

**SOCIAL BARGAINING IN STATES AND CITIES:  
TOWARD A MORE EGALITARIAN AND DEMOCRATIC WORKPLACE LAW**

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“Could Experiments at the State and Local Levels Expand Collective Bargaining  
and Workers’ Collective Action?”

A well-documented problem motivates this symposium: The National Labor Relations Act (NLRA) does not effectively protect workers’ rights to organize, bargain, and strike. Though unions once represented a third of American workers, today the vast majority of workers are non-union and employed “at will.” The decline of organization among workers is a key factor contributing to the rise of economic and political inequality in American society.<sup>1</sup> Yet reforming labor law at the federal level—at least in a progressive direction—is currently impossible. Meanwhile, broad preemption doctrine means that states and localities are significantly limited in their ability to address the weaknesses in labor law, even where local politics would permit such gains.

Employment law, however, does not face the same preemption hurdles as labor law, leaving room for experimentation at the state and local level. This is important not only because traditional employment law is a critical tool for improving workers’ lives, but also because labor and employment law ought not be understood as separate categories. Like labor law, employment law can be a tool for strengthening civil society and protecting workers’ collective voice. For example, employment law can empower worker organizations by engaging them in enforcement activity<sup>2</sup> and by deputizing them to administer benefits.<sup>3</sup> Its provisions can protect concerted activity.<sup>4</sup> In addition,

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<sup>1</sup> See, e.g., Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *AM. SOC. REV.* 513, 513-14 (2011).

<sup>2</sup> Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 *POL. & SOC’Y* 552 (2010); Catherine L. Fisk & Seema N. Patel, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, *HARV. L. & POL’Y REV. ONLINE* (2017), <http://harvardlpr.com/wp-content/uploads/2017/11/Patel-Fisk-CoEnforcement.pdf>.

<sup>3</sup> Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 *N.C. L. REV.* 319 (2012).

employment law can be used to enable a form of sectoral bargaining through which workers and employers, in conjunction with public officials and the general public, negotiate workplace standards at the sectoral level rather than at the firm level.<sup>5</sup>

In this brief essay, I will consider how states and localities can use tripartite commissions or wage boards to enable public sectoral bargaining—what I will call “social bargaining”—consistent with federal preemption doctrine and other legal constraints.<sup>6</sup> I refer to these social bargaining mechanisms as “tripartite” because, at a general level, they include representation from three categories: workers, business, and the public. In practice, however, they typically are, and should be, multi-partite with individuals representing a range of worker, business, and public interests.

To be sure, a full-fledged system of social bargaining would require new federal legislation. Yet a state and local approach offers promise in the interim. State and local commissions or wage boards can involve worker organizations, business organizations, and the public in decisions about wages, benefits, and working conditions. In so doing, they can increase wages and improve conditions for workers throughout the economy; they can augment the role of civil society in administration; and they can help strengthen worker organizations, particularly if combined with other reforms.<sup>7</sup>

## I. Why Social Bargaining?

Most industrial democracies empower unions to negotiate for workers on a sectoral basis.<sup>8</sup> Through one method or another, the government extends union-negotiated standards to workers throughout the economy, while workers also have rights of participation at the shop level through, for example, works councils, local unions, or

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<sup>4</sup> Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

<sup>5</sup> Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); see also DAVID ROLF, THE FIGHT FOR FIFTEEN 253-58 (2016); David Rolf, *Toward a 21st Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016), <http://prospect.org/article/toward-21st-century-labor-movement>; Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624 (2016). For one account of how all these reforms fit together, see DAVID MADLAND, CTR. FOR AM. PROGRESS, THE FUTURE OF WORKER VOICE AND POWER (2016) [hereinafter FUTURE OF WORKER VOICE]; see also David Madland & Alex Rowell, *How State and Local Governments Can Strengthen Worker Power and Raise Wages*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://www.americanprogressaction.org/issues/economy/reports/2017/05/02/166640/state-local-governments-can-strengthen-worker-power-raise-wages/>.

<sup>6</sup> For further discussion, see *infra* Parts III & IV.

<sup>7</sup> In earlier work, I consider the possible drawbacks of moving to a system of social or sectoral bargaining. See Andrias, *supra* note 5. I do not reiterate those arguments here.

<sup>8</sup> See STEVEN J. SILVIA, HOLDING THE SHOP TOGETHER 27-28, 38-41 (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>.

competing minority unions.<sup>9</sup> In many systems, unions also play a crucial role in administering benefits, giving workers an incentive to join unions.<sup>10</sup>

Contemporary American labor law, however, does not affirmatively grant unions power to negotiate on behalf of all workers in a given sector; rather, it channels most negotiations about wages and benefits to the firm level.<sup>11</sup> At the same time, U.S. law makes organizing and bargaining at the firm level extraordinarily difficult and permits significant resistance by employers.<sup>12</sup> The result is that the vast majority of workers are unrepresented by unions and uncovered by agreements reached by unions. Meanwhile, employment law is generally considered a separate regime under which workers are individually entitled to rights but concerning which unions have no special role.<sup>13</sup>

In the last several years, a number of worker movements, as well as a host of scholars, have begun to challenge this paradigm.<sup>14</sup> The worker movements have intensified their focus on organizing at a sectoral level. They have also tried to engage governments, as well as employers, in efforts to raise wages and improve working conditions, as part-and-parcel of the organizing campaigns. From these struggles, I have argued, one can glimpse the outlines of an alternative form of labor law—a labor law that aspires to social bargaining.<sup>15</sup>

The social bargaining approach—i.e., government-mandated sectoral bargaining that addresses a range of issues of concern to workers—has significant advantages. First, and perhaps most important, it is more effective than firm-based bargaining in reducing economic inequality.<sup>16</sup> Researchers have shown that firm-based bargaining compresses wages within the firm at which it occurs.<sup>17</sup> Yet, it tends to raise wages throughout an industry only if there is enough union presence in the industry or geographic area to pose a threat to non-unionized firms; employers raise wages to stave off unionization or to

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<sup>9</sup> See Andrias, *supra* note 5, at 6, 33-34, 77-80; MADLAND, FUTURE OF WORKER VOICE, *supra* note 5.

