The Program on Law and Political Economy at Harvard Law School
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REPORT

AN ANTI-OLIGARCHY FRAMEWORK FOR CONSTITUTIONAL LABOR ADVOCACY

Sanjay Jolly

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EXECUTIVE SUMMARY

This report is designed as a strategic resource to advance a robust constitutional regime for labor rights, focusing on the role state attorneys general can play to protect workers' rights to engage in concerted activity and collective bargaining. Its proposed interventions emerge in the context of the Supreme Court's systematic rollback of constitutional labor protections alongside the Court's attack against the National Labor Relations Act and federal administrative labor enforcement. The Court's anti-labor jurisprudence marks the forefront of a long-term legal strategy to constitutionalize an oligarchic political and economic order, accelerating in recent years toward a full-blown democratic crisis engulfing not only the labor movement but the entire American polity. A vigorous defense of collective worker organizing is thus paramount to the struggle for American democracy. The extraordinary challenges looming over the nation's democratic institutions at the present juncture in turn compel pro-labor legal advocates to reassess their strategic outlook.

To that end, this report draws on a rich body of Law and Political Economy (LPE) scholarship to illustrate a distinct "anti-oligarchy" framework for constitutional labor advocacy. Following longstanding progressive traditions in American constitutional politics, it suggests anchoring an advocacy agenda for labor democracy in a broad conception of workers' fundamental rights. Rather than adapting to and confining legal argument within the Court's increasingly hostile posture toward American workers, the anti-oligarchy approach expands the constitutional terrain to the political branches, worker organizations, and the broader public. By mobilizing on the basis of shared constitutional commitments, these institutions can reinvigorate the role they have historically played to enshrine fundamental labor rights in the American legal system. This represents a strategic effort to democratize constitutional interpretation, debate, and advocacy contrary to the judiciary's often-presumed dominion over how the Constitution ought to shape our economy and society.

State governmental institutions play a central role in anti-oligarchy constitutional strategies. Particularly at a moment when all three branches of the federal government are actively suppressing the Constitution's democratic and egalitarian features, state governments and state-level advocacy stand as the essential bulwark for working peoples' rights. Today, as advocates adapt to grave new political circumstances, they increasingly recognize state constitutions, state legislatures, and state attorneys general

as potent, if generally underutilized, levers for democratic struggle. Incorporating these resources into an effective long-term strategy in turn requires a shift away from advocacy approaches that narrowly privilege the federal judiciary towards the embrace of a capacious and public-facing labor constitutionalism. The principal objective of this report is to make the case for that latter approach.

The report proceeds over five sections. Section I reflects on the legal and political landscape American workers face today, suggesting that while the current moment poses sobering challenges, it also presents unique opportunities to advance constitutional labor protections. State attorneys general are indispensable to that fight, but alongside other labor allies, the assumptions underlying their advocacy strategies invite closer assessment. Section II synthesizes an extensive academic literature on constitutional political economy to elaborate the anti-oligarchy framework. Deeply rooted in a long tradition of American constitutional politics, the framework consists of three core elements: *style*, requiring a shift from formalist to structural modes of constitutional argument; *sphere*, expanding constitutional advocacy beyond courts to encompass legislatures and public fora; and *source*, anchoring claims in state rather than federal constitutional provisions. Section III surveys specific constitutional provisions—both federal and state—that can serve as anchors for anti-oligarchy legal arguments, before navigating the complex terrain of federal preemption that shapes the scope of state-level advocacy interventions. Section IV describes what a favorable advocacy ecosystem for anti-oligarchy constitutionalism would entail, outlining strategic considerations and institutional infrastructures tailored to the diverse tools available to state attorneys general. Section V concludes. Taken together, the report's findings offer a prospective blueprint for advocacy strategies that aim to secure workers' fundamental rights as the foundation for constitutional democracy.

TABLE OF CONTENTS

I. INTRODUCTION: THE URGENT NEED FOR LABOR'S CONSTITUTION

The United States today finds itself at a historic crossroads that will determine the future of the American constitutional order and the labor movement's place within it. Over the past half-century, extreme conservative institutions have fundamentally transformed American constitutional law by strategically capturing the federal judiciary.[1] On nearly every major issue shaping public life—including campaign finance, environmental regulation, antitrust, consumer protection, and labor—the courts have reinterpreted the Constitution to thwart popular legislation and entrench oligarchic power into the prevailing constitutional order.[2] Generations of conservative legal activists have effectuated their vision for American society through sustained efforts to assume control the nation's judicial institutions, focusing principally on the Supreme Court. It is a vision in which the wealthy few dominate all Americans, and it has increasingly defined our reality as the result of a long-term legal strategy directly targeting the democratic egalitarian advances won in the previous century during the New Deal and Great Society.

The American working class has borne the brunt of this constitutional assault. For decades, inflation-adjusted wages for American workers have stagnated while the concentration of income and wealth at the top of the distribution rose to nearly unprecedented levels. The data paint a stark picture: booming corporate profits alongside plateauing wages, marked shifts in income and wealth distribution, and a widening chasm in compensation between corporate executives and their employees.[3] These economic realities came about not by "natural" market forces but largely through the systematic dismantling of constitutional protections for workers who engage in collective action and especially those seeking to organize their workplaces. The share of

[1] *See* Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008).

[2] *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (establishing a pleading standard requiring factual allegations that make the claim to relief plausible rather than merely possible); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (holding that political spending by corporations in candidate elections cannot be limited under the First Amendment); Janus v. American Federation of State, County, and Municipal Employees, Council 31, 585 U.S. 878 (2018) (holding that public sector agency fees violate the First Amendment rights of non-consenting employees); Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020) (holding that the CFPB's single-director structure with for-cause removal protection violates the separation of powers); West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022) (ruling that the "major questions doctrine" required clear congressional authorization for agency action with major economic and political significance).

