions spoke out against the government's treatment of the workers. When Sara Nelson, president of the Association of Flight Attendants, was asked about the conflict, she invoked the Constitution: "What we heard from all over the country was, . . .'We did away with slavery with the 13th Amendment'. . . . No other country in the world would put up with this."[185] Nelson has also critiqued judges' role in limiting workers' constitutional rights, particularly their speech rights, while elevating those of employers. As she opined in the *New York Times*, judges in Alabama and Iowa have harshly restricted how picketers can assemble, while the Supreme Court has elevated business property rights over workers' rights. She emphasized that each of those judicial decisions cut into workers' free speech interests in spite of courts' vigorous protection of free speech in other arenas.[186]

---

[183] *See* Andrias, *supra* note 32, at 1594.

[184] 5 U.S.C. § 7311 (prohibiting an individual from holding a federal position if he or she "participates in a strike, or asserts the right to strike, against the Government of the United States . . . or is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia").

[185] Henry Grabar, *What Workers Can Learn from "the Largest Lockout in U.S. History,"* SLATE (Jan. 25, 2019), https://slate.com/business/2019/01/sara-nelson-flight-attendant-union-strik-tsa-shutdown.html [https://perma.cc/RY2C-CS7M].

[186] Sara Nelson, *America's Judges Are Putting My Life on the Line*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/opinion/courts-labor-strikes.html?unlocked_article_code=1.Tk0.2-A7.bREILAk-bg_S&bgrp=a&smid=url-share [https://perma.cc/Q5PU-QNXM].

In a speech urging all 2020 presidential candidates to support a program of "unions for all," SEIU President Mary Kay Henry similarly offered an expressly constitutional vision. She discussed the struggles facing low-wage workers, the problems of racial and gender injustice, and the need to extend labor rights to *all* workers. Henry explicitly invoked the American constitutional tradition. She opened by extolling the United States' commitment of "liberty and justice for all" and then turned to the Constitution's framing and its shortcomings, including the embrace of slavery and the lack of women's suffrage rights. She called on her listeners to demand "liberty and justice for all," and then tied union rights to the First Amendment: "[T]he First Amendment is the right of the people to peaceably assemble. That freedom . . . that freedom to join together . . . to organize . . . is a fundamental American value grounded in our Constitution."[187]

Labor leaders have also pressed First Amendment arguments about labor rights on social medial and in op-eds, objecting to employer anti-union activity. In response to the *New York Times*'s efforts against its unionizing journalists, Sara Nelson argued: "The same First Amendment that protects freedom of the press also protects the freedom of association of these workers. Back off, @nytimes!"[188] Similarly, when more than 9,000 faculty and graduate workers struck at Rutgers University, supporters signed a letter invoking the strikers' rights of freedom of speech and assembly.[189]

Meanwhile, in numerous social media posts and speeches, labor and its allies in government have framed workers' struggles as fundamentally about democracy and freedom. UAW President Shawn Fain has argued that engaging in strikes and protest is not only constitutionally protected but a "civic duty" and has described the strikers as "the new arsenal of democracy."[190] Speaking to a group of fast-food workers in support of their

---

[187] SEIU, *Mary Kay Henry Unions for All Speech*, YOUTUBE (Aug. 28, 2019), https://www.youtube.com/watch?v=osswzqqLnHg&ab_channel=SEIU [https://perma.cc/X3XX-YWYD]. Notably, the PRO Act legislation builds on this analysis: Committee reports expressly invoke the First Amendment as a ground for the law's enactment, particularly as to eliminating restrictions on secondary boycotts. H.R. REP. NO. 116-347, at 34 (2019).

[188] Sara Nelson (@FlyingWithSara), X (Feb. 2, 2022, 9:26 AM), https://twitter.com/FlyingWithSara/status/1488881497775951877 [https://perma.cc/JEY4-33B2]; *see also* Sara Nelson (@FlyingWithSara), X (June 17, 2022, 1:43 PM), https://twitter.com/FlyingWithSara/status/1537853417321897987 [https://perma.cc/PN2L-JVMM] (writing in response to SpaceX's firing employees who criticized Elon Musk: "Bosses like Musk trample your freedom of speech the moment you start working for them. The only freedom they care about is their freedom to steal your labor and control your life. Want to protect your rights? Build your union").

[189] *See* Open Letter from Barbara Ransby et al., to Jonathan Holloway, President, Rutgers Univ., https://drive.google.com/file/d/1qDit6KCecVM7qHQr0LeD-GbYpIesQ5zi/view [https://perma.cc/R4H6-HAQY].

[190] *See supra* note 180.

efforts, Congressman Ro Khanna remarked, "We talk a lot in this country about democracy, freedom, and rights . . . but the reality is that most of us spend a lot of our time at work . . . . I believe you can't have democracy in America if you don't have workplace democracy."[191] In response to Starbucks workers' recent organizing efforts, Representative Pramila Jayapal wrote, "What would happen if corporations took a completely different approach to unions, respecting workplace democracy & seeing the union as a partner to ensuring reality to the values the company espouses? This workplace democracy is linked to health of our own democracy."[192]

B. Social and Economic Rights

The second component of labor's alternative constitutional vision is the demand for economic security through stronger entitlements for workers. That is, in addition to seeking protections for the right to organize, bargain collectively, and strike, labor seeks substantive guarantees of economic security and fair working conditions for all workers. It makes those demands not only of employers but also of the state as a matter of public right. This part of the agenda is largely led by organizations of low-wage service workers, many of whom are women and people of color, but has more recently been elevated by manufacturing workers as well during the UAW strikes. The pioneering effort here was the "Fight for $15," a movement of low-wage workers that began in 2012 with a few hundred workers in New York. Earning only about $7 an hour, servers at places such as KFC, Taco Bell, and McDonalds went on strike demanding what was then considered an unthinkable raise—more than double what they were earning, to $15 per hour—as well as unions at their workplaces.[193] Over the next decade, the

---

[191] Bay City News, *U.S. Rep. Khanna Hosts Roundtable with Fast Food Workers in Support of State Legislation*, KRON4 (July 8, 2022), https://www.kron4.com/news/u-s-rep-khanna-hosts-roundtable-with-fast-food-workers-in-support-of-state-legislation/ [https://perma.cc/WSQ2-CCYN]; *see also* @AFLCIO, X (June 9, 2022, 4:24 PM), https://twitter.com/AFLCIO/status/1534994861652336640 [https://perma.cc/R2P5-YTKH] ("Every demand working people make—from better wages and workplace protections to a voice on the job and racial justice—is built on a bedrock of democracy."); @SBWorkersUnited, X (Feb. 25, 2022, 3:16 PM), https://twitter.com/SBWorkersUnited/status/1497304626533707779 [https://perma.cc/2RBB-W6Z3] ("Rev. Dr. William J. Barber II, social justice leader, explains how organizing for the right to form a union is just as critical to democracy as the right to vote."); @fightfor15, X (July 8, 2022 8:03 PM), https://twitter.com/fightfor15/status/1545559291385585664 [https://perma.cc/4Q4F-B3A3].

[192] Rep. Pramila Jayapal (@RepJayapal), X (Feb. 1, 2022, 12:41 PM), https://twitter.com/RepJayapal/status/1488568316188844037 [https://www.perma.cc/P2BZ-SG2R].

[193] Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES (Nov. 29, 2012), https://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html [https://perma.cc/AER7-XGMA].

Fight for $15 movement grew to become national in scope.[194] Fast-food workers, airport and retail workers, home-health aides, and even adjunct professors joined nontraditional strikes and protests to demand from their employers and governments substantially higher wages that would enable a decent life as well as the right to form a union.[195]

Though few of these workers have yet won a union, they have had great success in raising wages and shifting the terms of the public debate around economic security and inequality. Since 2012, three states have raised minimum wages to $15 or more, and many other states and localities have raised their minimum wages above the federal floor.[196] Democratic politicians who once decried even modest increases in the federal minimum wage are now nearly unanimous in their support for a $15, or higher, minimum wage, while ballot initiatives to raise wages have passed in even some of the most conservative states.[197] A recent study concluded that the Fight for $15 has helped raise the earnings of nearly twelve million workers of color and eighteen million women.[198]

More recently, the UAW has captured national attention with its demands for greater economic justice and equality within the auto industry—and its insistence that the President of the United States help the workers

---

[194] Lydia DePillis, *It's Not Just Fast Food: The Fight for $15 Is for Everyone Now*, WASH. POST (Dec. 4, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now/ [https://www.perma.cc/WZ6L-J8G7]; Andrias, *New Labor Law*, *supra* note 15, at 49.

[195] DePillis, *supra* note 194.

[196] *Minimum Wage Tracker*, ECON. POL'Y INST. (July 1, 2023), http://www.epi.org/minimum-wage-tracker [https://perma.cc/S9QQ-34VR]; *State Minimum Wages*, NAT'L CONF. OF STATE LEGIS. (Aug. 30, 2022), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [https://perma.cc/JZ9C-882G]; NAT'L EMP. L. PROJECT, CITY MINIMUM WAGE LAWS: RECENT TRENDS AND ECONOMIC EVIDENCE (2015), http://fairworldproject.org/wp-content/uploads/2015/06/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf [https://perma.cc/P4L6-JD5S].

[197] *See, e.g.*, Molly Kinder, *Even a Divided America Agrees on Raising the Minimum Wage*, BROOKINGS INST. (Nov. 13, 2020), https://www.brookings.edu/blog/the-avenue/2020/11/13/even-a-divided-america-agrees-on-raising-the-minimum-wage/ [https://perma.cc/2CP5-AD7F] (describing the passage of a ballot initiative in Florida, with more than 60% support, to raise the minimum wage from $8.56 to $15 by 2026); Michelle Cheng, *Florida Is the Most Conservative State Yet to Approve a $15 Minimum Wage*, QUARTZ (Nov. 4, 2020), https://qz.com/1926558/amendment-2-florida-is-eighth-state-to-adopt-a-15-minimum-wage/ [https://perma.cc/W35A-EYQR] (noting that voters in Missouri and Arizona approved $12 minimum wages through ballot initiatives).

[198] YANNET LATHROP, T. WILLIAM LESTER & MATTHEW WILSON, NAT'L EMP. L. PROJECT, QUANTIFYING THE IMPACT OF THE FIGHT FOR $15: $150 BILLION IN RAISES FOR 26 MILLION WORKERS, WITH $76 BILLION GOING TO WORKERS OF COLOR 2 (2021), https://www.nelp.org/wp-content/uploads/Data-Brief-Impact-Fight-for-15-7-22-2021.pdf [https://perma.cc/LZ5E-7XZ6].

achieve those demands.[199] Notably, the UAW, the Fight for $15, and other low-wage worker movements, such as the Domestic Workers Alliance, NY Taxi Workers' Alliance, Amazonians United, and unions organizing low-wage workers, have almost entirely eschewed the language of efficiency and productivity that previously dominated debates about wages and compensation. Rather, they frame their economic demands as *rights*, appealing to higher law and invoking Dr. Martin Luther King Jr. and other civil rights leaders.[200] As during the Gilded Age constitutional clash, workers are arguing that material security and greater economic equality are essential to both freedom and democracy.[201] They are also insisting on entitlements for all workers, including those who have long been paid a sub-minimum wage.[202] Indeed, SEIU, the Domestic Workers Alliance, and numerous elected officials have linked poor conditions for workers to the legacy of slavery and invoked the Constitution in opposition.[203]

Wages constitute only a part of the campaigns for worker entitlements. The movements have also pushed for—and won—numerous new state and local laws providing paid sick time, paid parental leave, vacation time, and other benefits, reshaping the baseline for employment in many localities.[204] At the federal level, the CARES Act's cash transfers reflect the changed debate around economic entitlements, with growing numbers of Americans

---

[199] Shane Goldmacher & Coral Davenport, *United Auto Workers Hold Off on Backing Biden, for Now*, N.Y. TIMES (May 3, 2023), https://www.nytimes.com/2023/05/03/us/politics/biden-auto-workers-endorsement.html [https://perma.cc/8AYG-XXP6]; Katie Rogers & Erica L. Green, *Biden Joins Autoworkers on Picket Line in Michigan*, N.Y. TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/us/politics/biden-uaw-strike-picket-michigan.html [https://perma.cc/5W32-3U8V].

[200] *See, e.g.*, @fightfor15, X (Sept. 6, 2021, 11:30 AM), https://twitter.com/fightfor15/status/1434901853196619785?lang=ca [https://perma.cc/EN8V-WXGN] ("'All labor has dignity . . . it is a crime for people to live in this rich nation and receive starvation wages' -Rev. Dr. Marking [sic] Luther King Jr., talking to striking sanitation workers in Memphis. 1968."); *About NDWA*, NAT'L DOMESTIC WORKERS' ALL., https://www.domesticworkers.org/about-ndwa/ [https://perma.cc/54XJ-4673] (declaring that the aim is "working to shift the way care work is understood, valued, and compensated—to ensure that these much-needed jobs are good jobs with dignity, economic security, and opportunity for advancement").

[201] LICHTENSTEIN, STATE OF THE UNION, *supra* note 75, at 5–6 (describing nineteenth- and early-twentieth-century claims that living wages were essential to maintaining a self-governing republic and were part of the "second emancipation").

[202] Andrias, *New Labor Law*, *supra* note 15, at 47.

[203] @fightfor15, X (Dec. 17, 2020, 10:45 PM) (retweeting an article about Reconstruction), https://twitter.com/fightfor15/status/1339778667849932805 [https://perma.cc/7DB2-XF4Q].

[204] *See State and Local Laws Advancing Fair Work Scheduling*, NAT'L WOMEN'S L. CTR. (Sept. 2023), https://nwlc.org/wp-content/uploads/2019/10/Fair-Work-Schedules-Factsheet-9.14.23v1.pdf [https://perma.cc/D7HYT9UY]; *Paid Sick Leave*, NAT'L CONF. STATE LEGISLATURES (July 21, 2020), http://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx [https://perma.cc/ZKB6-92PE].

supporting the idea of economic guarantees.[205] Even more significantly, perhaps, worker groups urged the enactment of the Pandemic Unemployment Assistance and Pandemic Unemployment Compensation, which together provided unemployment insurance benefits for those who were providing nonmarket care to family members at home because of the pandemic.[206]

At the same time, the movements have fought for nonmaterial, dignitary rights at work—for limitations on autocratic employer power. As numerous scholars have documented, the U.S. nonunion workplace is extraordinarily autocratic. To be sure, legislation that emerged out of the New Deal constitutional clash placed limitations on unfettered employer power by providing for minimum wages and maximum hours (the Fair Labor Standards Act), protecting the right to unionize (the NLRA), and ensuring other basic rights to workers (social security). Moreover, subsequent employment law statutes (Title VII, the Family Medical Leave Act, the Occupational Safety and Health Act), as well as state common law employment doctrines of tort and contract, have created some exceptions to employers' unfettered authority to fire employees at will. Nonetheless, enforcement is weak, millions of workers are excluded from these protections, and the protections themselves remain paltry.[207] As scholars have documented and news stories regularly remind, workers can be commanded to pee or forbidden to pee; they can be fired for associating with whom they want, for expressing political opinions, for moving too slowly, or for simply saying the wrong thing to their boss.[208]

During the last few years, unions and other worker organizations have helped enact a range of new laws, mostly at the state and local level, that chip away at authoritarian control over the workplace—or at least reduce the range of decision-making over which employers can exercise authoritarian control. New statutes prohibit last-minute schedule changes, require employers to allow bathroom breaks, require pay transparency, and create

---

[205] *See* Aaron Kaufman, Hannah Pugh, Brianna Rauenzahn, Jasmine Wang, Jamison Chung & Peter Jacobs, *Universal Basic Income After COVID-19*, REGUL. REV. (May 2, 2020), https://www.theregreview.org/2020/05/02/saturday-seminar-universal-basic-income-after-covid-19/ [https://perma.cc/3YXQ-J7CD]; Claudia Sahm, *COVID-19 Is Transforming Economic Policy in the United States*, 56 INTERECONOMICS F. 185 (2021).

[206] *Unemployment Insurance Provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, NAT'L EMP. L. PROJECT (Mar. 27, 2020), https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/ [https://perma.cc/YWH9-9S4J].

[207] *See* Andrias, *New Labor Law*, *supra* note 15, at 37–40; Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 801–02, 806 (2018).

[208] *See* Bagenstos, *supra* note 24, at 245, 247–56.

additional protections against sexual harassment.[209] New state laws also limit the use of noncompete clauses in labor contracts, while at the federal level, the FTC has proposed a rule that would make noncompete clauses in labor contracts an unfair method of competition in violation of the Federal Trade Commission Act.[210] Meanwhile, a new California law takes aim at the use of digital surveillance and algorithmic management, requires warehouses with at least 100 employees to disclose performance quotas to workers, and prohibits workloads that prevent workers from taking legally mandated meal and rest breaks.[211]

Even more radically, workers in Philadelphia and NYC have recently won legislation that replaces at-will employment with just cause discipline rights for workers in particularly vulnerable industries.[212] These laws mark a significant change from the United States' longstanding and anomalous practice that workers can be fired for any reason or no reason at all, save legally proscribed motivations such as racial discrimination.[213] According to one union leader who helped spearhead the recent just cause legislation that now protects NYC fast-food employees, "[t]he revolution begins somewhere. . . . These workers were thirsty to be treated with respect and tired of having their at-will employment status hung over their heads to keep

---

[209] *See, e.g.*, N.Y.C., N.Y., Fair Workweek Law, Local Laws 98, 99, 100, 106, 107 (2017) (requiring predictable schedules); S.B. 9427-A/A.10477, 2021–2022 Leg. Sess. (N.Y. 2022) (pay transparency); A.B. 547, 2019 Leg., Reg. Sess. (Cal. 2019) (sexual harassment); H.B. 3279, 2017 Leg., Reg. Sess. (Or. 2017) (sexual harassment and discrimination in janitorial services and agriculture); S.B. 1162 (Cal. 2022) (pay transparency); S.B. 19-085, 2019 Leg., Reg. Sess. (Colo. 2019) (Colorado Equal Pay for Equal Work Act).