<sup>10</sup> Dimick, *supra* note 3.

<sup>11</sup> See Andrias, *supra* note 5, at 6, 28-32. The original New Deal briefly promised, though never fully achieved, a more sectoral system that integrated labor and employment law. Kate Andrias, *Rethinking Labor's Administration, The Lost Promise of FLSA's Wage Boards* (draft).

<sup>12</sup> See Andrias, *supra* note 5, at 25-27.

<sup>13</sup> *Id.* at 37-40.

<sup>14</sup> See sources cited *supra* notes 1-5.

<sup>15</sup> Andrias, *supra* note 5.

<sup>16</sup> KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 5, 9-10, 194, 203-07 (2014); Jonas Pontusson, *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRIT. J. POL. SCI. 281, 289-90 (2002); Michael Wallerstein, *Wage Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649, 669, 672-76 (1999).

<sup>17</sup> RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 79-82 (1984).

compete for labor.<sup>18</sup> This rarely occurs under our current regime. In contrast, social bargaining directly affects wages throughout the labor market; agreements apply to all employers in the industry or region, helping create more wage compression over all.<sup>19</sup> Indeed, comparative studies suggest that, from the perspective of creating egalitarian outcomes at the societal level, the critical factor in a labor law regime is the establishment of broadly inclusive union organizations empowered to negotiate sectorally.<sup>20</sup>

Second, social bargaining increases workers' voice in public policy decisions.<sup>21</sup> Social bargaining gives worker organizations an official seat at the table when policy decisions affecting workers are made. More generally, worker organizations' broader mandate enhances their incentive and ability to serve as a counterweight to organized business interests in the political sphere. And giving worker organizations, as well as businesses, a formal role in setting social welfare policy could be a particularly helpful tool if, as predicted, automation becomes more prevalent and more bargaining about income must occur directly with the state.

Third, social bargaining responds well to the increasing problem of the fissured employer.<sup>22</sup> Workers throughout an economic sector bargain together, whether employed by a lead firm, a contracted firm, or a temporary agency. This avoids protracted legal battles about the identity of the employer and provides a disincentive for companies to subcontract with the aim of reducing labor costs. Likewise, social bargaining can potentially cover both independent contractors and employees, minimizing battles over worker classification.

Finally, social bargaining takes most disputes about wages and benefits outside of the workplace, potentially facilitating collaborative relationships between workers and firm managers.<sup>23</sup> Relatedly, it addresses several of the efficiency-based objections to collective bargaining by changing the topics over which much bargaining occurs.<sup>24</sup>

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<sup>18</sup> Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 699 (2013).

<sup>19</sup> See Pontusson, *supra* note 16; Wallerstein, *supra* note 16.

<sup>20</sup> Thelen, *supra* note 16, at 204-07; see also SILVIA, *supra* note 8, at 41 (emphasizing the central role the law and state institutions play in sustaining the German industrial relations system).

<sup>21</sup> Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Relations,"* 1990 WIS. L. REV. 1, 40-43 (1990).

<sup>22</sup> Andrias, *supra* note 5, at 78.

<sup>23</sup> MADLAND, FUTURE OF WORKER VOICE, *supra* note 5.

<sup>24</sup> Dimick, *supra* note 18, at 692 (explaining that when union structures are highly decentralized and firm-based, the rational response of unions is to advocate for "seniority-based layoff policies, job definitions and demarcations, internal labor markets, rules limiting employer discretion over technology, manning and staffing requirements, and so forth").

As previously noted, achieving a system of social bargaining at the federal level is, at least in the near term, impossible.<sup>25</sup> Yet states and localities can make some progress toward the vision by creating tripartite administrative structures that include representatives from worker organizations, business groups, and the general public who then negotiate over such employment law standards as minimum wages, benefits, health and safety, and scheduling.

One might wonder whether creating tripartite administrative mechanisms at the state or local level is worth the trouble, absent the ability to enact a system of full-fledged mandatory sectoral bargaining *and* greater protections for concerted activity. After all, if workers have enough political power to enact a tripartite commission structure at the state or municipal level, wouldn't they be better off just legislating higher wages or better standards? Moreover, don't tripartite commissions just create another forum in which workers have to marshal scarce resources, competing with more powerful companies? There is some force to these critiques. Statutory gains are stickier than administrative gains. Certainly, it would be foolish to forsake lasting legislative victories for temporary administrative achievements more easily abolished by a hostile executive. And without a shift in power dynamics, tripartite commissions can, like other governmental fora, be dominated by elites.<sup>26</sup>

Nonetheless, both U.S. history and experience abroad suggest that tripartite administrative processes, if well structured, offer advantages over a purely legislative approach. At the most basic level, administrative processes offer states and localities the ability to address workplace issues with specificity and expertise, as well as the capacity to proceed with reform even in periods of legislative gridlock. Moreover, the tripartite approach in particular can improve the chances of lasting gains for workers while enhancing civil society and civic participation more broadly.<sup>27</sup> This is because tripartite commissions can increase worker organizations' role in decisions about the political economy while extending the fruits of bargaining to more workers. They can provide a forum for workers' collective engagement in workplace issues while sending a message about the legitimacy of worker organizations. As such, tripartite processes can facilitate

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<sup>25</sup> On the long history of labor law's ossification and the difficulty of reform, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1611-12 (2002).

<sup>26</sup> On the dominance of economic elites in U.S. government see, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 2, 285 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 79-81, 157-58 (2012); KAY LEHMAN SCHLOZMAN ET AL., *UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 69-95 (2012).