[3] William Lazonick, Profits Without Prosperity, *Harvard Business Review* (Sept. 2014); *Trends in the Distribution of Family Wealth, 1989 to 2022*, Congressional Budget Office (Oct. 2024); Josh Bivens & Jori Kandra, *CEO pay has skyrocketed 1,460% since 1978*, Economic Policy Institute (Oct. 4, 2022).

American workers belonging to a labor union has decreased rapidly since the postwar period. In absolute terms, union membership peaked in 1979, when 21 million Americans, or about a quarter of the workforce, belonged to a union.[4] By 2024, only 14.3 million Americans were in a labor union, marking a historic low of less than 10% of the workforce. Today, less than 6% of private sector workers are represented by a union.[5]

Even as labor activity has surged in recent years and public support for unions has reached all-time highs, American workers are stymied by a legal regime that not only fails to protect them but actively impedes their rights to organize collectively, all too often making unionization into a Sisyphean feat.[6] In addition to barring millions of workers from union membership entirely, the American legal system functionally enables union-busting by failing to stop employers from interfering in workers' concerted activities through retaliation, surveillance, captive audience meetings, threats, and other coercive measures. As a result, some of the world's wealthiest corporations—including Amazon, Apple, Google, and Starbucks—routinely violate their workers' rights to organize with de facto impunity.[7]

The Supreme Court has accelerated this systematic rollback of constitutional labor rights through a series of landmark decisions. Since 2018, the Court has ruled that requiring public sector employees to pay union dues violates their First Amendment right to free speech;[8] that state labor regulations granting unions the right to meet with workers on employer's property at certain times violates the Takings Clause;[9] and that unions can be held liable for economic damages caused by strikes.[10] While courts have long formulated ways to clamp down on the fundamental rights of American workers and their representative organizations, the legal obstacles at hand have become markedly more stifling, setting up a potentially catastrophic trajectory for the labor movement.

Anti-labor legal activists' most prized target is the National Labor Relations Act (NLRA), with mounting constitutional attacks against the National Labor Relations Board (NLRB or Board) and the broader regime of administrative labor enforcement. A

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[4] *A Brief Examination of Union Membership Data*, Congressional Research Service (Jun. 16, 2023).
[5] *Union Members—2024*, Bureau of Labor Statistics (Jan. 28, 2025).
[6] *See* Joseph Fishkin & William Forbath. *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Harvard University Press, 2022), 451.
[7] *See* John Logan, *Corporate union busting in plain sight*, Economic Policy Institute (Jan. 28, 2025); Daniel Wiessner, House Dems urge NLRB probe of Google's alleged union busting, *Reuters* (May 30, 2024); Daniel Wiessner, Apple accused by US labor board of imposing illegal workplace rules, *Reuters* (Oct. 2, 2024).
[8] *Janus*, 585 U.S. 878 (2018).
[9] Cedar Point Nursery v. Hassid, 594 U.S. ___ (2021).
[10] Glacier Northwest v. International Brotherhood of Teamsters Local Union No. 174, 598 U.S. 771 (2023).

series of Supreme Court decisions in 2024 alone diminishing the scope of federal agencies' interpretative, adjudicative, and remedial authorities signal an ongoing effort to systematically erode the NLRB's structure and function on constitutional grounds.[11] The companies SpaceX, Amazon, Trader Joe's, and Starbucks have taken to openly flouting well-established labor laws as they each push cases aimed at setting up the Supreme Court to declare the NLRA unconstitutional for violating separation-of-powers principles.[12] Not long ago, learned jurists would have correctly taken their constitutional claims to be extreme, meritless, and even absurd. However, owing to a generational effort by large corporations and conservative legal activists working in concert over many years, they may well be on the verge of further constitutionalizing their hostility to workers' democratic rights.

The Supreme Court has never been more actively allied with the anti-labor movement than it is today, as it eviscerates the administrative state, increases the power of the judiciary, and limits the government's ability to regulate in the public interest. Across its decisions, the Court's "key jurisprudential move" for entrenching oligarchy through constitutional argument is "to confer special constitutional status on certain carefully chosen types of claims of individual right—claims that unravel progressive regulatory regimes whose purpose and effect was to make economic and political power less concentrated and less unequal."[13]

The Court's special hostility for labor unions has far-reaching social implications, threatening core pillars of American democracy. Collective bargaining levels the playing field with employers to help ensure dignity and accountability in the workplace. Higher

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[11] *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (requiring federal courts to independently interpret statutes rather than deferring to agency interpretations); Starbucks Corp. v. McKinney, 602 US 339 (2024) (applying a more employer-friendly standard by which a court grants a preliminary injunction requested by the NLRB in a case involving the termination of seven workers who were organizing a union); Securities and Exchange Commission v. Jarkesy, 603 U.S. 109 (2024) (holding that administrative penalties cannot be enforced without a jury trial); Corner Post v. Board of Governors of the Federal Reserve System, 603 U.S. 799 (2024) (expanding the statute of limitations for judicial review of federal agency rulemaking); *see also* NLRB v. Starbucks Corp., 125 F.4th 78, 97 (3d Cir. 2024) (narrowing the limited financial remedies available to workers who are fired or laid off in violation of federal labor law). *But see* International Union of Operating Engineers, Local 39 v. NLRB, 155 F. 4th 1023 (2025) (upholding the *Thryv* remedies scheme granting workers backpay and damages for other direct or foreseeable pecuniary harms flowing from losing their jobs).