[210] Press Release, FTC, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/DG8X-ZU6L]; Brian Mead & Aaron Sayers, *Restrictive Covenants Evolve from Common Law to Statutory Regulation: The 2022 Watershed*, REUTERS (Feb. 22, 2022, 12:13 PM), https://www.reuters.com/legal/transactional/restrictive-covenants-evolve-common-law-statutory-regulation-2022-watershed-2022-02-22/ [https://perma.cc/64FC-YX8X].

[211] A.B. 701 (Cal. 2021). On the increasing use of workplace surveillance, see Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735 (2017).

[212] KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 26 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/B92Q-PHL8].

[213] Montana is the one state that has general just-cause rights. *At-Will Employment—Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/9EM4-5NQS]. For a discussion of the historical roots of at-will employment, see Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 AM. J. LEGAL HIST. 397 (2020).

them docile and quiet."[214] Rather than seeking just cause protection only through private contracts, they are also calling on the state to guarantee it for all workers.[215]

Here, again, labor's efforts press against what has long been understood to be a basic feature of the U.S. constitutional order: that the government has no obligation to provide fair working conditions and wages to workers—or to provide for socioeconomic rights more broadly, and indeed that Congress has no affirmative power to do so under the Reconstruction Amendments that prohibit slavery and guarantee equal protection and liberty. The majority on the Court adopted this position in the aftermath of the Civil War and reaffirmed it in the 1970s against vociferous opposition from more liberal Justices.[216] Even by statute, the United States has provided few social welfare rights or basic employment rights, particularly compared with other industrialized democracies.[217]

In light of this history, labor has eschewed asking the courts to interpret the big-C Constitution to guarantee workers' rights. Instead, it has articulated its rights in the public arena and pushed for the legislative and administrative instantiation of guaranteed wages and other employment rights. In other words, the hope is that the praxis of living wages and dignified working conditions will reshape the small-c constitution, resulting in the entrenchment of labor rights, eventually changing understandings of the

---

[214] Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, but a New Law in New York Could Change That*, BLOOMBERG (June 21, 2021), https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire [https://perma.cc/5GTT-E475].

[215] As I explore elsewhere, there is some division within the labor movement on the strategy of fighting for universal labor rights through statutes: Some unions reject the commitment to universal rights, in part out of a fear that providing such rights would disincentivize unionization. *See* Andrias, *New Labor Law*, *supra* note 15, at 70–76.

[216] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (rejecting the argument that the Fourteenth Amendment protects a fundamental right to education); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (holding that a state cap on welfare grants regardless of a family's size or need did not violate the Equal Protection Clause); The Civil Rights Cases, 109 U.S. 3, 11–12 (1883) (holding that the Fourteenth Amendment does not allow Congress to prohibit "private" discrimination, including in public accommodations); United States v. Cruikshank, 92 U.S. 542, 554 (1875) (holding that the Reconstruction Amendments "add[] nothing to the rights of one citizen as against another"); *cf.* Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–13 (1969) (arguing that "economic inequality as such is repugnant to constitutional values" and urging that the Court use the Fourteenth Amendment to protect certain minimum entitlements); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 119–29 (2013) (describing state constitutional provision of social and economic rights including labor rights).

[217] KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 114–52 (2014); Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 187 (2001).

Constitution—including concepts of free labor, equal protection, and liberty—such that all workers have a right to dignified working conditions and living wages, in addition to the right to bargain collectively to improve their conditions.[218] Constitutional arguments that now seem off-the-wall, will, through praxis, become on-the-wall. At the very least, labor seeks to ensure that government remains *permitted* to legislate workplace entitlements, a power that capital's constitution would deny in many instances, as discussed below.[219]

C. "We the People" and Antisubordination

The third critical component of contemporary worker movements' agenda is to expand who qualifies as a rights bearer—as an equal member of the political and social community—ending longstanding exclusions among paid workers while simultaneously expanding the definition of work to include social reproduction or care work. Since its inception, U.S. labor law has denied coverage or effective coverage to large swaths of workers. The most significant exclusions stem from the country's history of slavery. In particular, due to pressure from southern democrats, President Roosevelt agreed to exclude labor statutes from the New Deal, including the NLRA and FLSA, all domestic and agricultural work.[220] These sectors were almost entirely made up of African Americans and continue to be populated by people of color, immigrants, and women.[221] Although FLSA now covers some domestic workers, the NLRA continues to exclude both sectors. Health care workers—predominantly women—were also initially excluded from the NLRA. They were added only in the 1970s, when the private health care industry grew rapidly, fueled, ironically, by industrial workers' private health care benefits as well as by financialization.[222]

The federal labor statutes also exclude workers classified as independent contractors, including millions of workers in the growing "gig"

---

[218] It is worth noting that labor's demands, to date, fall short of what many foreign constitutions guarantee under the rubric of socioeconomic rights, including education, welfare, health care, and housing. *See* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 123 (2001).

[219] *See infra* Section III.C.

[220] IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 265–69 (2013); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 105–07 (2001); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987).

[221] *See* Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 519, 524–26 (2021).

[222] 1974 Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended at 29 U.S.C. § 152(14)); GABRIEL WINANT, THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA 16–19, 146–58, 167–78 (2021).

economy. These workers are also predominantly Black and brown, giving rise to what Veena Dubal has termed a "new racial wage code."[223] In addition, the NLRA exempts supervisors, and the Court has interpreted this exclusion broadly to exclude many "pink collar" professional employees, such as nurses.[224] And, as previously discussed, the statute excludes public sector workers who rely on state-level protections that vary considerably; several states deny workers the right to collectively bargain, and many deny them the right to strike.[225] Until recently, the NLRB has also interpreted the statute to exclude various other nontraditional workers, such as graduate students and student athletes.[226] Additionally, although the law formally covers workers irrespective of immigration status, the Supreme Court has significantly limited the remedies available to undocumented workers, holding that they are entitled to neither reinstatement nor back wages when employers violate the NLRA and terminate them because of union activity.[227]

Under contemporary constitutional understandings of equality, the exclusions of domestic, farm, and gig workers and others raise scant concern. None of the labor exclusions facially discriminate on the basis of race or gender, and it is difficult, if not impossible, to prove that the exclusions constitute disparate treatment on the basis of race or gender or are driven by animus against a particular group, as the Supreme Court's approach to equal protection requires.[228] Under that doctrine, government classifications can have significant disparate effect on minority groups without violating the Constitution. Yet labor is rejecting the Court's impoverished vision of equality, insisting on the need to expand who counts as an equal member of the political and social community and to eradicate persistent forms of labor

---

[223] Dubal, *supra* note 221, at 549.

[224] *See* NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 720 (2001); NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 573–74, 584 (1994); Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 699–700 (2006).

[225] *See* Andrias, *Strikes, Rights, and Legal Change*, *supra* note 9, at 143–44; Andrias, Janus*'s Two Faces*, *supra* note 179, at 55–56.

[226] *Compare* Brown Univ., 342 N.L.R.B. No. 42, at 16 (July 13, 2004) (holding that graduate student assistants are not employees for NLRA purposes), *with* Columbia Univ., 365 N.L.R.B. No. 136, at 1 (Dec. 16, 2017) (recognizing undergraduate and graduate student assistants as employees under the NLRA); *compare* Northwestern Univ., 362 N.L.R.B. 1350, 1351–52 (2015) (resolving matter on jurisdictional grounds without deciding whether student athletes are employees for NLRA purposes), *with* NLRB Gen. Couns. Mem. 21-08, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act 3–4 (Sept. 29, 2021) (recognizing student athletes as employees under the NLRA).

[227] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903–05 (1984).

[228] *See* Washington v. Davis, 426 U.S. 229, 239, 242, 246 (1976); Massachusetts v. Feeney, 442 U.S. 256, 273–74, 278–79 (1979).

subordination.[229] In so doing, it seeks to make real the Reconstruction Amendments' promises of both equal protection and free labor.

In recent years, labor has mounted new challenges to almost all of the exclusions. Labor calls for norms and laws that limit the control and coercion exercised by business over historically subordinated workers and for a move away from formalist definitions of "employee" that leave many workers without protection. For example, if adopted, the PRO Act would create a presumption that workers are employees, not independent contractors, unless the employer makes a series of statutorily specified showings.[230] This change would effectuate employee status for millions of workers in the gig economy who currently lack the legal right to organize, bargain, or strike. Meanwhile, pressed by worker movements including graduate students, employees of arts organizations, student athletes, and logistics workers like those employed by FedEx, the General Counsel has made clear she will aggressively guard against misclassification and work to extend the Act's protections to more workers even without statutory reform.[231] Consistent with this goal, in June 2023, the Board reinstated a more lenient test for who qualifies as an employee, overturning the restrictive approach from the Trump Administration.[232]

Although taken individually these changes to who qualifies as an employee under the NLRA may seem like ordinary, nonconstitutional policymaking, they are part of labor's broader project to extend fundamental labor rights to all workers and to end structural hierarchy and inequality

---

[229] *Cf.* RUTH DUKES & WOLFGANG STREECK, DEMOCRACY AT WORK: CONTRACT, STATUS AND POST-INDUSTRIAL DEMOCRACY 83–84, 123 (2022) (explaining how "self-employed" or contract workers were excluded from twentieth-century ideas of the "industrial citizen" and more recent efforts to reincorporate them).

[230] *See, e.g.*, Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7 (Cal. 2018) (describing and adopting the ABC test for employee status). Under the ABC test, a worker is an employee unless the employer can show that the worker is free from the employer's control and direction in performing the work; the work also takes place outside the usual course of business; and the worker is customarily engaged in an independent trade or business. *Id.*

[231] NLRB Gen. Couns. Mem. 21-08, *supra* note 226. For instance, the Board has begun acting on these promises by withdrawing a rule proposed by the Trump Board in 2019 that would have denied graduate students the right to organize as employees. Danielle Douglas-Gabriel, *Labor Board Withdraws Rule to Quash Graduate Students' Right to Organize as Employees*, WASH. POST (Mar. 12, 2021, 3:01 PM), https://www.washingtonpost.com/education/2021/03/12/nlrb-graduate-student-workers-unions/ [https://perma.cc/V9MW-UNL4]. The precedent permitting graduate students to organize is *Columbia Univ.*, 365 N.L.R.B. No. 136 (Dec. 16, 2017).

[232] Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at 1, 8 (2023); *see also* Standard for Determining Joint-Employer Status, 88 Fed. Reg. 73,946, 74,017 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103) (defining as a "joint employer" any employer who exercises control or retains the right to exercise control over "one or more of the employees' essential terms and conditions of employment").

within the labor market and economy, transforming conceptions of who counts as an equal member of "we the people."

Worker movements have also pressed for changes at the state and local level: Several jurisdictions have enacted provisions increasing protections for independent contractors and gig workers.[233] Some changes have also occurred in the public sector: The state of Virginia has made it easier for public sector workers to organize, now allowing cities, counties, and towns to bargain with their employees, although still banning bargaining for state workers.[234] Meanwhile, unions have organized millions of home care workers through innovative public–private partnerships that transformed caregivers into quasi-public employees who can bargain collectively with the state or local governments funding the care.[235] These campaigns have been led by women of color and have sought to force society to value the labor of care, often using rhetoric about the need to "be taken out of slavery," as well as broader claims about dignity, justice, and rights.[236]

Although the PRO Act would not expand the NLRA to cover agricultural or domestic workers,[237] movements among these workers have recently won labor rights in several states and localities. In particular, domestic workers have, over the past decade, created an energetic worker movement to demand legal protections for these excluded workers and that care work be valued.[238] Through the Domestic Workers Alliance and related groups, they have won passage of several state and city Domestic Workers Bills of Rights and successfully pressed the International Labor Organization

---

[233] SEATTLE, WASH., MUNICIPAL CODE § 14.34 (2021) (extending rights related to disclosure and timely compensation); N.Y.C., N.Y., ADMINISTRATIVE CODE § 20-1522 (2021); N.Y.C., N.Y. Minimum Pay for Food Workers (June 11, 2023) (to be codified at scattered sections of 6 R.N.Y.C.); Joanna Fantozzi, *New York City's Minimum Wage Law for Delivery Workers Upheld by the Courts*, NATION'S REST. NEWS (Dec. 1, 2023), https://www.nrn.com/news/new-york-city-s-minimum-wage-law-delivery-workers-upheld-courts [https://perma.cc/QG7F-NX7M].

[234] H.B. 582, 2020 Gen. Assemb., Reconvened Sess. (Va. 2020).

[235] EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE 149–82, 194–200 (2012).

[236] *Id.* at 123–25, 168, 176; *see also id.* at 122, 166, 177 (describing home care workers' demands to be taken out of "slavery" and their invocation of "tropes of slavery, dignity, justice, and rights").

[237] This decision may reflect continued reticence even within the more traditional labor movement and its congressional allies to equally value care work and agricultural work long dominated by immigrants and people of color. *See Why the US PRO Act Matters for the Right to Unionize: Questions and Answers*, HUM. RTS. WATCH (Apr. 29, 2021, 6:00 AM), https://www.hrw.org/news/2021/04/29/why-us-pro-act-matters-right-unionize-questions-and-answers [https://perma.cc/K5TU-59WG] (criticizing the PRO Act for excluding such workers).

[238] For a history of these movements, see, for example, BORIS & KLEIN, *supra* note 235, at 214–18, and Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 413–14 (2011).

to adopt a new convention governing domestic work.[239] They have also helped bring about new Department of Labor regulations expanding wage entitlements for live-in domestic workers and workers providing companionship services.[240]

In seeking to eradicate exclusions from labor law, the domestic worker movements frame their demands as being about much more than economic policy. Rather, they insist on being treated as full rights-bearing members of the community and expressly situate their exclusion in the history of subordination and labor exploitation that has defined U.S. constitutional history.[241] As the Domestic Workers Alliance puts it:

> Domestic work is deeply rooted in the history of slavery, and it's this legacy that continues to shape the sector today. It is defined by low pay, rampant abuse and sexual harassment, and a lack of worker protections. This creates a rigged system where care work is continually undervalued despite being essential to our economy and society.[242]

They seek to treat care work—whether performed by domestic workers or by family members—as fully valued work and as essential to democracy and freedom.[243] Their legislative allies make similar arguments. For example, Representative Jamaal Bowman recently argued that "[c]are providers and domestic workers at every level, in every state, must have the right to organize and form a union. Democracy cannot thrive without care providers and the work of unions."[244]

---

[239] Shah & Seville, *supra* note 238, at 413–14; *see, e.g.*, 2013 Cal. Stat. 3425–27 (California Domestic Worker Bill of Rights); 2010 N.Y. Laws 1315–18 (New York Domestic Workers Bill of Rights); *see also* ILO, Domestic Workers Convention, June 16, 2011, 2955 U.S.T.S. 51379.

[240] Shah & Seville, *supra* note 238, at 414, 426; *see* 29 C.F.R. §§ 552.2, 552.3, 552.6 (2015).

[241] *See History*, DOMESTIC WORKERS UNITED, https://www.domesticworkersunitednyc.org/history [https://perma.cc/T4P9-VJH9]; *Mission*, DOMESTIC WORKERS UNITED, https://www.domesticworkersunitednyc.org/mission [https://perma.cc/7U6W-F33R].

[242] *About NDWA*, *supra* note 200; *see also* @domesticworkers, X (June 18, 2020, 6:14 PM), https://twitter.com/domesticworkers/status/1273740969939173376 [https://perma.cc/732T-3FPJ] ("Domestic workers earn an average of about $11 to care for our loved ones. This work is rooted in the legacy of slavery and it[]s continued devaluing is the result of anti-Black racism. This is the moment to reverse that long history of discrimination, and start valuing care.").

[243] *See* BORIS & KLEIN, *supra* note 235, at 224 (emphasizing that care workers believe their work is of social and economic value, that it produces larger public goods, and that it is entitled to just renumeration); Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL'Y J. 159, 162–66 (2011) (describing the characteristics and concerns of domestic workers); *cf.* Nancy Fraser, *Contradictions of Capital and Care*, NEW LEFT REV., July/Aug. 2016, at 100 (arguing that "social reproduction is a condition of possibility for sustained capital accumulation" but "capitalism's orientation to unlimited accumulation tends to destabilize the very processes of social reproduction on which it relies," leading to crisis).

[244] @JamaalBowmanNY, X (Feb. 19, 2020, 6:42 AM), https://twitter.com/JamaalBowmanNY/status/1230095219321974786 [https://perma.cc/H5AU-Z52L].

Farmworkers, too, have sought and won new rights, including in New York, where an appellate court recently struck down a Jim Crow-era exclusion that denied farmworkers the right to organize and collectively bargain.[245] The case emerged from worker organizing. The Worker Justice Center of New York sued the state after its member was fired from his job as a dairy worker for meeting with coworkers and organizers to discuss workplace conditions. They argued that, by excluding farmworkers from the State Employment Relations Act, the state violated the New York Constitution's guarantee of equal protection and infringed upon workers' fundamental right to organize and collectively bargain.[246] In winning the lawsuit, plaintiff Crispin Hernandez was quoted: "All workers deserve to have a voice and be heard at their place of work, and farmworkers deserve to be treated with respect and dignity."[247]

The New York legislature subsequently enacted the Farm Laborers Protection Act, providing both wage and hour protections and robust organizing rights, including union recognition when a majority of workers sign union cards.[248] Since the enactment of the law, more than 600 farmworkers in New York have successfully organized across numerous farms and with several unions.[249] As one farmworker told the *Guardian*, "[s]ometimes we are pushed to work so hard, it doesn't feel doable. It was always the boss's word. Now with a union, we feel we have someone pushing back."[250] Meanwhile, in the South, the innovative Coalition of Immokalee Workers continues to organize successfully by forcing private

---

[245] Hernandez v. State, 173 A.D.3d 105, 115 (N.Y App. Div. 2019). California and Hawaii provide farmworkers more rights than most other states. *See* Benjamin I. Sachs, *Safety, Health, and Union Access in* Cedar Point Nursery, 2021 SUP. CT. REV. 99, 99–100 (discussing California labor law protections for agricultural workers); Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act* 11 (June 1, 2005) (working paper), https://ssrn.com/abstract=733424 [https://www.perma.cc/W7XC-YCAM] (discussing the relatively more pro-organizing farm labor laws in Hawaii and California).