<sup>27</sup> On history of tripartism in the U.S., see Andrias, *supra* note 5, at 17-18; Andrias, *supra* note 11; NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT* 271-98 (1995). On possible ways to structure tripartite commissions, see *infra* Part III.

organizing efforts.<sup>28</sup> One might recall the CIO message that, “the President wants YOU to join the union!”<sup>29</sup> In addition to signaling the legitimacy of worker organizations, tripartite commissions can signal the vulnerability of employers to regulation. As scholars have shown, when law demonstrates that those in power are subject to a higher authority, law has the potential to open space for mobilization.<sup>30</sup> Finally, if, as discussed below, tripartite commissions are combined with other reforms that build power for worker organizations, they can be a critical step in constructing a more egalitarian regime.<sup>31</sup>

## II. Existing Mechanisms for Social Bargaining

How might social bargaining be operationalized at the state and local level under existing law? For the most part, state and local minimum employment standards are set legislatively or by traditional regulatory mechanisms.<sup>32</sup> However, a few states, including California, New Jersey, and New York, already vest the power to set wages or other standards with tripartite commissions, i.e., boards with representation from employee groups, industry groups, and the public.<sup>33</sup> These commissions provide an existing foothold for social bargaining.

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<sup>28</sup> See *infra* notes 49-53 and accompanying text (discussing NY example); Andrias, *supra* note 11 (discussing ways in which wage boards facilitated organizing in the 1930s and 40s).

<sup>29</sup> See IRVING BERSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941*, at 41 (1969) (quoting CIO organizers).

<sup>30</sup> Benjamin Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 *TEX. L. REV.* (forthcoming 2017) (analyzing sociological research and applying to labor law debates).

<sup>31</sup> See *infra* Part III.

<sup>32</sup> That is, a few states grant executive branch actors the power to raise wages or regulate hours in particular sectors of the economy following public hearings. *E.g.*, MASS. GEN. LAWS ANN. Ch. 151 § 7 (West 2013); N.D. CENT. CODE ANN. §§ 34-06-01 to 08 (West 2014); see also statutes collected *infra* note 33. For public hearing requirements, see, e.g., CAL. LAB. CODE § 1178.5; COLO. REV. STAT. §§ 8-6-108, -109; N.D. CODE ANN § 34-08.

<sup>33</sup> See CAL. LAB. CODE §§ 70-74, 1173, 1178 (West 2011) (authorizing an Industrial Welfare Commission, appointed by the governor, and composed of two representatives of employers, two from recognized labor organizations, and one from the general public; requiring commission to review adequacy of minimum wage every two years; and providing for industry specific wage boards); COLO. REV. STAT. § 8-6-109 (authorizing a wage board comprised of an equal number of employer, employee, and public representatives); N.J. STAT. ANN. § 34:11-56a4.7 (establishing the “New Jersey Minimum Wage Advisory Commission” with “five members as follows: the Commissioner of Labor and Workforce Development, ex officio, who shall serve as chair of the commission, and four members appointed by the Governor as follows: two persons who shall be nominated by organizations who represent the interests of the business community in this State and two persons who shall be nominated by the New Jersey State AFL-CIO”); N.J. STAT. ANN. § 34:11-56a8, a9 (providing that commissioner may establish a wage board to set minimum rates for employees in particular occupations; such boards shall be composed of equal numbers of employer, employee, and public representatives). Arizona law also permits the

For example, California law provides for an Industrial Welfare Commission (IWC) composed of two union representatives, two employer representatives, and one representative from the general public.<sup>34</sup> The governor appoints each of the five members with the consent of the Senate, and members serve four-year terms.<sup>35</sup> The labor representatives must be drawn from “members of recognized labor organizations.”<sup>36</sup> The IWC’s authority goes beyond creating a basic minimum wage: It has authority to evaluate wages in “any occupation, trade, or industry” to ensure they are adequate “to supply the cost of proper living”; it also can consider whether “the hours or conditions of labor” are “prejudicial to the health, morals, or welfare of employees.”<sup>37</sup> If the IWC determines that wages, hours, or working conditions are inadequate, it selects a wage board—again composed of two labor and two employer representatives, along with a neutral party—to investigate and make recommendations.<sup>38</sup> Recommendations that receive the support of two-thirds of the wage board’s members are incorporated into IWC proposed regulations, which are then subject to public hearings.<sup>39</sup> If approved, the orders become part of the California Code of Regulation.<sup>40</sup> Using this process, the IWC has issued seventeen orders: twelve industry orders, three occupation orders, an order that applies to any industry or occupation not previously exempt by the IWC’s wage orders effective as of 1997, and one general minimum wage order.<sup>41</sup>

New Jersey’s tripartite Minimum Wage Advisory Commission (WAC or Commission) is charged with annually evaluating the state’s minimum wage.<sup>42</sup> As in California, the governor appoints the Commission’s members and is required to choose representatives from business and labor. To that end, New Jersey law incorporates a representative mechanism, specifying that the business representatives “shall be nominated by organizations who represent the interests of the business community in this State” and that the labor representatives “shall be nominated by the New Jersey State

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establishment of a tripartite wage board, but only to address wages of minors. ARIZ. REV. STAT. ANN. § 23–314.

<sup>34</sup> CAL. LAB. CODE. § 70.1 (West 2011). The IWC dates to 1913, but until the 1970s applied to women and child workers only. *See Indus. Welfare Comm. v. Superior Court*, 613 P.2d 579, 583-84 (Cal. 1980).

<sup>35</sup> CAL. LAB. CODE. § 70.

<sup>36</sup> *Id.* § 70.1.

<sup>37</sup> *Id.* § 1178.

<sup>38</sup> *Id.* §§ 1178, 1178.5.

<sup>39</sup> *Id.* § 1178.5(c).

<sup>40</sup> CAL. CODE REGS. tit. 8, § 11531 (West, Westlaw through Register 2017, No. 44).

<sup>41</sup> Department of Industrial Relations, *IWC Wage Orders-Prior*, STATE OF CALIFORNIA <http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm>.