[12] *See* Space Exploration Technologies Corp. v. NLRB, No. 24-50627 (5th Cir. Aug. 19, 2025) (relying on *Jarkesy* to hold that the NLRB's structure is likely unconstitutional on Article II grounds); Amazon's Complaint and Application for Injunctive Relief at 2-3. Amazon.com Services LLC v. NLRB, No. 5:24-CV-01000 (W.D. Tex. Sep. 5, 2024) (arguing that the NLRB's structure violates the Seventh Amendment); Cortes v. NLRB, No. 1:23-cv-02954 (D.D.C.), *aff'd on other grounds*, No. 24-5152 (D.C. Cir. July 22, 2025) (dismissing for lack of adverseness after government conceded unconstitutionality of Board member removal protections); Logan, *Corporate union busting in plain sight*, 3, 9; *see also* John Fry, Understanding the Latest Constitutional Attacks on the NLRB, *OnLabor* (Jan. 30, 2024).

[13] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 434.

unionization rates reduce income inequality, as well as racial and gender disparities.[14] Most significantly, unions remain among the most democratic institutions through which working people participate in civic life. Unions are *the* critical institutions for collectively representing working- and middle-class Americans as a counterweight against extreme concentrations of corporate power over our everyday lives. It is hardly surprising, then, that unions repeatedly emerge as the frontline of popular defense against oligarchy, authoritarianism, and fascism.[15] Recognizing the insoluble link between a strong labor movement and robust democratic institutions, President Kennedy aptly remarked in 1960 that "[t]hose who would destroy or further limit the rights of organized labor—those who would cripple collective bargaining or prevent organization of the unorganized—do a disservice to the cause of democracy."[16]

The conservative legal assault against organized labor is not simply a matter of dollars and cents, or even just the dignity and livelihoods of American workers, it is about *power*—political, economic, and constitutional. What is ultimately at stake is whether our constitutional order vests power in the people or in a wealthy, unaccountable super-minority. Labor's future is the future of the democratic order itself. As constitutional historians have recognized, "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."[17]

Today, as the country reckons with the second Trump administration, what was once a gradually accelerating constitutional rollback is quickly transforming into a full-blown constitutional crisis. Billionaires cynically use constitutional parlance to entrench their private interests, the President flagrantly disregards constitutional safeguards, and both feel emboldened by their apparent impunity. In their tireless efforts to erode separation of powers, federalism, and the basic tenets of democratic representation, the

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[14] *See* Henry S. Farber, Daniel Herbst, Ilyana Kuziemko, & Suresh Naidu, Unions and Inequality over the Twentieth Century: New Evidence from Survey Data, *The Quarterly Journal of Economics* 136, no. 3 (Aug. 2021), 1325-1385. Unions help reduce disparities and strengthen our democracy, Economic Policy Institute (Apr. 23, 2021).

[15] *See, e.g.*, AFL-CIO, Condemn Rising Fascism, Fight For Working-Class Unity, 2017 AFL-CIO Convention Resolution #47 (Oct. 24, 2017); *see also* AFSCME, Unions Sue Trump Administration Over Move to Bust Federal Employee Unions, press release (Apr. 4, 2025); Dana Gutterman, Labor in the Courts: How Unions Have Stood Up for Workers' Rights During the First 100 Days, Harvard Kennedy School Ash Center for Democratic Governance and Innovation (May 20, 2025); Susan Svrluga, Groups sue administration over funding freeze at University of California, *Washington Post* (Sep. 16, 2025).

[16] Special Labor Day Message from Democratic Presidential Candidate John F. Kennedy, The American Presidency Project (Sept. 5, 1960).

[17] Kate Andrias, "Constitutional Clash: Labor, Capital, and Democracy," *Northwestern University Law Review* 118, no. 4 (2024), 985.

constitutional order is coming undone. Not surprisingly, the executive branch's lawless conduct has principally targeted American workers—union members, public servants, educators, health professionals, and immigrant workers.[18] As the President finds common cause with billionaires to wage an extreme and regressive assault against the nation's democratic institutions, American workers will continue to bear the most serious repercussions.

But democratic commitments afford no time for dejection, nor should a realist perspective invite pessimism. The present historical moment, dire as it surely is, also presents a potent irony. As conservative legal activists continue to mold the constitutional order for a wealthy minority at the expense of American workers, their successes give rise to increasing popular headwinds. For their part, the President and his allies are pushing maximalist and lawless tactics, expecting the Supreme Court to reliably back their antiegalitarian efforts. At the same time, the growing outcry against pseudo-legal despotism is rejuvenating public awareness of our constitutional politics, compelling Americans to think deeply about who and what purposes the Constitution ought to serve. Public fallout has also placed renewed attention on the importance of state jurisdictions, where constitutions and legislatures have long been underutilized in the fight for Americans' fundamental rights.

These complex convulsions in the body politic create opportunities that cannot be taken for granted. With crisis comes rupture, and from rupture inevitably emerge major paradigmatic shifts. Our unsettled constitutional order—how we understand and interpret the nation's foundational texts to constitute ourselves as a nation—is there for the taking. As daunting as this period in American political history surely is, so too is it the precise moment for labor progressives to mobilize around an assertively democratic constitutional vision. The path for labor democracy is not to jettison the judiciary. Rather, it is to broaden the constitutional fight over fundamental labor rights from a narrow focus on hostile federal courts to states, their constitutions, legislatures, democratic worker organizations, and the public. The prevailing legal approaches used by progressive advocates are unlikely to fit this purpose, which instead calls for a retooled strategy and building new capacities for long-term coordination on multiple institutional fronts. In any such effort, state attorneys general have an indispensable part to play. Their unique responsibility in American civic and legal culture as "The People's

[18] *See* Exec. Order No. 14251, Exclusions From Federal Labor-Management Relations Programs, 3 C.F.R. 14553 (Apr. 3, 2025) (stripping union protections from more than one million federal workers across dozens of federal agencies); Exec. Order No. 14343, Further Exclusions From the Federal Labor- Management Relations Program, 3 C.F.R. 426883 (Aug. 28, 2025) (stripping collective bargaining rights for employees at seven additional agencies).