[246] *Hernandez*, 173 A.D.3d at 108.

[247] *Appeals Court Recognizes That Farmworkers Have a Fundamental Right to Organize*, NYCLU (May 23, 2019), https://www.nyclu.org/en/press-releases/appeals-court-recognizes-farmworkers-have-fundamental-right-organize [https://perma.cc/P4AE-7N76].

[248] *See* 2019 N.Y. Laws 845–56 (New York Farm Laborers Fair Labor Practices Act).

[249] Steven Greenhouse, *Union Wins at New York Farms Raise Hopes for Once-Powerful UFW*, GUARDIAN (July 6, 2023), https://www.theguardian.com/us-news/2023/jul/06/new-york-farm-workers-ufw-unions [https://perma.cc/UG3R-NZG9]. On the legacy of unfree labor in the south, see Hamilton Nolan, *Mississippi Believes It Can Be Organized. Does Anyone Else?*, IN THESE TIMES (Oct. 18, 2021), https://inthesetimes.com/article/organizing-the-south-mississippi-labor-unions-aflcio-rwdsu-southern-civil-rights-racism [https://perma.cc/AJF5-SWFN].

[250] Greenhouse, *supra* note 249.

contracts on employers through public pressure and boycott campaigns.[251] And California, one of the few states that has long provided organizing rights for farmworkers, recently strengthened its law, allowing workers to achieve a union if a majority sign union cards as in New York.[252]

In short, through organizing, administrative reform, legislative enactments, protest, and public statements, labor is seeking to change who counts as a full member of the demos, while reshaping the meaning of equal protection for workers. It expressly situates the exploitation of workers in industries dominated by women and people of color in U.S. constitutional history; and it demands an end to exclusions and systematic hierarchies that have long pervaded U.S. labor law. In so doing, labor advances a different conception of emancipation and equality, one that would treat all workers as full rights-bearing members of the community, as equal members of "we the people." At the very least, it insists that government has the power to achieve these goals, contrary to business's views as discussed in Part III, below.

D. A Democratic Administrative State with Democratic Control over the Market

Finally, worker movements increasingly seek to transform government and to increase its capacity to provide for the public good, making existing mechanisms more participatory and responsive to workers while subordinating the market to greater democratic control. In so doing, they offer a different vision of constitutional and administrative law—one that departs from not only the vision advanced by business and emerging from the Supreme Court's conservative supermajority but also the approach to governance adopted in the post-New Deal era. This strand of labor's vision is again constitutional in nature: It is seeking to change at a fundamental level how government is constituted and how governmental power is exercised. Its vision would require changes to current separation-of-powers doctrine and, even more so, to the constitutional law doctrines pressed by business as part of capital's constitution, discussed below.[253]

The contemporary American state is decidedly *not* socially democratic in its orientation.[254] Despite the aspirations of the CIO unions in the New

---

[251] James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, *in* TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES 351, 360–72 (Joanna Howe & Rosemary Owens eds., 2016); *see Announcing First Fair Food Program Sponsor in Tennessee!*, COAL. OF IMMOKALEE WORKERS (Feb. 18, 2022), https://ciw-online.org/blog/2022/02/announcing-first-fair-food-sponsor-in-tennessee [https://perma.cc/8JUQ-GZ8T].

[252] CAL. LAB. CODE § 1156.36.

[253] *See infra* Section III.D.

[254] *See* sources cited *supra* note 217.

Deal and World War II eras, the New Deal settlement neither established worker organizations as social partners with power to help set basic standards of employment or shape the direction of the economy nor achieved a state committed to extending principles of democracy into the economy.[255] Instead, since the post-World War II era, and particularly since the 1970s, the United States has embraced what were extolled as "free market principles" to govern the economic sphere, as well as technocratic decision-making; liberal, pluralistic lobbying; and presidential control over the administrative state.[256]

Despite significant internal debate about the utility of engaging with the state,[257] growing worker movements today seek to change this arrangement, to reposition labor's relationship with governance while reshaping institutions of government. This agenda can be seen in a few key moves.

First, worker movements increasingly seek to win the right to exercise collective power over social welfare policy, and, in so doing, to transform how government is constituted and the extent of democratic power over the economy. The Domestic Workers Alliance, for example, claims that "[w]hile anchored in domestic work, our work forges a path toward an economy and democracy rooted in justice, equality, and interdependence for all."[258] In "bargaining for the common good," the Chicago teachers' strike of 2019 demanded not only smaller class sizes, better wages, and improved school conditions but also changes to housing policy in a city where many students

---

[255] *See* JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 5–6 (2003); Andrias, *Fair Labor Standards Act*, *supra* note 93, at 619–20; Kate Andrias, *Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Fight for Greater Democracy*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY 384, 396–408 (Daniel Crane & William Novak eds., 2023). Short-lived emergency boards that governed certain industries, particularly during both World Wars, are recognized exceptions. *See* Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY 95, 95–96 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016) (defining terms); MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 71–81, 182–91 (1994) (detailing the experience of war labor boards).

[256] *See, e.g.*, Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 693–96 (2006) (describing neoliberal state organization); GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA 107–08 (2022) (describing the rise of neoliberalism in the United States); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 1–2 (2018) (explaining that neoliberalism required a protective state apparatus).

[257] For discussion of debates within the historical labor movements about whether a "statist" approach is wise, see Forbath, *Shaping American Labor*, *supra* note 69, at 1145–46; LICHTENSTEIN, CONTEST OF IDEAS, *supra* note 93, at 82–83; and Andrias, *supra* note 255. For discussion of contemporary debates, see Andrias, *New Labor Law*, *supra* note 15, at 70–76.

[258] *About NDWA*, *supra* note 200.

face homelessness.[259] That is, their reform efforts go beyond their relationship with their employer and even beyond labor policy to broader goals of making the government an effective guarantor of its residents' wellbeing.

Second, efforts are growing within the labor movement to have government take an active role in facilitating or mandating sectoral bargaining—a system in which the government would require unions and employers to agree to employment standards that would govern all workers within an industry. The United States is an outlier among industrialized democracies: Virtually all others empower unions to negotiate employment rights for workers on a sectoral or industrial basis.[260] Under sectoral bargaining systems, unions and employers negotiate standards that apply to all workers in the economic sector. Workers also have the right to participate at the shop level through, for example, works councils, local unions, or competing minority unions.[261] The United States has experimented with sectoral approaches and a system of democratic industrial policy at earlier times in its history. In the early New Deal period, for example, minimum wages were set on an industry-by-industry basis by administrative committees comprised of labor and employer representatives.[262] In addition, unions like the UAW and the Steelworkers achieved a form of sectoral bargaining by forcing employers to engage in pattern bargaining.[263] Yet the NRLA's legal regime does not facilitate or mandate such bargaining. Rather,

---

[259] Novello et al., *supra* note 182. On bargaining for the common good, see MCCARTIN, *supra* note 104.

[260] *See* Andrias, *Fair Labor Standards Act*, *supra* note 93, at 622 (citing STEPHEN J. SILVIA, HOLDING THE SHOP TOGETHER: GERMAN INDUSTRIAL RELATIONS IN THE POSTWAR ERA 26–28, 38–48 (2013)); Franz Traxler & Martin Behrens, *Collective Bargaining Coverage and Extension Procedures*, EURWORK (Dec. 17, 2002), http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-coverage-and-extension-procedures [https://perma.cc/9VST-JVCN]. *See generally* DAVID MADLAND, *Lessons from Canada, Britain, and Australia*, *in* RE-UNION: HOW BOLD LABOR REFORMS CAN REPAIR, REVITALIZE, AND REUNITE THE UNITED STATES 86 (2021) (comparing the United States to Britain, Canada, and Australia and arguing for sectoral bargaining); David Madland, *Historic New EU Law Part of Growing Push for Sectoral Bargaining*, ONLABOR (Jan. 19, 2023), https://onlabor.org/historic-new-eu-law-part-of-growing-push-for-sectoral-bargaining/ [https://perma.cc/9MNW-R5ZA] (describing the "global trend of economically advanced countries promoting sectoral bargaining"); David Madland, *New Zealand's New Sectoral Bargaining Law Holds Lessons for the United States*, ONLABOR (Dec. 22, 2022), https://onlabor.org/new-zealands-new-sectoral-bargaining-law-holds-lessons-for-the-united-states/ [https://perma.cc/5G6M-3XNW] (highlighting New Zealand's "Fair Pay Agreement" sectoral bargaining policy).

[261] *See* Andrias, *New Labor Law*, *supra* note 15, at 6, 33, 78–79; David Madland, Kate Andrias & Malkie Wall, *A How-To Guide for State and Local Workers' Boards*, AM. PROGRESS (Dec. 11, 2019) [hereinafter Madland et al., *How-To Guide*], https://www.americanprogress.org/article/guide-state-local-workers-boards/ [https://perma.cc/V7WY-JR4C].

[262] *See* Andrias, *Fair Labor Standards Act*, *supra* note 93, at 662–79.

[263] *See id.* at 640–41, 689.

U.S. employees are legally obligated to bargain only on a firm-by-firm, or even worksite-by-worksite, basis. This approach makes little sense given the shape of the contemporary economy, in which companies are both highly fissured and frequently national or international in scope. Workers at a single McDonald's franchise or Starbucks store, for example, can exercise little power when they organize and bargain on a store-by-store basis.[264]

The Fight for $15, Red for Ed, the Domestic Workers Alliance, and other contemporary worker movements are attempting to change this model. They are refusing labor law's orientation around the individual employer–employee relationship. Instead, they seek to bargain at the sectoral and regional level, for all workers—and they are calling on government to facilitate that process.[265] Though stymied at the federal level, the movements are working to create new administrative processes at the state level through which workers, employers, and government can set standards on a sector-wide basis, consistent with federal labor law preemption doctrine.[266] For example, in 2015, the Fight for $15 successfully called upon the New York Governor to convene a tripartite wage board made up of labor, business, and the public to receive public comment and negotiate a wage increase for the fast-food industry.[267] More recently, fast-food workers in California won legislation establishing a new state-appointed council of workers and employers that will help set industry-wide minimum standards for wages, health and safety conditions, some forms of leave, and protection from harassment and discrimination.[268]

Similarly, legislation in Seattle, passed in 2018, creates a tripartite system through which domestic workers can negotiate standards for their industry.[269] Colorado and New York have both created committees made up of workers and business to analyze and improve conditions in the agricultural industry.[270] Minnesota has enacted a robust standards board for the nursing home industry;[271] and Michigan has created, by executive order, a "nursing

---

[264] *See* Andrias, *New Labor Law*, *supra* note 15, at 29, 58–62.

[265] *See generally id.* (proposing sectoral and regional bargaining as a solution to American labor law's failure to protect working class interests).

[266] *See generally id.* (describing how state and local boards are a step towards sectoral bargaining and discussing legal constraints on such boards, including federal labor law preemption); Madland et al., *How-To Guide*, *supra* note 261.

[267] *See* Andrias, *New Labor Law*, *supra* note 15, at 64–65.

[268] A.B. 1228, 2023 Leg., Reg. Sess. (Cal. 2023).

[269] SEATTLE, WASH., MUN. CODE § 14.23 (2018).

[270] S.B. 21-087, 2021 Leg., Reg. Sess. (Colo. 2021); *Farm Laborers Wage Board*, N.Y. DEP'T OF LAB., https://dol.ny.gov/farm-laborers-wage-board [https://www.perma.cc/3DX7-43YF].

[271] *See* H.F. 908 § 181.212, 93rd Leg., Reg. Sess. (Minn. 2023).

home workforce stabilization council."[272] Nevada and Colorado have created boards to develop minimum employment standards for home care.[273] In total, six states and three local governments have enacted this type of policy since 2018, bringing into creation twelve new worker boards.[274] Numerous other states and cities are considering similar laws.[275]

This project is, by its very nature, constitutional: Worker movements are trying to reshape governmental structures, obligations, and powers. The goal is to create a new set of institutions through which fundamental decisions are made, while reshaping the principles that guide those decisions.[276] In so doing, labor is offering a different vision of administrative and constitutional law from the approach adopted in the post-New Deal era. Labor's approach is based less on technocratic expertise and more on social partnership and power sharing; the goal is greater democratic control over the economy. Notably, the industrial democracies that employ this approach most effectively have produced more egalitarian economies with stronger labor unions; and their governments exercise more democratic power over the private sphere.[277] Moreover, as discussed in Section III.D, labor's approach, if adopted in its most robust form, would require revision to existing nondelegation and due process constitutional doctrine. This doctrine currently prohibits government from allowing business and labor representatives to bind other actors in an industry. Even in more modest form, labor's vision for regulation of the economy by a participatory administrative agency, empowered to respond to changing conditions, would

---

[272] Mich. Exec. Order No. 2021-15 (Dec. 14, 2021).

[273] S.B. 23-261, 2023 Leg., Reg. Sess. (Colo. 2023); S.B. 340, 81st Leg., Reg. Sess. (Nev. 2021).

[274] *See* Aurelia Glass & David Madland, *Momentum for Worker Standards Boards Continues to Grow*, CTR. FOR AM. PROGRESS (Sept. 7, 2023), https://www.americanprogress.org/article/momentum-for-worker-standards-boards-continues-to-grow [https://www.perma.cc/ZNV3-B8LX].

[275] One proposal in New York would create a mechanism for nail salon owners and workers to set minimum prices and wages, while another would create a broad system of work boards for most industries. S.B. 1800, 2023 Leg., Reg. Sess. (N.Y. 2023); S.B. 6757, 2023 Leg., Reg. Sess. (N.Y. 2023). Illinois is considering a law that would create a standards board for childcare workers, while Minneapolis has proposed one that could provide recommendations for any industry. H.B. 2310 § 15, 103rd Leg., Reg. Sess. (Ill. 2023); Susan Du & Katelyn Vue, *Minneapolis Mayor, City Council Members Propose New Labor Board to Address Worker Dissatisfaction*, STAR TRIB. (June 15, 2022), https://www.startribune.com/minneapolis-mayor-city-council-members-to-create-a-new-labor-board-to-address-worker-dissatisfaction/600182460/ [https://www.perma.cc/MH66-ZVHP].

[276] *See* TUSHNET, TAKING THE CONSTITUTION, *supra* note 18, at 194.

[277] *See* Jonas Pontusson, David Rueda & Christopher R. Way, *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRIT. J. POL. SCI. 281, 282, 307 (2002); Michael Wallerstein, *Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649, 668–69 (1999); Kathleen Thelen, *Critical Dialogue: What Unions No Longer Do*, 13 PERSPS. ON POL. 155, 155 (2015). *See generally* THELEN, *supra* note 217 (comparing labor market institutions in the United States, Germany, Denmark, Sweden, and the Netherlands).

create a sharp conflict with the separation-of-powers and administrative law doctrine advanced by business and increasingly advanced by the conservative Court.[278]

* * *

In these four ways, labor is attempting to transform the small-c constitution and build a new constitutional order. It seeks to protect the right to organize and strike as fundamental and to advance democracy in the workplace; to guarantee socioeconomic rights for all workers; to eliminate racial and gender hierarchy in employment through a focus on antisubordination and inclusion; and to transform government such that more democratic control is exercised over the economy and the administrative state itself is more democratic. Sometimes labor articulates its vision in express constitutional terms—outside the courts in legislatures, agencies, and the public sphere. Other times, it declines to articulate a big-C constitutional argument. But whether it invokes particular textual provisions or not, the project is *constitutional*. Labor is attempting to change the fundamental commitments of the nation while reshaping government's obligations and duties and the scope and nature of rights. Through praxis, labor is seeking to reshape our small-c constitution and overcome what it sees as failings in the interpretation of the big-C Constitution. And, as the next Part explores, its efforts are teeing up a more formal constitutional clash as business presses its express, contrary constitutional vision in courts.

III. CAPITAL'S CONSTITUTION

Business recognizes the stakes of labor's project, and it is responding vigorously to advance its own constitutional agenda. After all, business's conflicting constitutional vision has long enjoyed a privileged place in the country's laws, even after the New Deal, and business is committed to maintaining that status. Thus, in response to labor's renewed efforts and with a sympathetic conservative supermajority on the Supreme Court, business is working to shore up and extend a set of big-C constitutional doctrines, as well as small-c constitutional customs and rules, to stymie labor's democratic vision and lock in the power of capital. Its strategy includes the First Amendment, the Takings Clause, the Supremacy Clause, the public and private nondelegation doctrines, the Dormant Commerce Clause, and—as in the *Lochner* era—the Due Process and Equal Protection Clauses, as well as statutory and common law arguments. In contrast to labor, it relies heavily

[278] *See infra* Section III.D.

on the courts and in particular the increasingly conservative Supreme Court, with appeal to the big-C Constitution.

In this Part, I examine the ways in which business and its anti-labor allies have reacted to the four pillars of labor's constitutional vision outlined above in Part II.

A. Against Democracy at Work: Employer Property and Speech Rights

First, corporations have responded to labor's effort to democratize the workplace and protect labor's speech and association rights by asserting new claims about their own free speech and property rights.