<sup>42</sup> N.J. STAT. ANN. § 34:11-56a4.7 et seq. (West 2016); *Id.* § 34:11-56a4.8(a). *See also Minimum Wage Advisory Commission*, STATE OF N.J., DEP’T OF LAB. & WORKFORCE DEV., <http://lwd.dol.state.nj.us/labor/lwdhome/MinWageCommission.html> (describing mission of Commission and collecting annual reports).

AFL-CIO.”<sup>43</sup> Unlike in California, however, the Commission has no representatives from the public; instead, the Commissioner of Labor and Workforce Development fills that function and serves as the Commission’s chair. And WAC does not have authority over benefits or working conditions. The law does, however, allow the Commissioner to establish sectoral wage boards, composed of labor and business representatives, which then recommend minimum wages in particular sectors. Wage boards can be established if the Commissioner believes “that a substantial number of employees in any occupation or occupations are receiving less than a fair wage.”<sup>44</sup> The law also provides for a public hearing process after which the Commissioner decides whether to approve or reject the report.<sup>45</sup>

To date, the experience with state-level tripartite commissions has been mixed. Some wage boards, including Colorado’s, appear to have been moribund for years.<sup>46</sup> In other states, like California and New York, wage boards have been used successfully at times. However, no commission is actively or aggressively setting employment standards today. Indeed, the California IWC has been without funding since 2004.<sup>47</sup> The California Division of Labor Standards Enforcement continues to enforce the existing wage orders, and the legislature has not repealed the IWC’s statutory responsibilities, but the current status of the IWC can be characterized as an unfunded legislative mandate.<sup>48</sup>

In New York, the Fight for \$15 movement recently used the state wage board with success. In 2015, after growing protests and strikes organized by the Fight for \$15, and at the request of Governor Andrew Cuomo, the NY labor commissioner exercised his authority to impanel a wage board to recommend higher wages in the fast food industry.<sup>49</sup>

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<sup>43</sup> N.J. STAT. ANN. *Id.* § 34:11-56a4.7.

<sup>44</sup> *Id.* § 34:11-56a8.

<sup>45</sup> *Id.* § 34:11-56a16.

<sup>46</sup> *See supra* note 33.

<sup>47</sup> Department of Industrial Relations, *Industrial Welfare Commission (IWC)*, STATE OF CALIFORNIA <http://www.dir.ca.gov/iwc/>. Disagreement between the California State Legislature, which wanted to increase the minimum wage, and the IWC, which did not, led the legislature to defund the IWC on July 1, 2004. The IWC remains defunded today, and its website states that “[t]he IWC is currently not in operation.”

<sup>48</sup> Victoria Bradshaw, *Raise the Wage Threshold but Don’t Put It on Autopilot*, CAPITOL WEEKLY (June 8, 2006), <http://capitolweekly.net/raise-the-wage-threshold-but-dont-put-it-on-autopilot/>.

<sup>49</sup> Andrew M. Cuomo, Opinion, *Fast Food Workers Deserve a Raise*, N.Y. TIMES (May 6, 2015), <http://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html>. As Cuomo noted, the New York Legislature had rejected his proposal to raise the minimum wage statutorily. N.Y. LAB. LAW § 654 (McKinney 2016); *Id.* § 655(1) (“A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and an equal number of persons selected from the general public.”); Mario J. Musolino, Acting Comm’r Labor, *Determination Regarding Adequacy of Wages*, N.Y. DEP’T LAB. (May 7, 2015),



The Board Members—representatives from labor, business, and the general public—held hearings over the next forty-five days, across the state.<sup>50</sup> Workers organized by the Fight for \$15 participated in great numbers at these hearings.<sup>51</sup> On July 21, the Board announced its decision: \$15 per hour for fast food restaurants that are part of chains with at least thirty outlets, to be phased in over the course of six years, with a faster phase-in for New York City.<sup>52</sup> The wage board order was a significant victory, followed by another victory: a bill to raise the state-wide minimum wage to \$15. However, in the negotiations over the state-wide minimum, employers successfully mobilized to strip the Commissioner’s authority to establish higher minimums for particular occupations. Thus, the ultimate compromise bill curtailed the powers of future tripartite wage boards.<sup>53</sup> Still, the New York experience shows how tripartite structures can be used to engage workers in setting terms of work for entire industries.

The New York example aside, where wage boards have operated, the potential for social bargaining has often been under-realized. Unions have not frequently engaged the commissions through wide spread mobilization, testimony, and collective action. The boards, as currently conceived, also have structural limitations. The ability of workers to use wage boards to their benefit largely depends on the identity of the governor in the state; he or she influences when such boards act and who constitutes them. Thus, in California, for example, former Governor Schwarzenegger tried to use the wage board to limit the legislature’s proposal to index the minimum wage.<sup>54</sup> Moreover, in most cases, the neutral representatives on the commissions effectively decide disagreements. These individuals, selected by the partisan governors, serve as the swing votes and thereby minimize the extent to which true bargaining occurs. This weakness is pronounced when there is no broader worker mobilization exerting pressure on the commissions.

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[http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Determination\\_wages\\_050715.pdf](http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Determination_wages_050715.pdf).

<sup>50</sup> *Fast Food Wage Board*, N.Y. DEP’T LAB. <http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm>.

<sup>51</sup> FAST FOOD WAGE BD., N.Y. DEP’T OF LAB., REPORT OF THE FAST FOOD WAGE BOARD TO THE NYS COMMISSIONER OF LABOR 10-11 (2015).

<sup>52</sup> Patrick McGeehan, *Push to Lift Minimum Wage Is Now Serious Business*, N.Y. TIMES (July 23, 2015).

<sup>53</sup> N.Y. L. 2016, ch. 54, part K, § 4. Existing wage orders remain in effect and New York law still allows the Commission to act regarding hours. *See id.* § 5; Nat’l Rest. Ass’n v. Comm’r of Labor, 34 N.Y.S. 3d 232, 235-36 (N.Y. App. Div. 2016) (discussing legislative history).