> *"With crisis comes rupture, and from rupture inevitably emerge major paradigmatic shifts. Our unsettled constitutional order—how we understand and interpret the nation's foundational texts to constitute ourselves as a nation—is there for the taking."*

Lawyers" positions them to assume a leading role in the fight for constitutional labor democracy at a crucial historical juncture. To do so effectively, they will need a different framework for conceptualizing their advocacy strategy—one that embraces constitutional politics as a terrain for energetic democratic struggle.

II. THE ANTI-OLIGARCHY CONSTITUTIONAL FRAMEWORK

The notion that the United States faces a constitutional rupture may feel unprecedented, but recurrent paradigm shifts over constitutional meaning in response to historical crises are as old as the republic itself. For the first two-thirds of American history, the Constitution was widely understood not as an external force constraining politics but as an engine for necessary democratic conflict. Indeed, until the mid-twentieth century, "constitutional claims were central to great national political debates about the relationship between the Constitution and the nation's economic and political life."[19] These claims tended to originate outside the courts in civil society, working inwards over time to influence legislation and judicial arguments. Examining the longer durée of American legal history reveals the kinds of sustained, multi-pronged efforts necessary for advancing constitutional democracy.

The following discussion elaborates how that history can inform labor rights advocacy in the present day. Drawing from a burgeoning academic literature in constitutional political economy, it proposes a strategic framework that reorients constitutional labor advocacy around the task of directly confronting today's oligarchic order. This anti-oligarchy constitutional framework aims to recover what Joseph Fishkin and William Forbath, in their book *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (2024), term the "democracy of opportunity" tradition—a history of popular constitutionalism extending from the Founding to Reconstruction to the Gilded Age and Progressive Era to the New Deal.[20] Embracing these American democratic traditions in today's advocacy environment suggests three critical moves: shifting from formalist to structural modes of constitutional argument (*style*); expanding constitutional advocacy beyond court-centered approaches to embrace legislatures and the public (*sphere*); and grounding constitutional claims in state rather than federal constitutional provisions (*source*).

A. Recovering the Democracy of Opportunity Tradition

The democracy of opportunity tradition in constitutional politics consists of three main propositions. First, the Constitution militates against the threat of concentrated economic and political power. In other words, oligarchy is anathema to

[19] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 4.
[20] *See generally* Fishkin & Forbath, *The Anti-Oligarchy Constitution*.

constitutional democracy, the precise purpose of which is to combat tyrannical control whether it emerges from government or private industry. Second, constitutional interpretation must be attuned to the systemic factors that shape ordinary Americans' economic realities. More specifically, it is necessary to affirm a flourishing mass middle class as the structural requisite for constitutional self-government. And third, the Reconstruction Constitution's egalitarian commitments demand universal inclusion. Constitutional democracy thus extends to all people, across lines of race, gender, and other dimensions of group-based subordination.[21]

Over a century and a half, successive generations of reformers dedicated themselves to the fight for democracy in ways that transformed American constitutionalism. They adopted a decidedly structural mode of constitutional argument to "argue[] that our republican form of government, with its guarantees of equal citizenship, requires a broad middle class and cannot co-exist with oligarchy." Unlike today, their interlocutors understood such arguments in explicitly constitutional terms rather than as mere policy preferences. And crucially, they primarily directed their constitutional claims not at judges but at legislators, viewing the Constitution's guarantees of fundamental rights as imposing the foremost constitutional duties on Congress to pass legislation that creates the conditions necessary for democratic rule. Their world of constitutional politics thus focused not only or even principally on the judiciary, an institution they correctly understood as too parochial to function as a reliable democratic safeguard. Instead, both they and their opponents litigated their constitutional arguments across the broader public discourse as far-reaching claims upon the political branches.[22]

The democracy of opportunity tradition reached its nadir during the New Deal, with labor unions assuming a prominent role in the nation's constitutional structure. The era's leading progressive jurists recognized that strong secondary institutions—unions especially—were uniquely essential to the democratic order because they equipped ordinary citizens with the means to challenge entrenched concentrations of political and economic power.[23] Against the legal privations promulgated on the American working class during the Supreme Court's *Lochner* era (1897-1937), the Constitution became a key resource for mounting that challenge. Throughout the early 20th century, "labor activists engaged in what James Pope has termed 'constitutional

[21] Fishkin & Forbath, *The Anti-Oligarchy Constitution,* 8-12.
[22] Fishkin & Forbath, *The Anti-Oligarchy Constitution,* 8.
[23] Fishkin & Forbath, *The Anti-Oligarchy Constitution,* 445-46.

insurgency,' or, in Robert Cover's terms, in a 'jurisgenerative' process in which they contested reigning constitutional meaning. 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."[24]

The passage of the NLRA (or Wagner Act) in 1935 illustrates how the democracy of opportunity tradition inflected the period's constitutional politics: "The architects of the Wagner Act saw a constitutional mandate to protect the right to organize, and to build and protect the power of organized labor, as a countervailing institution against economic and political oligarchy."[25] For workers and government officials alike, the NLRA—together with other landmark New Deal legislation including the Social Security Act of 1935 (SSA) and the Fair Labor Standards Act of 1938 (FLSA)—represented the commitment to a constitutional order encompassing new fundamental rights and recasting Congress's authority to align with the regulatory imperatives of an industrial economy.[26] Labor advocates generated this constitutional change not through formal jurisprudence but by vitalizing the nexus of legislative responsibility and collective action. Outside the courts, workers and their allies articulated their campaigns for workplace democracy as a fundamentally constitutional struggle. Central to their account was the insistence that workers can truly exercise the *political* freedom necessary for democratic self-government only when they attain the *economic* freedom provided by secure, fair, and dignified employment.[27] The fighting spirit to unshackle the Constitution's promise of both political and economic liberty from the fetters of oligarchic power animated their legislative advocacy, popular mobilizations, and, only secondarily, agitation against anti-labor courts.