1. Clash at the Agency

Much of the constitutional fight has occurred at the agency level. During the Trump Administration, employers worked to unsettle longstanding NLRA protections for workers' speech and collective action rights, finding a sympathetic audience before the NLRB. For example, one of the Trump Board's first policies made it easier for employers to adopt rules, policies, and handbook provisions that restrict workers from engaging in concerted action, including speech related to union organizing.[279] Before the Trump Board's rulings, an employer's policy would be deemed unlawful if workers could reasonably interpret it to prevent them from engaging in protected concerted activity.[280] Thus, a "confidentiality policy" would be deemed unlawful if it was so broad that workers could reasonably interpret it to prevent them from speaking amongst themselves about working conditions; a no-loitering policy would be unlawful if workers could reasonably believe it prohibited them from talking to coworkers after their shifts. The Trump Board upended this longstanding doctrine, holding, over vociferous dissent, that such employer rules were no longer unlawful. Instead, a rule was problematic only if the General Counsel could show both that employees would actually interpret the rule as restricting their Section 7 activity *and* that the nature and extent of the potential impact on NLRA rights were not outweighed by legitimate justifications associated with the rule.[281] Applying the new standard, the Board permitted a host of employer rules to survive challenge under Section 8(a)(1) of the Act, including one requiring that employees sign documents misclassifying them as independent

[279] *See* The Boeing Co., 365 N.L.R.B. No. 154, at 4 (Dec. 14, 2017) (overruling Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004)).

[280] *Lutheran Heritage Village*, 343 N.L.R.B. 646.

[281] *The Boeing Co.*, 365 N.L.R.B. at 7.

contractors[282] and another that restricted employee comments to the media and required confidentiality regarding pay and compensation.[283]

The Trump Board further restricted employees' speech rights by limiting the forums in which employees could engage in protected associational activity. Although the rule has long been that employees can engage in union solicitation and communication while at work, as long as not on working time, the Trump Board held that companies could punish employees for using corporate email systems to engage in union activity, including sending pro-union messages, circulating petitions, or organizing walkouts.[284] It also ruled that off-duty employees do not have a right to handbill or engage in other organizing activity in nonwork areas of their workplace if their employer is a contractor at the workplace as opposed to the owner of the property.[285] Given the proliferation of contractor relationships and the growth of the "fissured" workplace, this opinion was particularly detrimental to workers' ability to communicate with their coworkers and public supporters.[286]

The Trump Board also permitted greater employer discrimination against union speech and other associational activity. In *Kroger*, the Board held that a supermarket could call the police to stop a union official from soliciting workers in a store's parking lot, even though the employer regularly allowed organizations like the Salvation Army and the Girl Scouts to solicit on the employer's property.[287] This overturned a longstanding rule that required employers to give unions similar access as other groups.[288] According to the Trump Board, discrimination occurs only when the employer prohibits an organization from engaging in activities "similar in nature" to the union activities.[289] Further privileging employer property rights over union organizers' ability to speak with workers, and workers' ability to engage in associational activity, the Board changed the rule on access to nonwork, public spaces. It held that a hospital could ban a union organizer from simply talking with nurses in the cafeteria at the hospital, even though the area was open to the public.[290]

---

[282] Velox Express, Inc., 368 N.L.R.B. No. 61, at 1–2 (Aug. 29, 2019).

[283] *See* LA Specialty Produce Co., 368 N.L.R.B. No. 93, at 3–4 (Oct. 10, 2019).

[284] *See* Caesars Ent. Corp., 368 N.L.R.B. No. 143, at 1 (Dec. 16, 2019) (overturning Purple Commc'ns, Inc., 361 N.L.R.B. 1050 (2014)).

[285] Bexar Cnty. Performing Arts Ctr. Found., 368 N.L.R.B. No. 46, at 2 (Aug. 23, 2019).

[286] DAVID WEIL, THE FISSURED WORKPLACE 7 (2014).

[287] *See* Kroger Ltd. P'ship, 368 N.L.R.B. No. 64, at 10–11 (Sept. 6, 2019) (overturning Sandusky Mall Co., 329 N.L.R.B. 62 (1999)).

[288] *Id.* at 10.

[289] *Id.* at 2.

[290] *See* UPMC, 368 N.L.R.B. No. 2, at 5–6 (June 14, 2019).

In another line of cases, the Board curtailed employees' collective speech rights by significantly limiting protections for the right to strike and protest. As discussed in Part II, groups of employees have engaged in short strikes to call attention to labor problems and pressure their companies to change practices.[291] In July 2019, the Trump Board ruled that Walmart workers engaged in an "intermittent" strike that was not protected by labor law, even though the strikes occurred only four times over the course of more than a year and many of the employees had engaged in only one of the work stoppages. Accordingly, Walmart faced no legal consequence for retaliating against the strikers.[292] And, in a series of other cases, Trump's General Counsel tried to clamp down on a range of expressive labor protest activity, arguing that it was inherently coercive.[293]

In short, during the Trump Administration, employer speech gained significantly more protection, while worker and union speech lost protection, leaving workplaces less democratic. With reduced ability to speak amongst themselves or collectively, workers lost some of their ability to balance out the power differences between businesses and employees. The changes under the Trump Board thus tipped workplaces back further in the direction of autocracy by management.

As discussed in Part II, now, under the Biden Administration, the new NLRB General Counsel is pushing back, building on the rising organizing efforts and taking up labor's vision in ways that would significantly expand protection for worker speech and association.[294] As the cases make their way before the full Board, the agency is reversing the Trump-era precedents and embracing a more expansive vision of worker speech and association rights—one that is sensitive to relationships of power within the workplace and that sees as its primary goal the facilitation of democratic values.[295]

---

[291] *See supra* note 181 and accompanying text.

[292] *See* Walmart Stores, Inc., 368 N.L.R.B. No. 24, at 1 (July 25, 2019).

[293] *See, e.g.*, Respondent's Memorandum in Opposition to the Request for a Temporary Restraining Order, King v. Construction & Gen. Building Laborers' Local 79, 393 F. Supp. 3d 181 (E.D.N.Y. July 1, 2019) (complaint alleging that Scabby the Rat violates secondary boycott restrictions); Brief by Counsel for the General Counsel, Int'l Bhd. of Elec. Workers, Local 98 v. Spruce, No. 04-CC-223346 (NLRB filed May 16, 2019) (brief arguing that inflatable rats and bullhorns violate secondary boycott restrictions); Int'l Union of Operating Eng'rs, Local 150, Nos. 13-CP-227526, 13–CC–227527, 13–CC–231597 & 13–CC–233109 (NLRB. 2021) (cases arguing that inflatable rats and banners violate secondary boycott restrictions); Int'l Bhd. of Elec. Workers, Local 134, NLRB Advice Memorandum, No. 13-CC-225655 (Dec. 20, 2018) (arguing that inflatable fat cat constituted an unfair labor practice).

[294] *See supra* Section II.A.

[295] *See supra* notes 152–162 and accompanying text.

2. Clash at the Court

The NLRB has thus been a site of vigorous contestation over the scope and nature of speech, democracy, and property rights in recent years—a site of small-c constitutional clash between labor and business—with the Board now playing an important role in advancing labor's vision. But the Board's ability to do so is increasingly being threatened as business advances big-C constitutional arguments in federal courts. In a series of cases over the last few years, business has persuaded the Supreme Court and conservative lower courts to constitutionalize protection for employer speech and property rights. Recent cases have seen workers' collective labor rights pulled back in three key ways: (1) the weakening of unions in the name of free speech; (2) the weakening of employees' collective action rights in the name of freedom of contract; and (3) a further weakening of collective action rights and union access in the name of employer property rights.

First, the Court has leveraged a broad interpretation of freedom of speech to weaken public sector unions and threaten workplace democracy more generally. In *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, the Court held that public sector collective bargaining agreements that require employees to pay "fair-share" or "agency" fees—i.e., to cover the costs that unions incur in negotiating and administering labor contracts—violate the First Amendment.[296] The *Janus* majority overruled *Abood v. Detroit Board of Education*, a four-decades-old precedent holding that employees covered by a collective bargaining agreement could be required to pay "fair share" fees.[297] *Janus* represented the culmination of decades of efforts by conservatives to impose "right to work" on all public sector workers in order to weaken unions and, in particular, workers' collective political power.[298] Many predicted that *Janus* would have substantial adverse effects on union membership and funding.[299] The holding has indeed resulted in some significant losses among public sector unions,

[296] 138 S. Ct. 2448, 2486 (2018).

[297] 431 U.S. 209, 235–36 (1977).

[298] *See* Andrias, Janus*'s Two Faces*, *supra* note 179, at 25.

[299] *See, e.g.*, Sarah Jaffe, *With* Janus*, the Court Deals Unions a Crushing Blow. Now What?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/supreme-court-janus-unions.html?unlocked_article_code=1.Tk0.wA9m.e9pSz7q5EqbU&bgrp=a&smid=url-share [https://perma.cc/AU7T-N6ZM] (arguing that in the wake of *Janus*, "[t]he long-term goal is defunding unions, shriveling their political and shop-floor power, to push both political parties deeper into the arms of business and to leave working people with no champions").

although some unions have responded successfully by engaging in intense internal organizing to minimize the harm.[300]

Whatever the immediate impact, the First Amendment reasoning at *Janus*'s core provides a basis for further attack on worker speech and workplace democracy. Before *Janus*, the Supreme Court had already expanded the scope of activity that the First Amendment protects, transforming what was previously understood to be ordinary regulatory activity into First Amendment violations, while also increasing protection for corporate speech.[301] In *Janus*, the Court fully embraced the idea that democratically enacted rules requiring people or corporations to subsidize or transmit messages with which they disagree violate the First Amendment, even when those messages are not imputed to the objecting individual.[302]

Using similar logic, a panel of the U.S. Court of Appeals for the D.C. Circuit in 2013 concluded that requiring an employer to inform workers of their legal right to organize a union via an official posting violated the NLRA's statutory "free speech" provision and the First Amendment.[303] Though the circuit sitting en banc ultimately rejected this reasoning,[304] employers are pressing the argument again post-*Janus*, arguing, for example, that NLRB remedies violate free speech principles when the Board orders

---

[300] Andrias, Janus*'s Two Faces*, *supra* note 179, at 53–54. *See generally* Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 CALIF. L. REV. 1821 (2019) (describing paths forward after *Janus* as well as challenges facing unions operating without union security provisions). According to Mary Kay Henry, president of the SEIU, "*Janus* was seized on by us and other parts of the labor movement as an opportunity to re-educate and activate our members in a much bigger fight that we're all committed to having." Rebecca Rainey & Ian Kullgren, *1 Year After* Janus, *Unions Are Flush*, POLITICO (May 17, 2019), https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266 [https://perma.cc/ZLQ7-CMLX].

[301] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra 138 S. Ct. 2361, 2371–72 (2018); Harris v. Quinn, 573 U.S. 616, 647–49 (2014); Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734–35 (2011); Citizens United v. FEC, 558 U.S. 310, 342–43 (2010); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 476–78 (2007). For scholarship critiquing these doctrinal developments, see sources cited *supra* note 116. For additional scholarship that explores an affirmative alternative vision for the First Amendment, see Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1986 (2018), and Lakier, *Imagining an Antisubordinating First Amendment*, *supra* note 31, at 2158–59.

[302] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463–64 (2018).

[303] Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014); *see also* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014), *reh'g granted*, 800 F.3d 518 (D.C. Cir. 2015), *and overruled by Am. Meat Inst.*, 760 F.3d 18; R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012), *overruled by Am. Meat Inst.*, 760 F.3d 18.

[304] *Am. Meat Inst.*, 760 F.3d at 23–27; *see also* In-N-Out Burger, Inc. v. NLRB, 894 F.3d 707, 716 (5th Cir. 2018) (affirming NLRB decision that restaurant employees have rights under Section 7 of the NLRA to wear buttons displaying union message); Nat'l Ass'n of Mfrs. v. Perez, 103 F. Supp. 3d 7, 17 (D.D.C. 2015) (requiring an employer to post government speech about labor rights is not compelled speech in violation of the First Amendment).

that an employer post a notice or read a statement declaring that it has committed unfair labor practices.[305] And in a series of cases, employers have begun to argue that their speech is protected—and thus cannot constitute an unfair labor practice—even if it has the effect of coercing employees, and even if it is without any basis in fact, unless the Board can prove that the employer's *intent* was to coerce.[306] Though no circuit has yet accepted this position, several courts of appeals have scrutinized intensely and reversed the Board's findings of unfair labor practices.[307]

A second avenue pursued by business and embraced by the Supreme Court against union rights and collective action sounds in freedom of contract. During the same term as *Janus*, the Court constrained workers' collective action rights in *Epic Systems Corp. v. Lewis*, justifying the decision with reference to the employer's and employee's contract rights.[308] In that case, the Supreme Court held, by a 5–4 majority, that the Federal Arbitration Act allows employers to require their employees to agree as a condition of employment to arbitrate all employment-related disputes on an individual basis: Workers must waive their right to participate in collective legal action through a class action lawsuit or class arbitration, notwithstanding Section 7 of the NLRA, which guarantees employees the right to engage in concerted action.[309]

Although the Court did not go so far as to constitutionalize employers' contractual rights using the Fourteenth Amendment, it used *Lochner*-esque ideas about freedom of contract to elevate class action waivers over the NLRA's protection of workers' collective action rights.[310] At the same time, the Court laid the groundwork to narrow Section 7 even further in the future,

---

[305] *See* Denton Cnty. Elec. Coop., Inc. v. NLRB, 962 F.3d 161, 174 (5th Cir. 2020) (striking down an order to read a notice to employees); Sysco Grand Rapids, LLC v. NLRB, 825 F. App'x 348, 359 (6th Cir. 2020) (same); *cf.* HTH Corp. v. NLRB, 823 F.3d 668, 678 (D.C. Cir. 2016) (emphasizing the dangers of compelled speech but upholding a public notice reading order "[g]iven the company's long history of unlawful practices and . . . severe violations" and the fact that the company has the option to have a Board employee read the notice).

[306] *See* Tesla, Inc., 370 N.L.R.B. No. 101, at 37 (Mar. 25, 2021); Brief of Petitioner Cross-Respondent Tesla, Inc. at 46–47, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. July 30, 2021); Brief for Respondent Cross-Petitioner NLRB at 35–36, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. Sept. 28, 2021).

[307] *See, e.g.*, FDRLST Media, LLC v. NLRB, 35 F.4th 108, 126 (3d Cir. 2022) (reversing the Board's finding that an employer's tweet was an unfair labor practice). *But see* Tesla, Inc. v. NLRB, 63 F.4th 981, 993–94, 996 (5th Cir. 2023) (upholding the Board's order that Musk posted an unlawful threat on X, formerly known as Twitter, and Tesla terminated a worker unlawfully but rejecting unions' argument for a public notice-reading remedy).

[308] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[309] *Id.* at 1632.

[310] *See id.* at 1633–42, 1648–49 (Ginsburg, J., dissenting) (suggesting that the majority resurrected *Lochner*-era freedom of contract ideas and even the long-dead yellow-dog contract).

and particularly to restrict protection for workers' engagement in democratic governance. It dismissed as dicta its own prior statements that the NLRA protects employees when they engage in collective action through "administrative and judicial forums";[311] opined that Section 7 should be understood to protect only activities that fit within the ambit of "self-organizing" and collective bargaining; and suggested that forms of collective action that developed after the enactment of the NLRA would not be covered.[312] As Justice Ruth Bader Ginsburg argued in dissent, the Court was reviving a tradition of eliminating democratically enacted legislation aimed at workplace democracy albeit without formally invoking "liberty of contract."[313] In short, the Court accepted business's small-c constitutional arguments over those of labor.

Third, in *Cedar Point Nursery v. Hassid*, the Court again cut back on labor's collective action and speech rights, this time using employer property rights. The Court held that a forty-year-old California regulation granting limited access rights to union organizers to an agricultural employer's property interfered with the owner's right to exclude and therefore constituted a *per se* physical taking.[314] The case involved a California regulation dating to the 1970s that emerged from the United Farm Workers' struggle to extend basic rights of economic security and workplace democracy to farmworkers.[315] Under the rule, union organizers were permitted to access the property of agriculture businesses to meet and talk with workers during nonwork hours on up to 120 days per year.[316] Such access was necessary to enable organizers to reach workers toiling for long hours and sometimes living on farms. It also functioned to legitimize unionization following years of violent repression. Although the California Supreme Court upheld the regulation and the U.S. Supreme Court denied certiorari more than three decades ago,[317] in 2021, pressed by agribusiness, the Chamber of Commerce, and conservative property rights groups, the Supreme Court agreed with employers that, by allowing organizers to come

311 *Id.* at 1628–29 (discussing *Eastex v. NLRB*).

312 *Id.* at 1625.

313 *Id.* at 1648–49 (Ginsburg, J., dissenting).

314 141 S. Ct. 2063, 2072 (2021).

315 On the farmworkers' movement, see generally SUSAN FERRISS & RICARDO SANDOVAL, THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT (Diana Hembree ed., 1997), which documents Chavez's leadership of the farmworkers movement, including firsthand accounts from supporters of the movement and photographs, and Jennifer Gordon, *Law, Lawyers, and Labor: The United Farmworkers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1 (2005), which discusses Chavez and the United Farm Workers Movement's successful pursuit of California's Agricultural Labor Relations Act.