<sup>54</sup> *See* Erica Muñoz, *Raising the California Minimum Wage is Not Enough: Creating a Sustainable Wage By Accounting For Inflation Through Indexing*, 16 S. CAL. INTERDISC. L.J. 423 (2007); Bradshaw, *supra* note 48; Majorie Fochtman, *From the Experts: Will the Revival of California’s Industrial Welfare Commission Reduce the Explosion of Wage and Hour Litigation for California Employers?*, HR DAILY (Mar. 1, 2007), <http://hrdailyadvisor.blr.com/2007/03/01/from-the-experts-will-the-revival-of-california-s-industrial-welfare-commission-reduce-the-explosion-of-wage-and-hour-litigation-for-california-employers/>.

Nonetheless, more could be done to use existing wage boards aggressively, as was done by the Fight for \$15 in New York. In jurisdictions where worker organizations have significant political influence, and where the executive branch is amenable, workers can petition wage boards to act. Where statutes permit, they can demand sector-by-sector wage and benefit improvements, beyond minimum wage increases. They can also engage workers in collective action designed to achieve such gains, as the Fight for \$15 did in New York.

### **III. Expanding Tripartite Commissions, Increasing Civic Participation, and Building Worker Power**

Progressive states and localities could also create more ambitious, participatory, and representative tripartite commissions. A range of possibilities is worth exploring. First, state laws, or local laws where home rule power is sufficient, could give tripartite commissions broader mandates on a sector-by-sector basis, making clear that authority is not limited to setting a single minimum wage. Sector-by-sector wages, benefits, working conditions, leave policies, and scheduling rights could all be included in the scope of the commissions' work.

Second, to respond to concerns about the transient nature of administrative gains, the laws could make clear that the statutory mandate is to provide for a living wage and quality benefits. They could impose a cost of living wage increase as a default, or other default increases, creating a floor above which commissions would act. The statutes could also require commissions to act periodically rather than only upon executive branch request or public petition, and could require super-majority votes for any decisions not to raise wages or improve benefits as scheduled.

To ensure that the commission process actually involves representative worker organizations, the laws could further provide, building on the New Jersey model, that the composition of the commissions includes the elected leadership of NLRB-certified unions, other membership-based non-profit worker organizations in the particular sector, as well as leaders of the relevant industry groups and firms. The commissions would require multiple representatives on both the worker and business side, depending on the size and diversity of the particular sector. Another possibility would be to create systems by which workers throughout an industry could vote for representatives, selecting from among a slate of worker organizations; winners would then send representatives to serve on the commissions on a proportional basis.

New tripartite commissions also might cabin the power of the governor, state labor commissioner, or local executive over substantive outcomes in order to ensure that real social bargaining occurs. For example, the laws could create evenly split commissions, incorporating an arbitration process in the event of a stalemate, subject to state or local governmental review; they could require that the neutral representative on the board be selected jointly by worker organizations and business groups from a list of

approved arbitrators; or they could even establish a mechanism for consumer or public representation through a new democratic process encouraging the growth of membership-based consumer organizations.

Whether through existing or new statutes, collective action by workers is an essential component of effective social bargaining. Absent worker participation, tripartite commissions offer little promise. To that end, the success of wage boards depends on active organizing efforts by worker organizations. Workers engaged in such efforts would be entitled to protection under Section 7 of the NLRA, which protects concerted action, even through political channels and even among unorganized workers.<sup>55</sup> Thus, workers could, as they did in New York, testify before wage boards, demonstrate in favor of certain results, and organize their co-workers. Section 7 protects such activity even if the workers are not union members or seeking to form a union—as long as participation does not constitute unprotected or illegal activity.<sup>56</sup> The statute also protects concerted political organizing in the workplace, as long as it occurs off duty, in a nondisruptive manner, and is otherwise in accordance with nondiscriminatory work rules.

Of course, existing penalties for employer violations of Section 7 are weak.<sup>57</sup> Moreover, the current interpretation of Section 7 does not protect workers who withhold their labor in support of their wage and benefit demands unless those demands are directed at their employer.<sup>58</sup> Nor does it protect workers who engage in partial strikes, planned intermittent work stoppages, or secondary economic activity to advance their demands.<sup>59</sup> This doctrine has been persuasively critiqued,<sup>60</sup> though Board and Court

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<sup>55</sup> See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); see also Memorandum from Ronald Meisburg, General Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers, Memorandum GC 08-10 (July 22, 2008) (providing guidelines for how to handle unfair labor practice charges involving political activity arising out of immigration rallies).

<sup>56</sup> Andrias, *supra* note 5, at nn. 120-25 and accompanying text.

<sup>57</sup> See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

<sup>58</sup> See Memorandum from Ronald Meisburg, *supra* note 55, at 10-11 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978) (stating, in dicta, that “[t]he argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within ‘mutual aid or protection’ is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.”)).

<sup>59</sup> See Memorandum from Ronald Meisburg, *supra* note 55, at 12.

<sup>60</sup> See, e.g., Craig Becker, “*Better Than A Strike*”: *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 377-78 (1994); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 752 (1985); see also Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791 (arguing that freedom of assembly should be a source of legal protection for labor unions and worker advocacy efforts); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015) (arguing for broader First Amendment protection).

reinterpretation seems unlikely in the near term. In the meantime, worker organizations can structure their actions so that they fall within the protections of existing law.