Following the New Deal and postwar "labor peace," the democracy of opportunity tradition receded in favor of an ostensible constitutional settlement with the judicial branch. The victories of the New Deal lulled labor organizations into the complacent expectation that the courts would thereafter vigilantly scrutinize abridgements of civil liberties and civil rights while generally deferring on matters of economic legislation. By the middle of the twentieth century, the result was to broadly depoliticize American constitutionalism and naturalize the idea that the Supreme Court retains sole authority

[24] Andrias, "Constitutional Clash," 1004.
[25] Fishkin & Forbath, *The Anti-Oligarchy Constitution,* 447.
[26] Luke Norris, "The Workers' Constitution," *Fordham Law Review* 87 (2019), 1462-63.
[27] Norris, "The Worker's Constitution," 1501-03.

to interpret the Constitution.[28] But meanwhile, the conservative legal movement proceeded without any such complacency towards a well-funded and multi-pronged effort to erode democratic advances through judicial intervention. Their strategy led the Court to gradually, and then at an accelerated pace, whittle away at the NLRA's guarantees of workplace democracy by favoring employers' prerogatives over workers' rights to organize, bargain, and strike.[29] By and large, the conservatives constitutionalized their anti-labor regime by advancing previously fringe legal arguments that collective labor rights encroach upon freedom of speech, freedom of contract, and property rights.[30]

These repeated historical shifts in constitutional meaning highlight the interplay of legal-institutional dynamics and the broader terrain of political contestation. Labor activists in the early twentieth century and conservative legal activists up to the present day both recognized that only a "thin, permeable membrane" separates constitutional litigation within the courts from constitutional politics outside the courts. These spheres do not, and ought not, operate in silos, and effective legal advocacy must always account for their porous interdependence. The success of the conservative legal movement demonstrates the power of an integrated approach. Their activists methodically developed constitutional arguments in academic and policy circles, advanced them through strategic litigation, and watched as movement judges embraced novel political economy arguments that conservatives first advanced outside the courts.[31]

Today, the American workers fighting for their democratic rights echo their forebearers who resisted the *Lochner* Court and brought about a "constitutional revolution" during the New Deal.[32] Workers and their allies are increasingly voicing their advocacy not in policy terms or as statutory entitlements but in the language of their fundamental rights. As Kate Andrias observes, "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."[33] The Protecting the

[28] *See* United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938); Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 24-25; Andrias, "Constitutional Clash," 1009.
[29] Andrias, "Constitutional Clash," 1011.
[30] Andrias, "Constitutional Clash," 1046.
[31] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 421.
[32] Andrias, "Constitutional Clash," 989.
[33] Andrias, "Constitutional Clash," 1023.

Right to Organize (PRO) Act of 2021 exemplified the spirit of labor's constitutional resurgence, with the White House describing the legislation as defending "workers' right to strike—a *fundamental* economic right—and to engage in boycotts and other acts of solidarity with workers at other companies without penalty."[34] Similar constitutional language has proliferated throughout labor advocacy spaces, from union organizing campaigns to legislative testimony and popular mobilizations.

Still, labor's enlivened constitutional politics have so far been intermittent and generally inchoate, reflecting a pressing need for the labor movement and its allies to revive the democracy of opportunity tradition in both form and substance. This suggests thinking differently about constitutional claims, strategic litigation, and even the nature of legal victory. Rather than simply defending existing statutory protections or arguing that the Constitution permits pro-labor legislation, a robust strategic outlook would involve affirmatively advancing constitutional arguments that workers possess fundamental rights to organize and bargain collectively, and that legislators have constitutional duties to protect and promote those rights.

B. Critical Moves in Constitutional Labor Advocacy

The history of the democracy of opportunity tradition suggests three critical moves to reorient progressive constitutional advocacy. Taken together, they form the core elements of a strategic framework aimed at restoring constitutional politics as a favorable terrain for workers to wage their democratic struggle against oligarchic economic and political power.

1. Constitutional Style: From Formalist to Structural

The first critical move is to embrace a structural mode of legal argument emphasizing the fundamental duties of legislatures to fortify workers' constitutional rights. Such arguments stress that the Constitution not only permits but requires institutions that prevent oligarchic concentrations of power, ensure broad-based economic opportunity, and promote democratic participation in economic and political affairs.

The conservative legal movement has successfully used constitutional advocacy to transform the nation's political economy in part by deploying diverse doctrinal tools

[34] United States Office of Management and Budget, Statement of Administrative Policy - H.R. 842 – Protecting the Right to Organize Act of 2021 (Mar. 8, 2021) (emphasis added).

that frame policy preferences in explicit and affirmative constitutional terms.[35] This strategy contrasts sharply with the prevailing legal approach used by progressive advocates over the past several decades. Whereas conservatives seek to overturn popular democratic legislation by arguing against its constitutionality, progressive jurists tend to argue that the Constitution is silent on the matter and thus inapposite. As Fishkin and Forbath point out, the progressive argument is inadequate because it omits "whether the Constitution requires lawmakers to enact measures like the ones the Court struck down. In past rounds of debate about constitutional political economy, arguments of this form were common. Proponents of the democracy-of-opportunity tradition in different eras often responded to constitutional claims that Congress lacked the power to enact laws like these with constitutional claims that Congress had not only the constitutional power to do so, but also the constitutional duty."[36]