316 CAL. CODE REGS. tit. 8, § 20900(e) (2023).

317 Agric. Lab. Rels. Bd. v. Superior Ct., 16 Cal. 3d 392, 414–15 (1976).

onto their property and speak with workers, the state of California was "taking" the employers' property without compensating them in violation of the Fifth Amendment.[318]

Scholars disagree on how far-reaching the implications of *Cedar Point* are. Nikolas Bowie argues that the logic of the opinion highlights the Supreme Court's fundamentally autocratic commitments and, he contends, draws into question a host of democratically enacted civil rights laws.[319] Lee Fennell emphasizes that the ruling is more modest: Unlike in the context of the First Amendment, Fennell argues, the Takings Clause ruling permits a democratic escape hatch because governments can choose to pay for what they "take."[320] Nonetheless, the implications of *Cedar Point*'s big-C ruling for the small-c constitutional clash underway between labor and business are significant. Law reform efforts to enable wider organizer access, which had been gaining support in recent years,[321] now will likely be harder to achieve because such efforts might amount to a "taking" and thus require a novel regime to compensate employers.

Even more concerningly, *Cedar Point* marks a new path for narrowing additional union activity and worker speech and association rights that necessarily burden employer property interests. For example, under existing law, workers have Section 7 rights to use employer property to engage in union activity and pro-union speech while on nonworking time in a host of different ways. But *Cedar Point* could be marshalled to argue that those statutory rights also present "takings," and the government must compensate employers for all of those longstanding rights. Though such claims are unlikely to prevail in the short term, *Cedar Point* further entrenches business's constitutional vision over labor's.

---

[318] *Cedar Point*, 141 S. Ct. at 2072.

[319] *See* Bowie, *supra* note 25, at 196.

[320] Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 54 (2022). For other critiques and limiting constructions of *Cedar Point*, see, for example, Sachs, *supra* note 245, at 101–03, which argues that the practical implications of *Cedar Point* are limited, and that the holding itself is internally inconsistent; Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 126, which notes the Court's "divergence from precedent" while emphasizing the holding's limitation to physical invasions authorized by the government; and Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427, 433 (2023), which argues that *Cedar Point* "substantially curtails the ability of governments to respond to new collective action problems with novel laws and regulations authorizing physical invasions of property interests."

[321] *See, e.g.*, SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 50 (2018) ("[T]he new statute must provide union organizers with expanded access rights to workers. Critically, these rights must include the ability to meet with workers at work.").

Finally, in 2023, in *Glacier Northwest, Inc. v. Teamsters*, the Court again privileged employers' property rights over union rights. [322] The employer, a ready-mix concrete company in Washington state, alleged that its workers had caused substantial property destruction by striking and therefore it should be allowed to bring a state tort action against the union, notwithstanding NLRA preemption.[323] The employer invoked the Constitution, arguing that "[c]onstruing the NLRA beyond its text to authorize unions to destroy employer property with no just compensation would put the law on a collision course with the Takings Clause."[324] In an 8–1 decision, the Court avoided the Takings challenge because, it ruled, there was no conflict between the NLRA and state tort law, and the state court case could proceed.[325] In the Court's view, exercising no deference to the agency, the workers had clearly failed to take "reasonable precautions" to prevent the destruction of employer property (the governing standard set by the NLRB), and their strike was therefore unprotected.[326]

Notably, Justice Ketanji Brown Jackson invoked labor's small-c constitutional vision in her solo dissent, writing that "[t]he right to strike is *fundamental* to American labor law."[327] She argued that Supreme Court precedent and the text of the NLRA required the Court to refrain from ruling on whether the strike activity was protected while an NLRB investigation of the matter was ongoing; the existence of such an investigation indicated that the strike *was* "arguably" protected by the NLRA.[328] She leaned on labor's small-c constitutional arguments about both the enshrinement of labor organizing rights as *rights* and the importance of the administrative state in protecting workers' power.

B. Against Social and Economic Rights: Freedom of Contract, Preemption, the Dormant Commerce Clause, and More

Business is also mounting constitutional challenges to labor's efforts to guarantee socioeconomic rights for all workers through statutory reform. This aspect of the constitutional clash parallels even more directly the clash of a century ago.

---

[322] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 598 U.S. 771, 779 (2023).

[323] The Supreme Court has held that states are preempted from regulating activity that is protected or arguably protected (or prohibited or arguably prohibited) by the NLRA. San Diego Bldg. Trades Council Local 2020 v. Garmon, 359 U.S. 236, 244–45 (1959). Strikes are protected, albeit with exceptions. *See supra* notes 178–179 and accompanying text (discussing law on strikes).

[324] Brief for Petitioner at 2, *Glacier Nw., Inc.*, 598 U.S. 771 (No. 21-1449).

[325] *Glacier Nw., Inc.*, 598 U.S. at 780, 781, 784.

[326] *Id.* at 781.

[327] *Id.* at 789 (Jackson, J., dissenting) (emphasis added).

[328] *Id.* at 790.

In 1905, in *Lochner v. New York*, a 5–4 majority of the Court held that a New York maximum hours law violated the freedom of contract guaranteed by the Due Process Clause of the Fourteenth Amendment because it interfered with the ability of employers and employees to determine for themselves the terms of their contractual relationships.[329] The Court repudiated *Lochner* during the New Deal, and few opinions in Supreme Court history are more widely criticized.[330] Although scholars debate what precisely *Lochner* got wrong,[331] Justice Oliver Wendell Holmes's famous dissent captures the conventional view: The Court provided insufficient deference to the democratic determination by the New York legislature that a cap on hours was wise economic policy.[332] This rule of deference became a core part of the New Deal settlement.[333] Courts must uphold economic legislation unless it is wholly irrational.[334] In the decades following the fall of *Lochner*, minimum wage laws, maximum hours laws, and a host of other basic employment laws were considered well within state power and sheltered from constitutional attack.[335]

In the last few years, however, employers have begun mounting new *Lochner*-esque constitutional challenges to the range of legislation that labor has helped to enact at the state and local level. Although employers rarely frame their arguments in substantive due process terms, their core claims are familiar.

Consider a recent challenge to a Seattle ordinance that requires app-based food delivery companies, such as Instacart, DoorDash, and UberEats, to provide premium pay to their drivers for food deliveries.[336] The ordinance targeted a set of workers who, due to their classification as independent contractors, lack ordinary employee protections and supports and were

---

329 198 U.S. 45, 53, 57 (1905).

330 *See* Jamal Greene, *The Anticanon*, 125 HARV L. REV. 379, 380–81 (2011); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U CHI. L. REV. 373, 373 (2003); ACKERMAN, *supra* note 19, at 40.

331 Lakier, *The First Amendment's Real* Lochner *Problem*, *supra* note 127, at 1252–53 (discussing various critiques); Strauss, *supra* note 330, at 374–75 (suggesting that *Lochner* was wrong not because it recognized freedom of contract but because it treated it "as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right"); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (arguing that *Lochner* was wrong not because it involved judicial activism but because the Court conceived of market ordering as "part of nature rather than a legal construct" and took this to be a neutral baseline "from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship").

332 198 U.S. at 74–76 (Holmes, J., dissenting).

333 Sunstein, *supra* note 331, at 874.

334 Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

335 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); Bunting v. Oregon, 243 U.S. 426, 438 (1917).

336 Wash. Food Indus. Ass'n v. City of Seattle, 524 P.3d 181, 188–89 (Wash. 2023).

particularly at risk during the pandemic.[337] The app-based companies and supporting trade associations sued, raising a host of constitutional challenges. Although they purported to disclaim *Lochner*, they asked the court to scrutinize the democratically enacted ordinance carefully and to strike it down as "irrational." They emphasized their

> freedom to set terms by contract for labor and for payment from businesses over governmental power to regulate businesses for public health, safety, and welfare. . . . [R]ecognizing that a substantive due process claim based on an alleged 'freedom to contract' was doomed by decades of binding precedent, [they] repackaged their economic liberty arguments as [Contract Clause, Takings, and Equal Protection claims].[338]

The Chamber of Commerce also invoked *Lochner*-esque arguments. In its amicus brief supporting the gig companies, the Chamber did not rely on *Lochner* expressly, but it argued that the city was wrong to argue that courts should defer to the democratic judgments of the Seattle legislature. According to the Chamber, the ordinance "differs from ordinary police power regulation" because it "interferes fundamentally and irrationally with multiple aspects of how a company like Instacart can operate its business" and because it "purports to serve not employees needing protection from employers with superior bargaining power but rather independent workers who contract with companies like Instacart in order to be matched with consumers seeking the services those workers provide."[339]

Sitting en banc, the Washington Supreme Court was partially persuaded by these *Lochner*-esque constitutional arguments. It held that while the app-based companies did not show that the statute violated Equal Protection or the Privileges and Immunities Clause, they did state a claim under the Takings Clause and the Contracts Clause.[340] On the Takings Clause issue, the court ruled that the law might so interfere with the profitability of the companies' contracts with their drivers that it would constitute a taking under the *Penn Central* balancing test.[341] On the Contracts Clause issue, the court

[337] Seattle, Wash., Ordinance 126,094 (2020).

[338] Reply in Support of Motion for Discretionary Review at 6–7, *Wash. Food*, 524 P.3d 181 (No. 99771-3); Respondents' Brief at 24–28, *Wash. Food*, 524 P.3d 181 (No. 99771-3).

[339] Amicus Brief of the Chamber of Commerce of the United States of America at 2–3, *Wash. Food*, 524 P.3d 181 (No. 99771-3).

[340] *Wash. Food*, 524 P.3d at 187.

[341] *Id.* at 198.

found that the companies may be able to show a substantial impairment of their contracts with drivers.[342]

The restaurant industry's unsuccessful effort to defeat the New York City fast-food worker just cause law, discussed in Part II, provides another example of the extent to which business is pressing both a big-C and a small-c constitutional agenda against labor. The industry asked the court to second guess the New York City Council's reasoned judgment about workplace conditions, arguing that the law should be struck down under the Supremacy Clause and the Dormant Commerce Clause.[343] Again, the business groups did not "expressly invoke liberty of contract and the Due Process Clause. Yet their contentions regarding both the Dormant Commerce Clause and federal labor law preemption rest on a similar foundation."[344] In filings to the district court and Second Circuit, both the Chamber of Commerce and Restaurant Industry Law Center repeatedly invoked conceptions of employer freedom and objected to the democratically enacted law's "unprecedented intrusion" into the employer–employee relationship.[345] As the Third Circuit observed in response to business's challenge to a similar Virgin Islands just cause statute, the arguments rested on the "unsettling supposition that by enacting" just

[342] The court held that further factual inquiry was needed to determine whether the law interfered with reasonable expectations. *Id.* at 199–200. For a similar *Lochner*-esque challenge to state labor regulations, see Complaint for Declaratory and Injunctive Relief at 16, 17, Amazon.com Servs. LLC v. Sacks, No. 22-cv-01404 (W.D. Wash. Mar. 14, 2023) (alleging that state workplace safety laws infringe on Amazon's substantive due process rights by requiring abatement of safety risks while the case over those risks is pending).

[343] Memorandum of Law in Support of Motion for Summary Judgment at 8–19, Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022) (No. 21-cv-4801); Brief of Appellants & Special Appendix at 21–61, Rest. L. Ctr. v. City of New York, No. 22-491 (2d Cir. June 22, 2022); *see also Rest. L. Ctr.*, 585 F. Supp. at 379, 381 (rejecting these arguments).

[344] Brief of Amici Curiae Professors of Labor Law in Support of Defendant-Appellee at 29, Rest. L. Ctr. v. City of New York, No. 22-491 (2d Cir. Sept. 28, 2022); *cf.* Brief of Amici Curiae Chamber of Com. et al., Rest. L. Ctr. v. City of New York at 18-20, No. 22-491 (2d Cir. June 29, 2022) (arguing that the law interferes with employer–employee relationship without mentioning *Lochner* or Due Process).

[345] Brief of Appellants & Special Appendix, Rest. L. Ctr. v. City of New York, No. 22-491 (2d Cir. June 22, 2022); Brief of Amici Curiae Chamber of Com. et al., Rest. L. Ctr. v. City of New York, No. 22-491 (2d Cir. June 29, 2022). The Court of Appeals for the Second Circuit affirmed the district court's dismissal of the New York lawsuit, finding that the law "represents an unexceptional exercise of the City's traditional power to regulate and define minimum labor standards" and therefore did not violate either the Dormant Commerce Clause or the preemption provision of the NLRA. Rest. L. Ctr. v. City of New York, No. 22-491-cv, slip op. at 52 (2d Cir. Jan. 5, 2024). Specifically, the court held that the law constituted a regulation of the substance of labor relations, not of the process of labor relations, only the latter of which is regulated by the NLRA to the exclusion of further state regulation. *Id.* at 4, 22. Further, that the law affected primarily interstate firms did not mean that the law impermissibly regulated interstate *commerce*. *Id.* at 6, 46.

cause, the "legislature is regulating in an area that has traditionally been left to the freedom of contract between an employer and an employee."[346]

Meanwhile, business is also advancing structural constitutional law strategies against social welfare entitlements. Most prominently, it is pushing to deprive localities of their ability to legislate in the public interest by persuading conservative state legislatures to deprive liberal cities of authority to protect worker rights and other civil rights.[347] In 2016, for example, after an organizing campaign by low-wage workers, the city of Birmingham increased its minimum wage to $10.10 per hour. The state of Alabama responded by prohibiting localities from raising the minimum wage higher than the federal minimum of $7.25.[348] More recently, the state of Texas enacted a bill that strips cities of the ability to set standards for local workplaces, to ensure civil rights, and to improve their environments.[349]

C. Narrowing the Demos: Subordination and Exclusion

Business, particularly in sectors employing large numbers of "gig workers," has also intensely mobilized against labor's efforts to eliminate the subordination of certain classes of workers, again making statutory arguments that sound in freedom to contract. It has also relied on *Lochner*-era versions of the Equal Protection, Due Process, and Contracts Clauses in objecting to statutes that seek to extend labor rights to excluded workers.

During the Trump Administration, business repeatedly argued before the NLRB and the courts for a narrow definition of "employee" that excludes from protection the many workers classified as independent contractors. Both the Trump Board and the D.C. Circuit accepted business's cramped reading of the common law definition of employee, which emphasized the formal "freedom" and "entrepreneurial" rights of workers rather than the

---

[346] St. Thomas–St. John Hotel & Tourism Ass'n v. Gov't of the V.I., 218 F.3d 232, 246 (3d Cir. 2000).

[347] *See* Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385, 1395, 1389–90 (2022); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1750–51 (2021). On the ways in which national groups are using state authority to suppress the vote and erode democracy, see generally JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY (2022), and JOY BORKHOLDER, MARIAH MONTGOMERY, MIYA SAIKA CHEN & REBECCA SMITH, NAT'L EMP. L. PROJECT, UBER STATE INTERFERENCE: HOW TRANSPORTATION NETWORK COMPANIES BUY, BULLY, AND BAMBOOZLE THEIR WAY TO DEREGULATION 1, 8 (2018), https://www.nelp.org/wp-content/uploads/Uber-State-Interference-How-Transportation-Network-Companies-Buy-Bully-Bamboozle-Their-Way-to-Deregulation.pdf [https://perma.cc/3UJP-JEL6].

[348] *See* Lewis v. Governor of Ala., 896 F.3d 1282, 1287 1295 (11th Cir. 2018), *vacated on reh'g en banc*, 944 F.3d 1287, 1292 (11th Cir. 2019) (upholding state law against equal protection challenge on basis of standing).

[349] H.B. 2127, 88th Leg., Reg. Sess. (Tex. 2023).

functional control that firms in practice exercise over work.[350] The Trump Board also narrowed the definition of "employer," requiring that for a company to be deemed a joint employer, it must exercise direct and actual control over essential terms and conditions of workers, rather than solely indirect or reserved control (although that rule has since been overturned).[351] Here, business again invoked arguments about firms' freedom to contract, and the Trump Board accepted those arguments even though the changed standard would shelter businesses from liability and disable workers' collective activity.[352]

Meanwhile, as discussed in the prior Section, business has opposed state and local efforts to treat gig workers, farmworkers, and other nontraditional workers as equal rights-holders. In New York, business has brought a challenge to the new farmworker labor bill, arguing that extending to those workers collective bargaining rights and protection of concerted activities violates agricultural businesses' substantive and procedural due process rights.[353] In California, Uber and Lyft responded to legislation that extended employment rights to app-based workers with a ballot proposition that would roll back employment rights for app-based workers, while also constraining the legislature from making changes to the law in the future.[354] After massive spending by the platform companies, the proposition passed and was challenged by labor as unconstitutional under the state constitution.[355] At the same time, the companies challenged in federal court the California statute that narrows the definition of independent contractor. With stunning parallels to arguments rejected at the end of the *Lochner* era, they argued that treating rideshare drivers as employees for state law

---

[350] *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 7, 9–13 (Jan. 25, 2019); FedEx Home Delivery v. NLRB, 563 F.3d 492, 496–502 (D.C. Cir. 2009).

[351] *See* Joint Employer Status Under the National Labor Relations Act, NLRB, 85 Fed. Reg 11,184, 11,186 (Feb. 26, 2020) (codified at 29 C.F.R. 103). *But see* Standard for Determining Joint-Employer Status, 88 Fed. Reg. 73,946, 74,017 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103) (classifying an employer as a joint employer if it either exercises control or reserves the right to exercise control over essential terms or conditions of work).

[352] Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1328–37 (2021) (describing how both courts and the Trump Board have narrowed the joint employer test).

[353] Verified Complaint at 3–6, 83–84, N.Y. State Vegetable Growers Ass'n, Inc. v. Hochul, 23-CV-1044 (W.D.N.Y. filed Oct. 2, 2023).

[354] *See* A.B. 5, ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying prior California Supreme Court case that extended employment rights to gig workers); California Proposition 22 (codified as CAL. BUS. & PROF. CODE § 7448 *et. seq*) (overruling AB5).