Finally, to function well, tripartite commissions should be combined with reforms that protect the right to organize and that strengthen worker organizations. To be sure, many reforms to that end would require federal legislation or a change in preemption doctrine.<sup>61</sup> For example, states cannot, when regulating employees and employers covered by the NLRA, increase penalties for violations of the NLRA, nor can they prohibit permanent replacements or protect secondary boycotts, or establish a system of works councils. However, a few non-preempted reforms at the state and local level can accompany tripartite commissions. One promising example is the recent New York City law that gives employees the option of deducting contributions to qualified nonprofit organizations that will advocate for workers but without engaging in traditional collective bargaining with employers.<sup>62</sup> Other examples are laws that require the state or locality to compensate representatives for participation in wage boards, co-enforcement efforts like those described by Professors Fisk and Patel for this conference,<sup>63</sup> and proposals to engage worker organizations in more benefit administration.<sup>64</sup>

#### **IV. Legal Challenges to State and Local Tripartite Commissions for Employees**

Greater use of tripartite commissions at the state and local level would undoubtedly come under legal challenge—but the best reading of the law supports a conclusion that such regimes are permissible.<sup>65</sup>

1. *Federal Labor Law Preemption.* Employers or other aggrieved parties would likely challenge both state and local legislation on NLRA preemption grounds. The Fair Labor Standards Act (FLSA) does not preempt state and local wage legislation, as long as the non-federal benefits exceed the floors set by federal statutes.<sup>66</sup> States can pass, for example, higher minimum wages, more protective scheduling laws, and paid sick time provisions; so too can localities, as long as their home rule provisions permit them to do so. But opponents of social bargaining could potentially argue that once states or localities allow extensive social bargaining over wages and other terms or conditions in particular industries, they have entered the field of labor-management relations and are therefore subject to NLRA preemption.

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<sup>61</sup> See *infra* Section IV.1 (discussing preemption doctrine).

<sup>62</sup> Justin Miller, *In New York City, Fast-Food Workers May Soon Have a Permanent Voice*, AM. PROSPECT (June 15, 2017), <http://prospect.org/article/new-york-city-fast-food-workers-may-soon-have-permanent-voice>.

<sup>63</sup> See Fisk & Patel, *supra* note 2.

<sup>64</sup> See Dimick, *supra* note 3.

<sup>65</sup> See Andrias, *supra* note 5.

<sup>66</sup> 29 U.S.C. § 218(a) (2012).

In contrast to the FLSA, the NLRA's preemption regime is extremely broad.<sup>67</sup> There are two key cases. First, *San Diego Building Trades Council v. Garmon* holds that states are prohibited from regulating activity that is even "arguably" protected or prohibited by federal law.<sup>68</sup> Second, *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*<sup>69</sup> holds that Congress's decision to leave certain activity unregulated by the NLRA implied Congress's intent that these forms of union and employer conduct be left completely unregulated.<sup>70</sup> Where Congress left conduct "to be controlled by the free play of economic forces,"<sup>71</sup> the states, like the NLRB, cannot regulate it.<sup>72</sup>

Opponents of tripartite commissions could invoke *Garmon*, arguing that tripartite commissions require mandatory multi-employer bargaining, while the NLRA protects employers' rights not to participate in such bargaining. They might also argue that the NLRA expressly protects the right to refrain from unionization, and that wage boards effectively defeat that right. In addition, opponents could rely on *Machinists*, claiming that local or state tripartite commissions engage in a form of collective bargaining over which the state exercises substantive control. And, the argument would run, the NLRA clearly leaves the substantive outcome of bargaining "to be controlled by the free play of economic forces."<sup>73</sup>

Though one should not underestimate the risk of a negative ruling given the Supreme Court's current composition, a preemption finding under either *Garmon* or *Machinists* would represent a significant departure from existing doctrine. The Supreme Court has repeatedly emphasized the prohibition against state actors shifting the balance of power in privately negotiated agreements,<sup>74</sup> but it has never curtailed the ability of states and local governments to pass universally applicable employment legislation. Indeed, the Court has held that laws of general applicability are not preempted even when they "alter[] the economic balance between labor and management."<sup>75</sup> The Court has

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<sup>67</sup> Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 374-94 (1990). For a summary of labor preemption doctrine and its origins, see Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1164-69 (2011).

<sup>68</sup> 359 U.S. 236, 245-46 (1959).

<sup>69</sup> 427 U.S. 132 (1976).

<sup>70</sup> *Id.* at 141 (citing *NLRB v. Int'l Union of Ins. Agents*, 361 U.S. 477, 488-89 (1960), and *Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 187 (1965)).

<sup>71</sup> *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

<sup>72</sup> *Id.* at 149.

<sup>73</sup> *Id.* at 144, 149-50.

<sup>74</sup> *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986) (preempting Los Angeles's decision to condition the award of a taxi franchise on the taxi company's agreement to settle a strike).

<sup>75</sup> *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 532 (1979) (plurality opinion); *see also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("It would turn the

also emphasized that, “When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.”<sup>76</sup> Thus, the Court has upheld several state laws establishing workplace standards that would otherwise be negotiated in bargaining.<sup>77</sup>

In the case of tripartite commissions, unions would not be obtaining exclusive bargaining agreements, multiemployer or otherwise.<sup>78</sup> Wage board orders carry no requirement that the workers be members of a union, abstain from a union, or join a union. Nor do they force employers to engage in collective bargaining. Rather, tripartite commissions involve worker organizations and businesses in setting employment law. As courts have recognized “[i]t is now clear . . . that state substantive labor standards, including minimum wages, are not invalidated simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.”<sup>79</sup> “[T]he substantive terms of employment, which does not govern the *processes* of collective bargaining or self-organization and is not inconsistent with the general goals of the NLRA is not subject to *Machinists* preemption.”<sup>80</sup>

Finally, it is worth noting that the above preemption analysis applies only to workers who fall within the NLRA’s scope. Courts have long held that states can pass labor laws governing exempt workers—namely agricultural and domestic workers, independent contractors, and public sector employees—without confronting preemption

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policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.”); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22 (1987) (accord). The California Supreme Court has rejected a labor law preemption challenge to its state’s wage commission. *Indus. Welfare Comm’n v. Superior Court*, 613 P.2d 579, 600-01 (Cal. 1980) (emphasizing states’ authority to go beyond the federal legislation in adopting more protective regulations for the benefit of employees). For similar reasons, under current doctrine, a First Amendment challenge should fail. Any effect on the expressive interests of employers or objecting workers would be indirect. *See Lyng v. Automobile Workers*, 485 U.S. 360, 360-61 (1988) (holding that a statute denying food stamps to striking workers does not directly and substantially interfere with First Amendment rights).