In a similar vein, Andrias examines the arguments presented in *Janus v. AFSCME* (2018) to illustrate the inherent weakness of labor's constitutional evasion. In *Janus*, the Supreme Court overturned a state law authorizing public sector unions to collect fees from non-member employees covered by the collective bargaining agreement on the basis that the law violated the non-members' free speech rights.[37] As Andrias observes,

> the Court's conservative majority was able to argue that First Amendment concerns weighed only on the side of the union objectors, in part because labor (and the liberal Justices) started from the weak position … 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. 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. A better approach … 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.[38]

Progressive defenses of the NLRA relying solely on broad Congressional authority under the Commerce Clause to regulate labor relations affecting the national economy

[35] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 421.
[36] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 21.
[37] 585 U.S. 878, 891-95.
[38] Andrias, "Constitutional Clash," 1066-67.

are no longer adequate. Indeed, even in *NLRB v. Jones & Laughlin Steel Corp.* (1937), the seminal case upholding the NLRA's constitutionality on interstate commerce grounds, Justice Hughes underscored that the ability of workers to engage in "collective bargaining … without restraint or coercion by their employer" was a "fundamental right." Thus, he emphasized, "[d]iscrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority."[39] Rather than shying away from an affirmative vision of labor constitutionalism, advocates and jurists today must develop similarly robust structural arguments that demonstrate how worker organizing is essential to the constitutional system itself.

2. *Constitutional Sphere: From Court-Centered Advocacy to Legislatures and the Public*

At this point, one may anticipate a clear objection: of what use are intrepid legal arguments, meritorious as they may be on jurisprudential grounds, when they are sure to face overtly hostile courts? The answer raises the framework's second critical move—that labor advocates adopt what Andrias terms "nonjuriscentric constitutionalism" by expanding the arena for constitutional argument without neglecting the judiciary's import.[40] The starting point for such an approach is to recognize the wide range of public actors who play key roles in defining our constitutional order. Interpreting the Constitution's meaning does not begin and end with the Supreme Court. Constitutional politics happen not only in the judicial branch but across elected offices and civil society, which have every bit as much responsibility over tending to our constitutional system as the courts. Strategic arguments over the meaning of the Constitution thus have "a function in our public debate about constitutional political economy that includes, yet transcends, the courts."[41]

In the near future, even the cleverest legal advocacy will fail to overcome the judiciary's entrenched antipathy toward the labor movement. But if anti-oligarchy arguments are likely to face judicial hostility in the present, they can still prove extremely productive by reshaping the broader terrain of constitutional politics over a longer horizon. Throughout American history, successful social movements have understood that constitutional argumentation does not follow in the wake of judicial approval. Rather, by directing their claims to the public, legislators, and executive officials,

[39] 301 U.S. 1 at 33.
[40] Andrias, "Constitutional Clash," 1068.
[41] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 447.

movements build legitimacy and organizational power while laying the groundwork for eventual judicial recognition. Constitutional arguments thus serve multiple functions outside of litigation. They inspire collective action, provide moral authority for political demands, and gradually shift the boundaries of acceptable legal discourse. Efforts to expand the sphere of constitutional politics recognize that courts often follow rather than lead social change. Innovative public arguments alter what judges accept as legitimate legal claims, particularly when the bench's composition changes over time. For their part, conservatives spent decades painstakingly loading the courts with movement judges who came to embrace the novel constitutional propositions that conservatives generated within their civil society institutions.[42] So while arguments in the anti-oligarchy register may influence some judges directly, their larger strategic significance is to cultivate a language for movement-building and legislative advocacy on the basis of workers' fundamental constitutional rights and legislatures' essential constitutional duties.

Andrias makes a forceful appeal for this more capacious approach, arguing that constitutional arguments beyond the courtroom can provide workers' movements with crucial sources of power by strengthening organizing campaigns and mobilizing political transformation. She emphasizes that constitutional rights function as unique legal symbols that profoundly shape how movement actors generate, legitimate, and act upon their grievances and objectives. By articulating their movement strategies in the language of constitutional rights, workers access valuable political resources against unjust economic arrangements in a manner that is deeply rooted in the nation's foundational commitments. In doing so, they galvanize the energies of their fellow workers to organize collectively, expand their influence in the political branches and the broader public sphere, build power for legislative campaigns, and temper opposition from judges, who are never fully insulated from popular sentiments.[43]

This strategic reorientation leans on the recognition that the terrain of constitutional politics consists of multiple, permeable arenas. Its goal is not to formally amend constitutional text but to transform how the text—in both its narrow reading and larger social meaning—comes to be interpreted and effectuated. Judges are not the only, or even the most relevant, interpreters here. Rather, anti-oligarchy constitutional advocates seek principally to animate workers, the general public, and legislators. When legal actors, especially those in public office, advance structural constitutional

[42] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 421.
[43] Andrias, "Constitutional Clash," 1068.

arguments across diverse fora, they can shift the advocacy terrain to labor's advantage. Pressing their case consistently and unflinchingly even against hostile judicial reception cultivates popular consciousness of workers' fundamental rights and crystallizes legislatures' obligations to secure them.