[355] *See* Castellanos v. California, 305 Cal. Rptr. 3d 717, 737–42 (Cal. Ct. App. 2023). For a discussion of the platform companies' campaign against AB5, see Kate Andrias, *The Perils and Promise of Direct Democracy: Labour Ballot Initiatives in the United States*, KING'S L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575089 [https://perma.cc/KS47-7YRR].

purposes violates the Equal Protection and Due Process Clauses, in large part because the law purportedly "irrationally" exempts other workers and serves no legitimate state purpose.[356] Despite longstanding precedent requiring deference to economic legislation,[357] the companies sought to have the court impose searching judicial scrutiny. They also argued that the statute interferes with "the right to pursue a chosen profession" and that "forced reclassification" would impair the companies' contracts, in violation of the Contract Clause, and, stunningly, that the law constitutes a bill of attainder because it legislatively imposes punishment without the protections of a trial.[358] In a departure from the deferential rational basis review ordinarily given to economic legislation, the Ninth Circuit accepted these arguments in part, concluding that the plaintiffs plausibly pleaded an Equal Protection claim because the law extended employee status to some but not other workers and evinced animus to the gig companies.[359]

D. Administrative Rigidity and Incapacity

Finally, business has mounted a far-reaching challenge to labor's effort to reshape administrative governance to increase democratic control over the economy. Over the last decades, pro-business forces have mounted a concerted campaign to undermine the legitimacy of the administrative state, calling into question the constitutionality of many of its aspects, both old and new.[360] The business assault on administrative governance challenges not only the regulation of labor, but also a wide array of administrative actions that exert public control over the economy, including those that protect the environment and consumers. But because labor's project squarely raises the question of democratic control over the economy and public participation in government, labor has been at the center of many of the debates and faces some of the greatest risks.

---

[356] *See* Plaintiffs-Appellants' Opening Brief at 22, Olson v. California, 62 F.4th 1206 (9th Cir. 2023) (No. 21-55757).

[357] *See supra* note 108 and accompanying text (discussing approach outlined in footnote 4 of *Carolene Products* in 1938).

[358] Plaintiffs-Appellants' Opening Brief, *supra* note 356, at 39–58.

[359] *Olson*, 62 F.4th at 1219.

[360] Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–9 (2017). For examples of the types of anti-administrative-state arguments gaining traction, see generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); and Mike Lee, U.S. Sen., The Time for Regulatory Reform in Congress (Mar. 7, 2017) (transcript available at https://www.lee.senate.gov/public/index.cfm/speeches?ID=2ED7B201-8099-406A-A872-A07C7ADE9D36 [https://perma.cc/6AUA-LGZR]).

Once considered off-the-wall, arguments that long-standing administrative structures violate the separation of powers or due process began appearing in lower-court opinions and Court concurrences several years ago.[361] By 2022, the assault on the administrative state had captured a majority on the Court.[362] In *West Virginia v. EPA*, the Court announced that in cases involving "major questions," it will not apply the ordinary legal principles governing administrative agencies' interpretation of statutes. Instead, for agency action that is, in the Justices' view, "highly consequential," posing questions of "economic and political significance," the Court will demand clear congressional authorization.[363] "[A] merely plausible textual basis for the agency action" is insufficient.[364] The Court seemed particularly skeptical of broad readings of "cryptic" authorizing statutes, but the decision could sweep so broadly as to disallow regulation whenever the Court does not consider the authorization "clear."[365]

Justice Neil Gorsuch went further in his concurring opinion, reasoning that the major questions doctrine is required to avoid the constitutional problem of excessive delegation from Congress to the Executive.[366] His opinion suggests the possibility of a dramatic expansion of a separation of powers doctrine that had fallen into disuse in the post-New Deal era.[367] According to Justice Gorsuch, the major questions doctrine, and the nondelegation doctrine on which it rests, is required to vindicate the

---

[361] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1240–42 (2015) (Thomas, J., concurring in the judgment); *id.* at 1237 (Alito, J., concurring); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning whether *Chevron* deference to administrative agencies' interpretations of federal statutes violates the separation of powers); Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013) (adopting an expansive view of the nondelegation doctrine with respect to private parties), *vacated and remanded by* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).

[362] West Virginia v. EPA, 142 S. Ct. 2587, 2614–16 (2022); *see also* NFIB v. Dep't of Lab., 142 S. Ct. 661, 666–67 (2022) (holding that under the "major questions doctrine," OSHA's COVID-19 vaccine mandate exceeded the agency's statutory power despite textual support for the agency's authority); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (reading the CDC's organic statute narrowly to allow an injunction against the CDC's eviction moratorium).

[363] *See EPA*, 142 S. Ct. at 2610, 2609–13.

[364] *Id.* at 2609.

[365] *Id.* at 2608–09; *see* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023).

[366] *EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

[367] Notably, the Court has not invalidated a federal statute on nondelegation grounds since 1935, when it struck down portions of the National Industrial Recovery Act—a statute that emerged from the Gilded Age constitutional clash between labor and business. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 388 (2017); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Founders' conceptions of the separation of powers and federalism.[368] But recent scholarship has demonstrated that the originalist basis for the nondelegation doctrine is weak at best.[369] Rather, the effort to use the "major questions" doctrine to avoid nondelegation questions has grown out of business's effort to limit government's ability to subordinate the market to democratic decision-making. Indeed, numerous conservative scholars and even some Justices have been open about this agenda. On their view, the current administrative state burdens due process and economic liberty—or it impinges on expression protected by the First Amendment.[370]

Last term, the Court's conservative majority signaled again that it would make it harder for agencies to regulate in the public interest, limiting governmental authority to exercise power over business. In *Biden v. Nebraska*, the Court again read a congressional delegation of power to the Executive narrowly, striking down the Biden administration's student loan forgiveness program, which would have "cancel[ed] about $430 billion in debt," despite broad statutory language seemingly empowering the Secretary of Education to do so.[371] And in *Glacier Northwest*, discussed previously, the Court evinced a similar hostility to the NLRB's authority. There, the Court arrogated the Board's authority to determine what strike activity was "arguably protected" by the NLRA, concluding in the first instance that the workers' activity was unprotected.[372] Even more concerning, the Court is considering whether to overrule *Chevron v. Natural Resources Defense*

---

[368] *EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

[369] *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–80 (2021) (demonstrating how "the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control"); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1300–01 (2021) (discussing various delegations of administrative rulemaking authority by early Congresses to demonstrate the historical inaccuracy of the originalist argument for the nondelegation doctrine). *But cf.* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (arguing that the Founding Era history supports a nondelegation doctrine).

[370] DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 125 (2011); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 247–84 (2014); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1224–27 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (offering a due process argument); Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) (expressing concern that an expansive administrative state involves excessive delegation and "raises troubling questions about due process and fair notice"); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 973–81 (2014) (arguing that delegation of coercive power to private parties can amount to a due process violation).

[371] 143 S. Ct. 2355, 2488 (2023).

[372] *See supra* notes 322–326 and accompanying text.

Council, a nearly forty-year-old precedent, which requires that courts defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable.[373] If the Court does overrule *Chevron*, the NLRB's power to effectuate the goals of the statute could be further eroded. And business has mobilized en masse to effectuate that outcome, filing numerous amicus briefs in the case that make wide-ranging constitutional arguments against deference to agencies.[374]

Depending on where the Supreme Court takes the doctrine next, and how lower courts apply the Court's reasoning, the result could be to disable many of the NLRB's efforts to protect workers' rights—efforts which necessarily cover nearly the entire economy and arguably involve "major" political and economic questions and consequential trade-offs. Even when the Board exercises power under the Act's "capacious terms" and even when it is clear that Congress intended to provide "agency discretion," under the new precedent, conservative courts could refuse to allow the Board to exercise delegated authority. The most aggressive reading of the Supreme Court's recent decisions would thus relegate the labor agencies to robotically implementing clear textual directives in congressional mandates rather than using their expertise to fill in gaps in statutes and elucidate labor relations policy over time. Nearly all of the Board's recent actions to protect workers' collective speech and association rights could come under challenge. Similar arguments could be used to disable the range of regulatory actions designed to provide working people socioeconomic rights, also critical to labor's constitutional vision. In short, in the hands of conservative judges, the new major questions doctrine could eviscerate existing labor law and hamstring the NLRB, the Department of Labor, and other social welfare agencies in the future.[375]

A few examples already exist. Business owners recently challenged a Department of Labor rule directing the federal government to renew or reach new contracts only with businesses that pay a minimum of $15 per hour for work related to those contracts.[376] The challengers argued that the contractor pay increase runs afoul of the major questions doctrine because the

---

[373] Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022); Murray v. UBS Sec., LLC, No. 22-660 (cert. granted May 1, 2023).

[374] *Loper Bright Enterprises v. Raimondo*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/ [https://www.perma.cc/VWB4-HGZR].

[375] *See* Deacon & Litman, *supra* note 365; Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 1.

[376] Robert Iafolla, *Biden's $15 Contractor Minimum Wage Weighed as 'Major Question,'* BLOOMBERG L. (Sept. 28, 2022), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/XD8CTVIG000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/E9ZR-4QYV].

"underlying authority that's being claimed . . . is the authority to regulate wages for a fifth of the economy," which they characterized as a "truly awesome power."[377]

In another recent case, business forcefully pressed a nondelegation argument. *Allstates Refractory Contractors, LLC v. Walsh* presented a facial challenge to the constitutionality of the provision of the federal Occupational Safety and Health Act, which authorizes OSHA to promulgate the "permanent safety standards" that govern private workplaces. *Allstates* argued that this provision violates the nondelegation doctrine by failing to appropriately cabin the agency's authority insofar as it allows OSHA to promulgate any regulation that the agency deems "reasonably necessary or appropriate to provide safe or healthful employment."[378] Both the district court and the Sixth Circuit rejected this argument, but a dissenting conservative judge on the Sixth Circuit, seemingly writing to grab the attention of the conservative supermajority on the Supreme Court, opined: "For 88 years, federal courts have tiptoed around the idea that an act of Congress could be invalidated as an unconstitutional delegation of legislative power. The majority continues the trend. But, in my view, that streak should end today."[379]

Meanwhile, the lurking *private* nondelegation and related due process doctrines, advanced by business, also threaten to stymie labor's efforts at increasing democratic control over the economy, particularly its efforts at government-supported sectoral and social bargaining or tripartite standard setting. In the 1930s, before the "switch in time," the Court struck down several statutory schemes designed to establish tripartite sectoral bargaining in which labor, business, and government would set minimum wages and conditions across industries.[380] Most notably, in *Carter v. Carter Coal Co.*,[381] the Court struck down a law enabling coal miners and large coal producers in a given region to negotiate binding wage-and-hour standards for all regional miners and producers. According to the Court, the law constituted a most "obnoxious" legislative delegation because it allowed the majority of coal producers and miners in the industry to bind other private parties "whose interests may be and often are adverse to the interests of others in the same

---

[377] *Id.*

[378] Allstates Refractory Contractors, LLC v. Walsh, 625 F. Supp. 3d 676, 681 (N.D. Ohio 2022).

[379] Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting).

[380] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (striking down NIRA on nondelegation grounds, as well as commerce grounds).

[381] 298 U.S. 238 (1936).

business."[382] The Court's opinion was based both in a private nondelegation theory and in due process principles.[383]

In the late 1930s and early 1940s, the Court relaxed its hostility to engagement of citizen groups in bargaining about the shape of the economy. It upheld committees established by the Fair Labor Standards Act that allowed business and labor to jointly set minimum wages on an industry-by-industry basis because they could do so only within strict statutory parameters.[384] It also upheld several other administrative schemes that required participation and consent by affected organizations and parties.[385] But the Court never expressly repudiated the core holding of *Carter Coal*, which prohibited statutory schemes enabling labor and business to bargain contracts that bind others in an industry. To the extent it left open the possibility for co-regulatory approaches or sectoral standard setting, it required ultimate decision-making to rest with the Executive, significantly cabined by statute.[386]

Moreover, in recent years, conservatives have sought to reinvigorate and expand the private nondelegation doctrine and related due process arguments in ways that may put even co-regulation at risk. In addition to the general curtailment of administrative power discussed above, in 2013, Judge Janice Rogers Brown on the D.C. Circuit unexpectedly used the private nondelegation doctrine to strike down Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which granted Amtrak and the Federal Railroad Administration authority to "jointly develop" standards to evaluate the performance of passenger railways.[387] On certiorari, the Supreme Court concluded that Amtrak was not, in fact, a private party and,

---

[382] *Id.* at 311.

[383] *Id.*

[384] *See* Andrias, *Fair Labor Standards Act*, *supra* note 93, at 675–77 (discussing constitutional challenges to FLSA wage boards); Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Lab., 312 U.S. 126, 143 (1941) (upholding the FLSA wage boards and noting that they adequately cabined the discretion of the private actors and the DOL Administrator).

[385] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940) (upholding a scheme under which boards comprised of coal producers would propose fixed prices to a government agency); United States v. Rock Royal Coop., Inc., 307 U.S. 533, 577–78 (1939) (upholding a statutory scheme that required the two-thirds approval of milk producers before the Secretary of Agriculture could fix milk prices); Currin v. Wallace, 306 U.S. 1, 6, 15–16 (1939) (upholding a statute that required the approval of two-thirds of tobacco growers before the standard for tobacco sales imposed by the Secretary of Agriculture would take effect).

[386] Andrias, *Fair Labor Standards Act*, *supra* note 93, at 658–59.

[387] *See* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 668, 673 (D.C. Cir. 2013) (holding that "private parties must be limited to an advisory or subordinate role in the regulatory process"), *vacated and remanded*, 135 S. Ct. 1225 (2015) (concluding that Amtrak was a governmental entity and therefore declining to reach the question of whether the delegation itself was unconstitutional).

therefore, the Court did not reach the private delegation question,[388] although several Justices indicated their agreement with the D.C. Circuit's logic. In particular, Justices Samuel Alito and Clarence Thomas, in concurrence, urged new and more extensive prohibitions on private delegation; Justice Thomas invoked the Vesting Clause and the early New Deal separation of powers cases.[389] Meanwhile, Justice Gorsuch, in his writing, has sought to reinvigorate due process arguments against private delegation, as have conservative academics.[390]

Given the hostility of the conservatives on the Court to administrative governance generally—and to private delegations in particular—sectoral bargaining regimes that enable democratic regulation of the economy, like those that exist in many other countries and around which unions are increasingly organizing, are likely to face significant opposition. Under existing precedent, boards that involve workers in setting wages and working conditions are permissible if their discretion is sufficiently cabined and their work is subject to review by the Executive.[391] But even these more limited approaches at co-regulation appear to conflict with the theories pressed by the most conservative Justices.

Finally, the Court appears poised to question the very structure of the NLRB while making impossible the creation of other agencies that labor might urge in the future if they do not have a single head within executive control and traditional funding. In 2010, the Court decided *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, which invalidated the for-cause removal protections for members of the Public Company Accounting Oversight Board (PCAOB).[392] The members of the PCAOB were appointed by the Commissioners of the SEC, who also have for-cause removal protections. The Court reasoned that the arrangement imposed double for-cause protections on the PCAOB members and held that this level of insulation from the President's removal power violated the separation of powers.[393] Ten years later, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court invalidated for-cause removal protections for the Consumer Financial Protection Bureau (CFPB) Director, again on separation-of-powers grounds.[394] This term, the Court is considering whether the CFPB's funding structure is unconstitutional under the Appropriations

[388] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1228 (2015).

[389] *Id.* at 1237–38 (Alito, J., concurring); *id.* at 1252 (Thomas, J., concurring).

[390] *See supra* note 370.

[391] *See* Andrias, *Fair Labor Standards Act*, *supra* note 93, at 658–59.

[392] 561 U.S. 477, 492 (2010).

[393] *Id.*

[394] 140 S. Ct. 2183, 2197 (2020).

Clause and whether the system of administrative judging used by the Securities and Exchange Commission is unconstitutional.[395]

These decisions—and business's arguments in the pending cases—demonstrate a blinkered conception of how administrative lawmaking should work that could ultimately have significant implications for labor law—both under current law and even more so were labor able to instantiate some of its aspirations for greater democratic control over the economy through new lawmaking. While the NLRB's structure is well-established, Gillian Metzger points out that several members of the Court "would appear to give little weight to the tenure of administrative arrangements in assessing their constitutionality."[396] In short, business's assault on the administrative state, as taken up by the Supreme Court, threatens to undermine the current Board, as well as the possibility of democratic participation in public governance and greater democratic control of the economy through a robust system of administrative governance and varied institutions.

IV. FORGING A NEW CONSTITUTIONAL POLITICAL ECONOMY

In sum, business has taken advantage of a conservative supermajority on the Supreme Court to shore up and extend a set of big-C constitutional doctrines as well as small-c constitutional practices, customs, and rules. Business's strategy is not limited to the First Amendment or to a separation-of-powers attack on the administrative state—the areas that have received the most scholarly attention.[397] It also invokes the Takings Clause, the Supremacy Clause, the private and public nondelegation doctrines, the Dormant Commerce Clause, the Due Process and Equal Protection Clauses, small-c constitutional arguments about freedom of contract and property rights, and statutory and common-law arguments. Across doctrinal areas, business is invoking the Constitution in an effort to stymie labor's vision; limit democratic control over the workplace, the economy, and the government; and lock in the power of capital. And to a great extent, the Supreme Court seems willing to embrace this agenda—a particularly worrisome development for labor given that the Court has also adopted an

[395] Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 51 F.4th 616 (5th Cir. 2022), *cert. granted* (U.S. Feb. 27, 2023) (No. 22-448); Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *cert. granted* (U.S. June 30, 2023) (No. 22-859). Notably, SpaceX recently filed a lawsuit challenging the constitutionality of the NLRB on nearly all of these grounds. Space Exploration Techs. Corp. v. NLRB, Case 1:24-cv-00001 (S.D. Tex. filed Jan. 4, 2024).

[396] Metzger, *supra* note 360, at 19.