<sup>76</sup> *Metro. Life*, 471 U.S. at 756-57 (internal quotations and citations omitted).

<sup>77</sup> *See Coyne*, 482 U.S. at 20-22 (1987) (requiring a one-time severance payment to employees upon the closing of any plant employing over 100 workers); *Metro. Life*, 471 U.S. 724 (1985) (approving a state statute requiring all general health insurance policies or employee health-care plans that covered hospital and surgical expenses to also include minimum mental health-care benefits).

<sup>78</sup> *Cf. Sachs*, *supra* note 67 (discussing preemption arguments with respect to tripartite negotiations that result in privately negotiated agreements).

<sup>79</sup> *Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004), *amended*, No. 02-56735, 2004 WL 292128 (9th Cir. Feb. 17, 2004).

<sup>80</sup> *S. Cal. Edison Co. v. Pub. Utilities Comm’n*, 45 Cal. Rptr. 3d 485, 497-98 (Cal. Ct. App. 2006) (citing *Metro. Life*, 471 U.S. at 758, and rejecting reasoning of *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995)).

doctrine.<sup>81</sup> For those workers, more ambitious sectoral bargaining, along with more protections for concerted action, could be enacted, subject to other legal constraints, discussed below.

2. *Equal Protection and Dormant Commerce Clause.* Opponents are also likely to argue that tripartite commissions violate the equal protection and due process clauses of the Fourteenth Amendment and parallel state provisions and/or the federal dormant commerce clauses. These arguments have been easily dismissed: the statutes have a rational basis and do not discriminate between in-state and out-of-state businesses.<sup>82</sup> Expansion of the scope of tripartite board activity is unlikely to change either analysis.

3. *Separation of Powers.* A third line of challenge sounds in separation of powers law. To date, opponents have gained little traction on claims that wage boards excessively delegate power to the executive branch or to private parties. The statutes have survived review because they set forth a clear legislative policy position that cabins decisionmaking authority by the executive; they maintain ultimate decisionmaking authority in public officials, not in private parties; and they contain mechanisms to guard against arbitrary and capricious action.<sup>83</sup> Any expansion of social bargaining at the state

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<sup>81</sup> While laws governing labor relations of private sector supervisors are preempted, *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 662 (1974), lower courts have held that states can provide collective bargaining rights or otherwise legislate regarding other groups of workers who are excluded from the Act. *See, e.g.*, *United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (agricultural laborers); *Chamber of Commerce v. Seattle*, No. 2:17-cv-00371 (W.D. Wash. Aug. 1, 2017) (independent contractors); *Greene v. Dayton*, 81 F. Supp. 3d 747, 750-52 (D. Minn. 2015) (domestic workers). *See also* *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) (citing 29 U.S.C. § 152(2)) (“The National Labor Relations Act leaves States free to regulate their labor relationships with their public employees.”).

<sup>82</sup> *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015) (holding, with respect to the Seattle \$15 minimum wage law, that “[t]he district court did not clearly err in finding a legitimate purpose in the classification and a rational relationship between franchisees and their classification as large employers”; a “reasonably conceivable state of facts” could support the classification based on “the economic benefits flowing to franchisees” and franchisees’ ability to “handle the faster phase-in schedule”), *cert. denied sub nom.*, 136 S. Ct. 1838 (2016); *Nat'l Rest. Ass'n v. Comm'r of Labor*, 34 N.Y.S. 3d 232, 239-40 (N.Y. App. Div. 2016) (quoting *Matter of Tamagni v. Tax Appeals Trib. of N.Y.*, 695 N.E.2d 1125, 1133 (N.Y. 1998)) (concluding that the dormant commerce clause is not violated when “‘there is no differential treatment of identifiable, similarly situated in-[s]tate and out-of-[s]tate interests’ on the face of the wage order” and there is no evidence that “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”).

<sup>83</sup> *Nat'l Rest. Ass'n*, 34 N.Y.S.3d at 238 (“The Commissioner is tasked with making complex economic assessments in issuing a wage order, but has special expertise to do so in the form of investigative powers in the area of wages and leadership of an agency capable of providing expert guidance . . . [and that] ‘the basic policy decisions underlying wage orders were made and articulated by the Legislature.’”) (internal citations omitted).

or local level would have to maintain these basic characteristics.<sup>84</sup> Thus, in states with separation-of-powers and administrative law doctrine that roughly parallel federal law, it would be critical that any tripartite wage statute set forth an “intelligible principle” and that ultimate decisionmaking authority rest with a state official, not with private parties.

4. *Home Rule and State Preemption.* A fourth, and more significant, obstacle is that hostile state governments can eliminate the ability of localities to enact social bargaining statutes. Municipal corporations are subdivisions of the state and only have authority to enact laws if the state has granted them such powers.<sup>85</sup> Accordingly, state governments can deny localities authority to engage in social bargaining or can overrule particular social bargaining that occurs at the local level. In circumstances where state government is more conservative than city or county government, elimination of home rule powers or rejection of particular regulations is a real danger.<sup>86</sup> The threat may be pronounced where the locality is governed by a racial minority group lacking effective representation at the state level.<sup>87</sup> For example, the Alabama legislature voted to nullify a City of Birmingham law that would have set the city’s minimum wage at \$10.10.<sup>88</sup> Missouri recently rolled back St. Louis’ \$10-an-hour minimum wage ordinance.<sup>89</sup> Ohio’s legislature recently enacted a statute prohibiting localities from raising their minimum wages higher than the statewide minimum, in anticipation of the City of Cleveland’s scheduled vote to increase the city’s minimum wage to \$15 an hour (the statute was

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<sup>84</sup> The analysis for each locality and state would vary.