> *Throughout American history, successful social movements have understood that constitutional argumentation does not follow in the wake of judicial approval. Rather, by directing their claims to the public, legislators, and executive officials, movements build legitimacy and organizational power while laying the groundwork for eventual judicial recognition.*

3. Constitutional Source: Embracing State Constitutions

The third critical move is to ground anti-oligarchy constitutional arguments in state rather than federal constitutional provisions as much as feasible. While nesting legal claims within state constitutions can be a jurisdictional tactic to insulate pro-labor state legislation from Supreme Court interference, it reflects much more than a strategic adaptation to hostile federal courts. State constitutions furnish unique and extensive materials for protecting fundamental rights, in some instances offering far more significant protections than federal constitutional provisions as they are interpreted by the Supreme Court.[44] When legal advocates advance their arguments on state constitutional grounds, they carve out legal and political space for state-level policy innovation that the current federal judiciary cannot easily disturb. This move to state jurisdiction also carries public legitimacy benefits, given much higher popular approval for state governments than for the federal government.[45]

Across the non-judicial spheres of constitutional politics, state constitutions remain underutilized symbolic resources through which workers can articulate their fundamental rights at a time when they are still developing their advocacy frames. In

[44] William J. Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (1977), 489-504. *See also* Jonathan L. Marshfield, "America's Misunderstood Constitutional Rights," *University of Pennsylvania Law Review* 170 (2022), 859 (arguing that while "the Federal Bill of Rights may operate as a bulwark against abusive majorities, state bills of rights grew from the belief that extra precautions are necessary to prevent government officials from using their political power to thwart or oppress democratic majorities").
[45] *See* Frank Newport, Americans' Views on Federalism as States Take on More Power, *Gallup* (Jul. 15, 2022).

other areas, we have already witnessed well-honed pivots toward state courts, legislatures, and ballot measures as a means of protecting fundamental rights from federal hostility—the most prominent example being state-level abortion rights advocacy in the aftermath of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022).[46] Many state constitutions include explicit protections for workers' rights, guarantees of economic opportunity, and commitments to democratic equality that provide stronger textual foundations for labor constitutionalism than do federal provisions.[47] Labor advocates have the opportunity to draw on these state provisions to develop sophisticated legal arguments that enshrine workers' organizing rights in the constitutional order.

C. From History and Theory to Practical Advocacy

Progressive political and civil society leaders can operationalize the anti-oligarchy constitutional framework by jointly deploying the three strategic moves at scale in their organizational strategies. State attorneys general in particular are uniquely positioned to effectuate anti-oligarchy constitutionalism because of their distinct legal authority, democratic legitimacy, and capacity to coordinate activities across multiple advocacy venues. The framework suggests conjoining the state attorney generals' diverse tools—from enforcement and litigation to legislative advocacy and community outreach—as a means of gradually institutionalizing labor protections as fundamental rights in courts, legislatures, and the public sphere.[48] Rather than treating each of these tools as a discrete initiative, advocacy leaders realize their greatest impact by integrating them within a unified strategy.

To imagine how anti-oligarchy constitutional strategies might be operationalized today, consider the circumstances animating the *Hernandez v. State* (2019) decision in New York, where a member of the Worker Justice Center of New York sued the state after he was fired from his job as a dairy worker for meeting with coworkers and organizers to discuss workplace conditions. The state's appellate court held that a labor statute's exclusion of agricultural workers from labor protections violated the state constitution's guarantee of equal protection, finding that the rights of workers to collectively organize and bargain through representatives of their own choosing are fundamental and thus

[46] 597 U.S. 215; Abortion Rights and Access One Year After Dobbs, League of Women Voters (Aug. 2, 2023).
[47] *See infra* Section III.B.
[48] *See infra* Section IV.

demand strict scrutiny review.[49] Following the decision, workers pushed the state legislature to pass the Farm Laborers Fair Labor Practices Act, which extended to agricultural workers wage and hour protections and robust organizing rights, including union recognition when a majority of workers sign union cards.[50] In the years since, hundreds of New York farmworkers have successfully unionized.[51]

The strategy used in *Hernandez* illustrates several critical features of anti-oligarchy constitutional advocacy. First, advocates employed a style of argument that straightforwardly characterized the state's statutory labor protections not as a permissible legislative preference but as a matter of the legislature's constitutional obligation to uphold all workers' fundamental rights to engage in concerted activity without interference. Second, advocates widened the discursive sphere in which they promulgated their legal claims in a manner that neither neglected the judiciary nor hinged their deliverance entirely on sympathetic judges. Far from reinforcing the courts as the sole provenance of constitutional interpretation, they positioned the legislature as the more pertinent forum for public constitutional debate. While advocates pursued their claims zealously in the courts, their constitutional arguments aimed principally at mobilizing workers into the legislative process, leading to a much more transformative outcome than even the most sweeping judicial relief could have achieved. Third, advocates relied on state constitutional provisions as the source of their legal claims, which provided stronger protections than would have been expected using federal constitutional provisions while simultaneously shielding their victories from federal countermand.

Hernandez's court victory notwithstanding, even adverse judicial rulings can generate the conditions for productive anti-oligarchy constitutional advocacy. When judges rebuff the proposition that collective organizing and bargaining are fundamental rights, they provide the labor movement with the opportunity to invigorate their constitutional claims in the political terrain. Rather than swallowing anti-labor rulings as the juristocratic equivalent of King Solomon's word, workers can harness the image of a hostile judiciary trampling on their fundamental freedoms as a rallying cry to fight together for the constitutional entitlements denied them. Were today's labor movement to evoke their forebearers of a century ago and develop its constitutional politics accordingly, judicial hostility would not be a cause for workers to eschew

[49] Hernandez v. State, 99 N.Y.S.3d 795, 802 (App. Div. 2019).
[50] N.Y. A.B. 8419, 2019-2020 Leg. Sess. (N.Y. 2019).
[51] Steven Greenhouse, Union wins at New York farms raise hopes for once-powerful UFW, *Guardian* (Jul. 6, 2023).

constitutionalism as a vehicle for democratic struggle so much as a provocation inspiring their turn towards it. Fueling labor constitutional advocacy with popular energies may shift judicial outlooks by itself, but the most potent upside is in mobilizing mass politics to compel legislators into performing their constitutional duties through statutory reform and to vitalize ballot measure campaigns.