[397] *See* sources cited *supra* notes 301 and 360.

extremely robust form of judicial supremacy that purports to render the Court the sole and final authority over the Constitution.[398]

The question then arises: Given that the Constitution—in the hands of courts generally and the Supreme Court in particular—has been such a potent tool against labor (as well as other progressive movements), why frame labor's struggle as constitutional? Why not avoid the Constitution altogether?

At the most basic level, the answer is that labor's project is fundamentally constitutional in nature. Labor is offering a new constitutional vision, even if its members do not always characterize their agenda as such. With appeal to higher law, labor unequivocally aims to change our nation's fundamental commitments, offers a different conception of rights, and advances a new way to structure government. Because the vision is constitutional in orientation and explicitly opposed by capital's constitution, the only way meaningfully to advance it is to take constitutional law seriously—both in and outside the courts. Labor's vision cannot be achieved by ceding this terrain to capital, even if it also must be fought in other fora. Those who urge abandoning constitutional law have both a too-limited conception of constitutionalism and a too-limited horizon for reform.

In this part, I first defend constitutionalism: both the importance of understanding labor's struggles as constitutional and, conversely, of labor and its allies advancing a robust constitutional vision that speaks to pressing political–economic crises and material conditions. I then argue that labor's efforts offer critical lessons regarding how to resist the conservative constitutional agenda of business and the Supreme Court in order to forge a more progressive constitutional order, highlighting the possibility and importance of nonjuriscentric constitutionalism, while still recognizing the importance of courts. Ultimately, labor's vision offers a coherent substantive challenge both to business's constitution and to some parts of the post-New Deal liberal compromise.

A. In Defense of Constitutionalism

In recent years, several prominent scholars have voiced skepticism about framing arguments for a more democratic and egalitarian political economy as "constitutional." David Pozen and Adam Samaha, for example, highlight the risks of constitutionalizing policy goals. They contend that doing so can inflame social conflict, constrict pathways for compromise, squander the benefits of professional legal reason, and threaten the coherence

[398] *See infra* note 432 and accompanying text.

of constitutional interpretation as a discipline.[399] They conclude that it makes sense to narrow the domain of constitutional law rather than expand it. Similarly, writing in response to Fishkin and Forbath, who urge an embrace of constitutional political economy arguments outside of courts,[400] Jonathan Gould suggests that constitutionalizing arguments about economic inequality might not be that valuable—and perhaps even counterproductive.[401] Ryan Doerfler and Samuel Moyn have put the point even more bluntly, arguing that the left should abandon constitutionalism because the Constitution "inevitably orient[s] us to the past and misdirect[s] the present into a dispute over what people agreed on once upon a time."[402] They declare: "The Constitution Is Broken and Should Not be Reclaimed."[403]

The constitutional clash between labor and business belies these "anti-constitution" arguments. First, labor's experience offers scant support for the contention that social conflict emerges *because of* an appeal to the Constitution or that compromise is more achievable if constitutional rhetoric is eschewed. The social tension between business and labor emerges from material conditions and a fundamental conflict over how to organize the political economy. It has existed throughout history, at least since the advent of modern capitalism, and persists whether or not labor invokes the big-C Constitution. The Constitution is embedded in these conditions and, to some extent, contributes to them—and thus, they cannot be addressed without also addressing the Constitution's role in them.

As a tactical matter, for labor to abandon constitutional arguments carries considerable risks. As Parts II and III demonstrate, normative fights about the content and scope of constitutional rights and structure are unavoidable. Even when labor avoids referencing the Constitution, business understands that labor aims to contest and reconstruct the constitutional order and presses its own constitutional arguments. Failing to contest those arguments leaves labor on weak terrain. In *Janus*, for example, the Court's conservative majority was able to argue that First Amendment concerns

---

399 David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 734, 791–96 (2021).

400 *See* FISHKIN & FORBATH, *supra* note 18, at 29–30.

401 Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2053, 2088–89 (2022) (reviewing MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022)).

402 Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html?unlocked_article_code=1.Tk0.I12s.uYmTB0ruc-Re&bgrp=a&smid=url-share [https://perma.cc/CE4F-X2CU].

403 *Id.*

weighed only on the side of the union objectors, in part because labor (and the liberal Justices) started from the weak position—first articulated in *Abood*—that union activity lacks constitutional import. The argument was that union activity is economic, not political, and is not protected by the First Amendment or other constitutional law.[404] The liberal *Janus* dissenters accepted this premise. They emphasized the need to balance union objectors' First Amendment rights with the government's right to manage the workforce through collective bargaining, but did not invoke any affirmative constitutional values on the side of unions.[405] A better approach, advanced many years before by Justice Felix Frankfurter in dissent, would have emphasized the central role that unions play in generating a robust public debate and advancing the freedom of speech and democracy and in ensuring free labor.[406]

In contrast to the dissent in *Janus*, Justice Jackson's recent solo dissent in *Glacier* suggests how courts could effectively invoke the Constitution on behalf of labor. In emphasizing that the right to strike is "fundamental to American labor law" she embraced labor's small-c constitutional arguments about labor organizing as a *right* and the importance of the administrative state in protecting workers' power.[407] A Court majority that advanced labor's constitution would not be the first. Earlier Courts, albeit infrequently, invoked the Constitution on behalf of workers: In *Thornhill*, for example, Justice Frank Murphy invoked the importance of labor picketing to the First Amendment and political debate.[408] And in *Pollock*, Justice Robert H. Jackson emphasized the breadth of the Thirteenth Amendment.[409]

The point is not that labor should develop an affirmative strategy to bring doctrinal constitutional arguments before the federal courts, at least not as presently constituted.[410] To the contrary, as discussed in greater detail below, labor's experience highlights the need for a less juriscentric constitutional culture—along with the importance of building workers' economic and political power in order to make possible constitutional

---

[404] *See* Andrias, Janus*'s Two Faces*, *supra* note 179, at 44.

[405] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2487–502 (2018) (Kagan, J., dissenting).

[406] Andrias, Janus*'s Two Faces*, *supra* note 179, at 43–45.

[407] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 598 U.S. 771, 789 (2023) (Jackson, J., dissenting).

[408] *See supra* note 97 and accompanying text.

[409] *See supra* notes 95–96 and accompanying text.

[410] Labor may be more likely to prevail with state constitutional claims, at least in some state courts. *See supra* notes 245–250 (discussing state constitutional victory by New York farm workers); ZACKIN, *supra* note 216, at 119–29 (describing prevalence of state constitutional labor rights). However, these claims can be preempted by federal law.

change. That is, labor's experience offers on-the-ground examples of how to engage in nonjuridical constitutional lawmaking combined with power-building efforts. Still, when labor is forced into courts—or when progressive judges craft opinions and dissents—it is a mistake to cede the Constitution to corporations.

More importantly, making constitutional arguments *outside* of courts can galvanize political and social change and organizing efforts, serving as an important source of resistance and strength for worker movements. In the United States, as Aziz Rana has written, albeit critically, the Constitution has come to inspire almost "religious devotion."[411] As the preceding examples from labor leaders and their allies demonstrate, the First Amendment, the Reconstruction Amendments, and the Constitution's embrace of democracy, equality, and freedom have extraordinary power and resonance in our culture.[412] And constitutional law's potential to galvanize does not depend on a uniquely American veneration of the Constitution. As sociologists have demonstrated, law frequently serves as a "master frame" that "resonate[s] deeply across social movements and protest cycles."[413] Constitutional rights in particular can serve as "fundamental legal symbols with a powerful impact on how grievances and objectives are conceived, legitimized, and acted upon."[414]

The Constitution, unlike more technical statutes and regulations, is meant to be read and enforced by the people.[415] And as the supreme law of the land, the Constitution can justify defiance of official law as a higher form of law-abiding behavior.[416] Constitutional law thus provides actors with "arguments, grounded in society's foundational commitments, for why the political settlement they oppose is unjust."[417] As Professors Lani Guinier and

---

411 Aziz Rana, *Why Americans Worship the Constitution*, PUB. SEMINAR (Oct. 11, 2021), https://publicseminar.org/essays/why-americans-worship-the-constitution/ [https://perma.cc/M68Y-77AB].

412 *See supra* Part II. For discussion of the importance of the First Amendment in constitutional culture, see Akhil Reed Amar, *The First Amendment's Firstness*, 47 U.C. DAVIS L. REV. 1015, 1025–29 (2014), and PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–119 (1982).

413 Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOCIO. 1718, 1725 (2006); *see also* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892 (2013) ("The Constitution offers resonant frames for social movement actors.").

414 Pedriana, *supra* note 413, at 1726.

415 AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, x, xii–xiii (2021); KRAMER, *supra* note 18, at 217–18.

416 *See* Pope, *Labor's Constitution of Freedom*, *supra* note 24, at 942–43 (discussing labor's defiance of judicial orders and existing laws as part of its "constitutional insurgency").

417 LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2001).

Gerald Torres explain, "rights talk . . . can provide an agenda for group mobilization, translating local complaints to a more generalized cause."[418] Movement invocation of rights, in turn, helps recreate the meaning of those rights by changing the background against which questions of legality and justice are understood.[419]

Yet, a defense of labor constitutionalism is based on more than the Constitution's rhetorical value or its potency as an organizing device. As this Article has sought to demonstrate, the very nature of labor's project is constitutional: The movement seeks to redefine the basic commitments and structures of our society. Doing so is an essential, critical enterprise for those who believe in a more democratic and egalitarian political economy.

Opponents of constitutionalism argue that change can be achieved without invoking the Constitution. They argue that the project of constitutionalism inappropriately tethers us to the past and takes important questions out of the process of democratic decision-making.[420] But those arguments are founded on an overly narrow view of what constitutionalism entails—a view that is embraced by the current majority on the Supreme Court, but that is neither descriptively accurate with regard to how constitutionalism has functioned in the United States historically nor normatively desirable.

In particular, the fear that constitutionalism is inherently antidemocratic gains force only if one accepts our current robust form of judicial supremacy as necessary to constitutionalism. Yet constitutionalism without judicial supremacy exists in many other industrial democracies and prevailed during other points in U.S. history.[421] Indeed, even in the context of the United States' putative commitment to judicial supremacy in recent years, extensive debate and contestation by citizens and social movements, as well as legislative and executive branch institutional practice, have functioned to

---

[418] Guinier & Torres, *supra* note 33, at 2748.

[419] *Id.* at 2799, 2804.

[420] Doerfler & Moyn, *supra* note 402 ("Arming for war over the Constitution concedes in advance that the left must translate its politics into something consistent with the past."); MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 200–02 (2022) (arguing that constitutionalization "ends up legitimating a system that is no longer the project of a people and no longer subject to popular control"); ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS 5–8 (2022) (suggesting that constitutional solutions cannot address the problem of democratic erosion).

[421] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 18 (2008) (noting that many countries adopted the German high court model that did not give judges supremacy over legislatures); KRAMER, *supra* note 18, at 144 (arguing that judicial supremacy "went into hibernation" for several decades in the nineteenth century).

construct constitutional meaning over time.[422] Courts are but one player in this constant contestation of constitutional meaning.[423] While they may temporarily resolve divisive political questions, their decisions mobilize other actors to assert their constitutional vision.[424] Claims on the text of the Constitution made by social movements have, in turn, brought "into being the understandings that judges then read into the text of the Constitution."[425]

Similarly, the concern that constitutionalism necessarily tethers political decisions to the past—and in particular to a past that is deeply antidemocratic, racist, colonialist, and sexist, as well as capitalist and extractive—is shaped in large part by the current Court's commitment to a particular form of "originalism" as an interpretive method.[426] But a narrow focus on original meaning or intent, as urged by conservative Justices and scholars, is not inherent to constitutionalism; indeed, as others have argued at length, it is not particularly defensible as an interpretive method.[427] In any event, in practice, the Constitution has proven to be subject to change without formal amendment. The way we interpret the big-C Constitution is determined in significant part by the background principles making up the small-c constitution. Those principles are shaped by the actions of popular

[422] *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (describing how "democratic constitutionalism" is sustained by "traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning and to oppose their government"); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1442–44 (2005) (discussing the relationship between law and movements that seek social change); NeJaime, *supra* note 413, at 891–901 (analyzing the contributions of "social movement scholarship," which "points toward a bottom-up model of social change in which courts and social movements participate in the complex process of constitutional construction"). On the role that historical practice and institutional settlement play in constructing constitutional meaning, particularly with regard to the separation of powers, see Issacharoff & Morrison, *supra* note 52, at 1918. For unpacking of the meanings of constitutionalism, see Primus, *supra* note 19, at 1082.

[423] *See* SEIDMAN, *supra* note 417, at 55 ("Healthy political communities are not fixed and static, and they do not have things worked out. . . . Instead, they are constantly reinventing their own histories and meanings.").

[424] *Id.* at 8.

[425] Siegel, *Text in Context*, *supra* note 33, at 312–13.

[426] *See* SCALIA, *supra* note 44, at 38, 45–47 (defending, as the best interpretive method, inquiry into the original meaning of the text of the Constitution); ERWIN CHEMERINSKY, *The Rise of Originalism*, *in* WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 1–24 (2022) (describing the rise of originalism); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (describing the Supreme Court's commitment to Justice Scalia's version of originalism).

[427] A thorough defense of this point is beyond the scope of this Article but has been ably made. *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 17, at 7–8 ("The basic problem with looking to original expected application for guidance is that is inconsistent with so much of our existing constitutional traditions."); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1162 (2012) (positing that "originalism seems to be either implausible or entirely manipulable. The only kind of originalism that is reasonably determinate leads to conclusions that practically no one accepts").

movements, by economic and social forces, and through legislation, regulation, and government practice.[428]

That is not to say that the objection to constitutionalism can be disposed of simply by rejecting a particular interpretive method. At bottom, a core disagreement persists: An argument against constitutionalism is an argument against treating any law or structures as higher law not subject to the ordinary legislative process. Conversely, an argument for constitutionalism is an argument in favor of articulating an alternative vision for society and attempting to entrench certain values and structures such that they are more stable than other policy decisions in service of that vision.[429]

Labor's experience demonstrates the importance of both articulating an alternative vision and seeking to entrench that vision. The more labor is able to entrench any victories it achieves, the harder it becomes for business to undo those victories.[430] Given business's extraordinary power, without entrenchment aimed at fundamental change of the constitutional political economy, labor's short-term policy victories are unlikely to persist. Put differently, making claim to higher-order commitments—as established both in formal law and in the social, economic, political, and cultural practices that surround it—is a way to push against the anti-egalitarian impulses of the existing structures and against capital's power.

Ultimately, what labor seeks is a shift in society's structures and values. It seeks to build power for working people and to reshape the economy. At the same time, it attempts to redefine society's fundamental commitments in line with a particular normative vision—a commitment to guaranteeing the material, organizational, and social conditions necessary for democracy to thrive. Whether and when claims should be framed expressly in constitutional terms, advanced before courts, legislatures, or agencies, through amendment, interpretation, or convention present tactical and strategic questions, but, at bottom, the goal is to entrench norms of

---

[428] Meanwhile, though the Constitution's amendment process is now believed to be almost insurmountable, that was not always the case and its formal unamendability may be overstated (even if still greater amendability would be preferable). *See* Pozen & Schmidt, *supra* note 47, at 2320–21; Vicki C. Jackson, *The (Myth of un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 I. CON. 575, 576 (2015).

[429] For developed defenses of constitutionalism, see SEIDMAN, *supra* note 417, and ALON HAREL, WHY LAW MATTERS 147–89 (2014). *See also* HAREL, *supra*, at 151 ("Only citizens whose rights are constitutionally entrenched do not live 'at the mercy of' the legislature and, consequently, their rights do not hinge upon the judgments or inclinations of such legislatures.").

[430] *See generally* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (describing how in particular moments of upheaval, the people have won constitutional changes that then become entrenched and durable even without Article V amendment).

democracy, equality, and freedom or nondomination and to reshape constitutional governance to that end—to build a new constitutional order.

B. Legislative and Popular Constitutionalism in Action—and Reimagined Courts

How, then, can labor advance its constitutional vision? In large part, labor's strategy is to build collective power for workers in order to change the social relations and structures in which the Constitution is embedded. In so doing, labor both articulates and seeks to instantiate its constitutional vision. As Part II demonstrates, labor's gains to date have occurred primarily in the workplace, and in popular and legislative arenas, not in the courts. Indeed, labor's constitutional vision, as practiced on the ground, is decidedly opposed to the notion that courts should be the *exclusive* and *final* interpreters of the Constitution. Rather, as Part II details, labor embraces legislative, administrative, and popular constitutionalism: It seeks to construct constitutional meaning not primarily in courts but rather in federal, state, and local legislatures and administrative bodies and in the public sphere. It thus offers a useful model for those seeking to resist the current Supreme Court. At the same time, labor's constitution does not reject the idea of judicial review, leaving room for courts to play a role in enforcing higher law principles that are prerequisites to a liberal, egalitarian democracy.

Today, the Supreme Court asserts itself as the exclusive body able to define constitutional meaning and constitutional law. Supreme Court holdings are thought to bind not only lower courts but all other branches of government, not only in specific, litigated cases but also in all similar or analogous circumstances.[431] Indeed, in recent years, the Court has claimed more and more power for itself, refusing to defer to Congress's interpretations of the scope of congressional enforcement power under the Reconstruction Amendments, treating fewer issues as ordinary economic legislation entitled to deference, refusing to defer to agencies' interpretation of statutes, and reaching out to decide issues not presented or fully briefed or argued.[432]

---

[431] Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("It is emphatically the province and duty of the judicial department to say what the law is." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[432] For examples of cases where the Court has struck down legislation as beyond the scope of Congress's enforcement power under the Reconstruction Amendments, see *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Morrison*, 529 U.S. 598, 626–27 (2000); *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 43–44 (2012); and *Shelby County v. Holder*, 570 U.S. 529, 553, 557 (2013). For examples of cases where the Court has declined to defer to legislative judgments and instead struck down regulations for violating the First Amendment, see *supra* note 301 and accompanying text.