<sup>85</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 278-79 (2009).

<sup>86</sup> See ZACHARY ROTH, *THE GREAT SUPPRESSION* 73-87 (2016) (describing how conservative state governments, often at the behest of industry groups, have enacted state laws to block progressive local legislation; but acknowledging that preemption can cut in favor or against progressive goals).

<sup>87</sup> Cf. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908-09 (1994) (“A centralized regional authority that encompasses several localities leaves little opportunity for politically empowered cultural communities to form and thrive.”).

<sup>88</sup> See Teresa Tritch, *The Backlash in Birmingham*, N.Y. TIMES: TAKING NOTE (Feb. 29, 2016, 1:23 PM), <http://takingnote.blogs.nytimes.com/2016/02/29/the-backlash-in-birmingham>. Notably, the legislature in Alabama is majority white; the city is majority African-American. *Id.* Alabama is one of five states with no state minimum wage. *Id.* Workers in Birmingham, represented by the NAACP, filed suit against the Alabama law, arguing that the state effort to nullify the local wage violates the Fourteenth Amendment’s equal protection clause. According to the complaint, the decision was “racially motivated” and “disproportionately impacts African-American residents.” Complaint at 3, *Lewis v. Bentley*, No. 16-CV-00690 (N.D. Ala. Apr. 28, 2016).

<sup>89</sup> *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NELP (July 6, 2017), <http://www.nelp.org/publication/fighting-preemption-local-minimum-wage-laws/>.



ultimately struck down).<sup>90</sup> Several other states have passed or are considering similar legislation, bringing the total number of states with laws that prohibit local wage ordinances to twenty-five.<sup>91</sup>

5. *Antitrust*. A final possible challenge comes from antitrust law—though this too should fail under existing precedent. The Sherman Act makes unlawful “every contract, combination . . . or conspiracy[] in restraint of trade,” and punishes the act of “monopoliz[ing], or attempt[ing] to monopolize . . . any part of the trade or commerce” among states.<sup>92</sup> Thus, private actors are prohibited from agreeing or otherwise colluding to achieve anticompetitive ends. Agreements between individuals that directly affect prices are considered “per se” illegal.<sup>93</sup> The antitrust laws, however, contain a labor exemption, which makes clear that labor unions are not combinations or conspiracies in restraint of trade within the meaning of the Sherman Act.<sup>94</sup> An additional judicially crafted “non-statutory” labor exemption extends to parties who enter into agreements with unions.<sup>95</sup>

Opponents to social bargaining statutes might argue that, because the labor exemption is not currently understood to cover independent contractors, social bargaining statutes governing such workers would violate the antitrust law.<sup>96</sup> This argument should fail, however, because statutes allowing social bargaining by independent contractors

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<sup>90</sup> Kevin Lui, *Ohio’s State Legislature Just Banned Cities From Raising Local Minimum Wages*, FORTUNE (Dec. 9, 2016), <http://fortune.com/2016/12/09/ohio-state-legislature-cities-local-minimum-wages/>. A state judge, however, ruled the state law unconstitutional on the ground that it violated the state’s one-subject rule.

<sup>91</sup> Sophie Quinton, *Iowa Bill Would Prevent Localities From Raising the Minimum Wage*, PEW: STATELINE (Mar. 28, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/28/iowa-bill-would-prevent-localities-from-raising-the-minimum-wage> (describing bills in Pennsylvania, Iowa, and Minnesota).

<sup>92</sup> Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1, 2.

<sup>93</sup> See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

<sup>94</sup> See Clayton Act § 6, 15 U.S.C. § 17 (2012); see also Clayton Act § 20, 29 U.S.C. § 52 (2012) (restricting the use of injunctions against union activity); *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 621-26 (1975); *United States v. Hutcheson*, 312 U.S. 219 (1941).

<sup>95</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

<sup>96</sup> For a discussion of antitrust law and low-wage independent contractors, see, e.g., Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 168-74 (2005); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977-79 (2016). Notably, courts have concluded that agricultural workers benefit from the labor exemption even though they are excluded from the NLRA. See *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 554 (9th Cir. 1974). In addition, labor organizations bargaining on behalf of non-employees are immune from antitrust liability if there is wage competition between those non-employees and employees. *Am. Fed. of Musicians v. Carroll*, 391 U.S. 99 (1968).

would fall squarely within the “state action” exception to the antitrust laws.<sup>97</sup> That exemption, also known as *Parker* immunity, allows states to enact anticompetitive regulation when acting in their sovereign capacities.<sup>98</sup> In establishing a wage board, or enabling a locality to establish a wage board, for independent contractors the state would be “clearly articulat[ing] and affirmatively express[ing] state policy.”<sup>99</sup> Moreover, the wage boards would be actively supervised by state officials, with state officials retaining authority to veto decisions that violate state policy.<sup>100</sup>

## CONCLUSION

In this era of striking economic and political inequality, reforming labor and employment law and rebuilding worker organizations are essential. With federal reform not currently possible, engaging workers and their organizations in state and local tripartite commissions is a step in the right direction. When combined with active worker organizing efforts and additional reforms that strengthen worker organization, state and local tripartism can function as an important building block of a more egalitarian and democratic workplace law.

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<sup>97</sup> *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)); *N.C. State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1114 (2015). *See also* *Clark v. City of Seattle*, No. 2:17-cv-00382, 2017 BL 298107 (W.D. Wash. Aug. 24, 2017).

<sup>98</sup> *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* immunity does not apply directly to local and municipal governments, but local law is immune if it restricts competition in a manner authorized by state law. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991).

<sup>99</sup> *Midcal Aluminum*, 445 U.S. 97.

<sup>100</sup> *See Chamber of Commerce of U.S. v. City of Seattle*, No. C17-0370RSL, 2017 WL 1233181 (W.D. Wash. Apr. 4, 2017) (upholding Seattle Ordinance 124968, which provides for collective bargaining and rate setting for drivers of hired cars, including Uber cars).