A growing group of scholars argues that progressives should reject the robust form of judicial review that characterizes the current system in the United States.[433] Building on empirical work that catalogues the immense political influence of American judges,[434] and motivated, perhaps, by the particularly conservative makeup of the current Court, they urge reforms that would limit the Court's power, increase congressional and presidential engagement in constitutional interpretation, and reorient debates about fundamental national commitments (whether constitutional or not) away from the Court.[435]

Labor's constitutional vision is of a piece with this approach: Through its practice, it rejects the notion of the Supreme Court as the sole interpreter of the Constitution. Although the contemporary labor movement has not, for the most part, joined calls to strip the Court of jurisdiction or to otherwise reduce its power,[436] its actions decenter the judiciary and treat it as only one of multiple actors with authority to interpret the Constitution—without the right to define for all time, short of amendment, the scope and shape of constitutional rights and structure. Whether pushing for the right to strike as

---

For examples of cases the Court has decided without full briefs or argument, see *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020); *Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo*, 141 S. Ct. 63, 65 (2020); and *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). On this phenomenon more generally, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

[433] *See* Weinrib, *Breaking the Cycle*, *supra* note 115; Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1706 (2021); Written Statement of Nikolas Bowie, Presidential Commission on the Supreme Court of the United States, at 24 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/GK93-LTR7]; *see also* FISHKIN & FORBATH, *supra* note 18, at 427–87 (urging legislative and popular constitutionalism to reinvigorate progressive political economy); PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [perma.cc/228H-VZR6] (analyzing arguments for and against limiting the power of the Court). For earlier arguments, see generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION, *supra* note 18; and MARK TUSHNET, *supra* note 421. For a defense of judicial review see Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 (2004), and HAREL, *supra* note 429, at 191–224, which emphasizes the importance of an adjudicative hearing.

[434] AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 225–27 (1999); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 563–64 (2018); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1385 (2020).

[435] PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 433, ch. 4; *see also* sources cited *supra* note 433.

[436] Testimony of Craig Becker, Presidential Commission on the Supreme Court of the United States (July 16, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Becker-Testimony.pdf [https://perma.cc/4GE2-BK8V] (emphasizing that the Court is unfair to labor but calling for only modest reforms); Letter from Mary Kay Henry, Int'l President, SEIU, to Comm'rs, Presidential Comm'n on the Sup. Ct. of the U.S. (Oct. 29, 2021) (arguing that the Court is captured by business interests and urging ethics reform and Court expansion).

a fundamental right, the importance of universal labor rights, or the extension of democratic control over the economy and a reimagined administrative state, labor is advancing is constitutional agenda outside of the courts. It appeals to federal, state, and local legislatures, administrative agencies, and the public, rather than focusing on courts. And it refuses to accept court doctrine that is antithetical to its constitutional vision, declaring, for example, that "[t]here is no illegal strike, just an unsuccessful one."[437]

In the current political economy, labor has good reason for rejecting judicial supremacy and engaging in a nonjuriscentric form of constitutionalism. As Part I demonstrates, courts have long evinced antagonism to both workers' collective action and redistributive legislation—not surprising, perhaps, given that federal judges have nearly always been drawn from the elite and educated in a particular legal tradition.[438] The ongoing constitutional clash described in Part III highlights the extent to which judicial hostility to labor is not a historical relic. Even constitutional arguments that appear logically available are often unsuccessful when labor attempts them in courts.[439] For example, scholars have written numerous articles explaining why labor picketing deserves greater protection if binding precedent from other areas is applied in the labor context.[440] These doctrinal arguments are sound, even compelling, and yet gain little traction before the federal courts, particularly the current Supreme Court. As the General Counsel to the AFL-CIO recently put it, "the labor

[437] Joe Burns, *There Is No Illegal Strike, Just an Unsuccessful One*, JACOBIN (Mar. 6, 2018), https://www.jacobinmag.com/2018/03/public-sector-unions-history-west-virginia-teachers-strike [https://perma.cc/P885-GEWM]; *see also* JOE BURNS, STRIKE BACK: USING THE MILITANT TACTICS OF LABOR'S PAST TO REIGNITE PUBLIC SECTOR UNIONISM TODAY 98–106 (2014) (describing how public employee unionists of the 1960s and 1970s saw the rights to bargain and strike as fundamental rights that "politicians did not have the power to restrict").

[438] *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010); *see also* TOMLINS, *supra* note 69, at 44–52, 61–67 (recounting the courts' treatment of collective action and the conflict between courts and the American Federation of Labor); Forbath, *Shaping American Labor*, *supra* note 69, at 1185–95 (describing the response of courts to labor movements in America).

[439] Pope, *Labor and the Constitution*, *supra* note 113, at 1074–76 (referring to labor as a constitutional "black hole"); Andrias, *supra* note 31, at 10–15, 26–27 (arguing that while much constitutional law relating to labor rights now seems indisputable, regressive holdings were, in fact, hotly contested and the losing side had equally strong, if not stronger, doctrinal arguments). *But see* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 177–78 (2015) (observing that unions are distinct in our legal system and subject to a quid pro quo that both constrains and empowers them in ways that form an essential context for adjudicating related constitutional claims).

[440] Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 300–14 (2015); Charlotte Garden, Citizens United *and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 573 (2014); Pope, *Labor and the Constitution*, *supra* note 113, at 1074–78; James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950–51 (1999).

movement—its leaders, its lawyers, and its members—no longer believe labor organizations and working people seeking to act together to improve their wages, hours and working conditions can obtain a fair hearing before the Court."[441]

Even when arguments are not presented before courts but rather brought in other governmental bodies, judicial supremacy over the Constitution can pose problems for labor: Any express appeal to the Constitution risks giving courts particular authority over those questions' resolution. For example, to the extent labor makes express constitutional arguments before the NLRB and the agency relies on them, the agency is entitled to less deference on review.[442] In short, a lower level of judicial supremacy is likely to be advantageous to labor in terms of policy outcomes.

Beyond the strategic concerns, however, the extreme version of judicial supremacy embraced by this Supreme Court—particularly when combined with a Constitution resistant to formal amendment—is in tension with the normative commitments undergirding labor's constitutional vision. That is, even if judges were more sympathetic to democracy in the workplace, to material entitlements, to equality among workers and an expanded conception of the demos, and to a democratic state with significant governing capacity, appeals to courts to serve as the "supreme" or exclusive interpreters of the Constitution would be inconsistent with the labor movement's commitments to achieving change through collective, democratic action.[443] At bottom, the notion that courts should be the sole and exclusive interpreters of the Constitution—the *only* institution to defend or elaborate the fundamental principles and structures that enable an egalitarian democracy—is at odds with the labor movement's commitment to democratizing control over workers' lives and, more broadly, over the political economy.

Nonetheless, labor's constitutional vision does not counsel in favor of abandoning judicial review or courts altogether. Rather, labor's experience offers support for a constrained form of judicial review that maintains the ability for judicial hearing and decision-making, and treats some core principles as higher law, not subject to ordinary lawmaking, but nonetheless

---

[441] Testimony of Craig Becker, *supra* note 436, at 1.

[442] Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001) (holding that where an administrative interpretation of a statute raises constitutional questions that Congress did not expressly intend for the agency to address, the Court is not required to defer to the interpretation); *see* Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1744 (2019) (arguing that "since the New Deal, opportunities for administrative constitutionalism have proliferated, but its practice has become more legalistic and more deferential to judicial doctrine").

[443] *See* Andrias, *supra* note 32, at 1594, 1614–15.

allows a wide berth for democratic action and for multiple actors to defend and enforce that higher law.[444] Consider the experience of New York farmworkers, discussed above. Their state constitutional victory highlights the extent to which courts can be an important site for constitutional contestation, particularly when pathologies in the democratic process allow corporations and wealthy interest groups to capture putatively democratic channels. There, the state courts provided a site for public hearing about critical labor issues and engaged in dialogue and debate with other branches and with the public, leading to subsequent legislative action.[445]

Arguments that courts are uniquely beholden to elites and should therefore play no role in constitutional politics risk occluding the democratic deficits in the political branches and in the political process more broadly. Indeed, the same pathologies that render courts sympathetic to business interests also frequently plague the executive and legislative branches. In such circumstances, judicial fora can be important alternative spaces for articulation of workers' constitutional arguments. Douglas NeJaime and Reva Siegel have argued:

> In conditions of genuine political domination, all branches fail in offering redress or access. Groups that are marginalized in democratic politics may find that courts provide alternative fora with different institutional features that strengthen the groups' ability to communicate in democratic politics. Because courts are differently open and feature different forms of reason giving and argument, groups challenging conditions of subordination often contest social arrangements by litigating and legislating at the same time.[446]

Ultimately, courts are political institutions embedded in the broader political economy. Their promise depends on the institutional structures that create them and the character of the judges who comprise them. Currently, the Supreme Court is functioning to do political work for corporations, even when such work cannot be achieved through ordinary political processes.[447] But if we recognize that courts are political, as well as legal, actors, we must also recognize that they can play an important role in the articulation of constitutional meaning for good.[448] The testimony of the labor leaders before

---

[444] How precisely to design a weaker form of judicial review or an easier process for constitutional revision is no easy question, and lies beyond the scope of this Article, but numerous plausible paths exist. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 433, at 152–201 (discussing a range of proposals); Doerfler & Moyn, *supra* note 433, at 1728–71 (comparing the desirability and feasibility of reforms).

[445] *See supra* notes 245–251 and accompanying text.

[446] Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1911 (2021) (emphases omitted).

[447] *See* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 129 (2020).

[448] *See* Andrias, *supra* note 31, at 23–24.

the Presidential Commission on the Supreme Court highlights the labor movement's awareness of these dynamics, with labor leaders pressing concerns about ethics of Supreme Court Justices and decrying the Justices' entanglement with corporate interests, while urging reform rather than abandonment of courts.[449] At the same time, as this Article has shown, the labor movement's actions evince a commitment to constitutionalism outside the courts. This duality reflects an implicit commitment to both minimizing courts' claim to exclusive control over constitutional meaning and transforming the courts' orientation and their constitutional understandings.

C. Beyond the New Deal Settlement: Toward a Democratic and Egalitarian Constitution

In short, labor's efforts offer an example of nonjuriscentric constitutionalism that envisions both a more modest role for courts and an altered judiciary. Unlike much of the contemporary scholarly literature critiquing judicial supremacy or urging Supreme Court reform, however, labor also offers an affirmative, *substantive* vision for a new constitutional order. That is, from labor's range of efforts described in Part II, a coherent constitutional alternative to capital's constitution can be constructed. As during the first constitutional clash, labor insists that we cannot have a democracy in the context of gross material inequality and power differentials among citizens. And it seeks changes in conceptions of both rights and governmental structure to that end.

Ultimately, the vision that emerges from labor's on-the-ground efforts is for a more fundamentally democratic and egalitarian constitutional order, and one that aspires to a system of free labor. Translated into more formal constitutional terms, labor's constitutional project includes: (1) redefining conceptions of freedom of speech and association and the constitutional guarantee of free labor to protect workers' collective activity, including against exercises of *private* domination; (2) recognizing social and economic rights as fundamental and necessary to a functioning democracy; (3) expanding who qualifies as a right's holder, as "we the people," and redefining what counts as equal protection under the law, while empowering Congress to eradicate systems of unfree labor as Reconstruction promised; and (4) expanding the powers, obligations, and participatory structures of government, while subordinating market forces to democratic control. As such, labor's constitutional vision contrasts not only with business's constitution being embraced by the right-wing Supreme Court but also with the constitutional settlement reached in the aftermath of the New Deal,

[449] *See* Testimony of Craig Becker, *supra* note 436; Henry, *supra* note 436, at 1–2, 7–11.

especially as it developed over subsequent decades and has been articulated by most of the Court's current and recent Justices.

As this Article has detailed, the New Deal settlement embraced at the outset a commitment to a broad congressional power and deference from the judiciary to the political branches as to economic legislation.[450] It also rejected the *Lochner* era's formalistic approach to liberty. But even before the New Deal settlement was curtailed beginning in the 1970s with the rise of neoliberalism and the Rehnquist Court, the Court did not unsettle the classical liberal constitutional tenets that long characterized U.S. Constitutional law. In particular, despite the goals of progressives, labor, and left-New Dealers, the post-New Deal settlement retained classical liberalism's suspicion of the state—the state is thought to curtail the natural rights enjoyed by individuals except when it enforces traditional contract and property rights.[451]

In addition, the post-New Deal constitutional order continued to see the existence and operation of private power as *not* of central constitutional concern—and, more generally, paid little attention to power relationships. It also failed to protect workers' collective labor rights, while rejecting as a violation of due process and the separation of powers efforts to subject the economy to shared democratic control.[452] And by the 1970s, it firmly rejected the idea of social and economic rights,[453] while also rejecting an anti-caste or antisubordination approach to equality.[454]

Labor's vision, elaborated above, offers a contrasting approach. Instead of focusing only on protecting individual rights from intentional state incursion, it embraces a more social democratic approach, with particular attention to how power is exercised.[455] It sees the state as having a legitimate role over market forces—as providing the best hope for achieving progressive social change. It also sees private power as posing a threat to

---

[450] *See supra* notes 88, 108 and accompanying text.

[451] *See* Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 CAN. J.L. & JURIS. 31, 32–38 (2004) (contrasting social democratic approaches with classically liberal approaches); GERSTLE, *supra* note 256, at 73–188 (describing ascendancy of neoliberalism). For exploration of the more ambitious democratic goals of the Progressive Era and early New Deal, see generally NOVAK, *supra* note 31; Andrias, *Fair Labor Standards Act*, *supra* note 93; RAHMAN, *supra* note 24; Pope, *Labor's Constitution of Freedom*, *supra* note 24; FISHKIN & FOBATH, *supra* note 18; JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920 (1986); and DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

[452] *See supra* notes 380–386 and accompanying text.

[453] *See supra* note 216.

[454] *See* Washington v. Davis, 426 U.S. 229, 230–31 (1976); Massachusetts v. Feeney, 442 U.S. 256, 257–58 (1979).

[455] *See* DAVID GARLAND, THE WELFARE STATE: A VERY SHORT INTRODUCTION 71–77 (2016).

basic constitutional values, and it seeks to extend principles of democracy and freedom of speech and association into the workplace and the economy. And it views reducing material inequality as a necessary precondition of political freedom. Finally, it focuses on problems of subordination and exclusion in order to realize equality and a system of free labor.

Ultimately, labor's constitution would subject a wider range of actions, including private actions, to constitutional standards, albeit not necessarily to judicial review. Labor's vision entails a more robust role for legislative constitutionalism. It would also promote a particular conception of freedom of speech and equality by protecting labor organizing and workers' collective action, including against private incursion. It would redefine the nature of constitutional obligations under the Reconstruction Amendments to include material and dignitary protections for workers (and, ultimately, on a similar theory, for broader social and economic rights such as health, education, and housing), and would eradicate the subordination of classes of workers. Finally, it would break from the post-New Deal constitutional order—and certainly the neoliberal constitutional order—by embracing the extension of democratic values into the social and economic domain, with the belief that the state, unions, and other democratic, civil society organizations must take an active role in achieving those aims.[456]

CONCLUSION

Today, in this moment of crisis in our economy and democracy, the shape of the U.S. constitutional order is very much up for grabs. Business, along with the Court's conservative supermajority, pushes a particular vision—one that is deeply antidemocratic and anti-egalitarian, in the area of labor and many other areas. As this Article has shown, labor's efforts to transform the workplace and the economy push the other way, offering a coherent alternative that challenges both business's version and the post-New Deal constitutional order.

Whether put in formal constitutional terms or not—and whether achieved through amendment, interpretative change, or through sub-constitutional reform and practice—labor's demands, taken holistically, do not just tinker at the edges of existing law. Rather, labor seeks to transform society's basic commitments, to reconstitute governmental obligations and powers, and to redefine rights. Labor advances a logic of what should be in ways that would require implementation of fundamental political and

[456] *Id.* at 8–9.

economic changes. Its demands would require a modification of the relations of power and the creation of new centers of democratic power.[457]

To be sure, labor's success is uncertain. Despite the rise in organizing and strike activity; the policy successes at the local, state, and federal administrative levels; and record-levels of support for workers, labor has yet to translate the new energy into major organizational victories or into fundamental federal law reform, let alone economic transformation. And in some ways, labor's vision as elaborated thus far falls short of what a truly democratic, egalitarian constitutional order would entail. Among other limitations, labor is engaging only sporadically with arguments for broader socioeconomic rights (like health care and education) or with such problems as the antimajoritarian structures of the Senate, the Electoral College, the Supreme Court, and the process for constitutional amendment. It also engages unevenly with problems of racial and gender justice outside of the workplace or with the potentially existential climate crisis. And some observers might argue that its critique of the political economy—its critique of capitalism—remains tepid. Yet labor's efforts nonetheless pose a significant challenge to the constitutional order and an important articulation of a more democratic and egalitarian alternative. Despite the absence of a supportive Court majority or an effective majority in Congress, labor's successes to date demonstrate that "even when the state seems quite uncongenial for advances in social justice and emancipatory social change, there is still much that can be done."[458] Labor is working on building a new constitutional order from within the interstices of the old.[459] Its efforts offer a model for others to build on.

---

[457] *See* ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 8 & n.3 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press ed. 1967).

[458] Erik Olin Wright, *How to Be an Anticapitalist Today*, JACOBIN (Dec. 2, 2015), https://jacobin.com/2015/12/erik-olin-wright-real-utopias-anticapitalism-democracy/ [https://perma.cc/U5KQ-5KJJ].

[459] *Cf.* ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS (2010) (discussing the feasibility of alternatives to capitalism aimed towards rebuilding hope for emancipatory social change).