The long-term, iterative character of anti-oligarchy constitutionalism also underscores the utility of judicial dissents and concurrences. Where the current judiciary is apt to turn its nose at anti-oligarchy constitutional claims, such arguments are instead more relevant to dissenters. The significance of these minority opinions should not be discounted, as dissenting judges build legitimacy for popular constitutional claims and transform what is considered reasonable argument within the judicial branch. Fishkin and Forbath demonstrate how these functions have historically been crucial to mounting an effective opposition against perceived judicial despotism in service of constitutional democracy:

> We saw the early twentieth-century labor movement draw on Holmes's and Brandeis's dissents to build their arguments when the movement defied antistrike decrees and lobbied for legislative repeal of the judge-made law of labor injunctions. We heard FDR invoke judicial dissents as he called on the American people to decide for themselves the great constitutional political-economic questions of the day.[52]

Conversely, Andrias invites prospective anti-oligarchy constitutionalists to consider how conservative legal strategies reached their fruition in *West Virginia v. EPA* (2022), where the Supreme Court lent its constitutional imprimatur to the major questions doctrine.[53] As she observes, the proposition that long-established administrative structures violate separation of powers or due process—an argument once considered outlandish even by conservative jurists—began appearing in lower-court opinions and concurrences as long as a decade before it was enshrined by the Supreme Court in 2022.[54] With conservatives now dominating the bench, dissenting voices such as that of Justice Jackson, who in *Glacier* invoked labor's constitutional vision that "[t]he right to strike is fundamental to American labor law,"[55] are charged with cultivating the ground for future constitutional advocacy in spite of today's unfavorable judicial landscape. Advocates, for their part,

[52] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 429.
[53] 597 U.S. 697 (2022).
[54] Andrias, "Constitutional Clash," 1058.
[55] 598 U.S. 771, 789 (2023) (Jackson, J., dissenting).

have the responsibility to furnish sturdy and sophisticated constitutional arguments that judges in the minority can use to construct a comprehensive anti-oligarchy jurisprudence.

III. CONSTITUTIONAL ARGUMENTS FOR LABOR DEMOCRACY

The anti-oligarchy framework offers advocates a theoretical scaffolding to reshape their strategies around today's fight for labor democracy. But if anti-oligarchy constitutional arguments are to gain purchase in legal and political discourse, they require effective doctrinal anchors. This Section identifies specific provisions in both the federal Constitution and state constitutions that can serve as vehicles for bolstering workers' fundamental rights. It seeks to demonstrate how labor advocates can wield anti-oligarchy principles to generate actionable legal arguments across multiple advocacy venues. As an interpretive exercise, the analysis proceeds from the framework's core insight that constitutional democracy requires robust protections for workers' collective action as a structural safeguard against oligarchic power. This perspective necessarily reorients how one reads constitutional text. Provisions that courts have long treated as irrelevant to labor relations—or worse, as obstacles to worker organizing—emerge instead as essential guarantees of the economic structures upon which political democracy rests.

The prevailing legal approaches to labor advocacy have long been insufficient doctrinally and practically in the face of hostile judicial attacks. Since the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.* (1937), the NLRA's constitutionality has hinged on Congressional authority to regulate labor relations affecting interstate commerce.[56] While this grounding sufficed to uphold the statute against initial attacks from Big Business, it has proven over time to be both legally assailable and politically sterile. Propping up virtually the entire federal labor enforcement apparatus on the shoulders of the Commerce Clause locates workers' rights within the federal government's regulatory powers rather than recognizing them as fundamental entitlements vested in the people themselves. Abstract principles of commercial regulation are weak grounds for inspiring American workers to mobilize their collective power. Instead, workers deserve a constitutional discourse that equips them to discern the stakes of labor law in terms of their own essential interests.

This Section thus surveys alternative textual foundations for reinvigorating labor constitutionalism's democratic core. The analysis focuses primarily on constitutional grounds for protecting workers' rights to engage in concerted activities such as unimpeded communication, collective organizing, and strike actions. Compiling what scholars and other legal analysts have identified as the most promising constitutional

[56] 301 U.S. 1, 46-47.

hooks, it then suggests how labor advocates might use these doctrinal anchors to advance a powerful anti-oligarchy jurisprudence. Following Fishkin and Forbath, the analysis distinguishes between three functions that a given provision can serve in anti-oligarchy argument. First, it can be used as a *sword* to strike down legislation impeding fundamental labor rights. Second, it can be a *shield* that defends pro-labor legislation, requiring advocates to demonstrate that the law performs constitutionally necessary work to preserve democracy and stave off oligarchy. And third, it can operate as an interpretive *guide*, providing judges with principles that frame how they construe labor statutes to ensure that constitutionally essential work can be accomplished.[57]

The first part of the analysis (III.A) assesses federal constitutional provisions and relies predominantly on insights from existing academic literature. The second part (III.B) explores state constitutional provisions. Because scholarly research on specific state constitutions tends to be sparse, the discussion here draws more heavily on primary legal research. It should be underscored that this analysis is not intended to be exhaustive. Strategic legal advocacy is an iterative process, and constitutional meaning evolves through sustained argument and contestation. Rather than suggesting a closed canon of labor-protective provisions, this Section aims to surface the most promising grounds on which to build anti-oligarchy constitutional arguments from diverse textual sources. In doing so, it seeks to encourage labor advocates to undertake further legal research and deliberation tailored to their specific strategic needs.

Finally, the scope of this discussion proceeds largely within the constraints of the prevailing regime for federal labor preemption. While the federal constitutional protections described below would be expected to supersede preemption obstacles, state constitutional claims would presumptively apply only to workers excluded from NLRA coverage—including public sector employees, agricultural workers, domestic workers, and independent contractors—except where otherwise noted. Crucially, however, today's preemption landscape is proving to be increasingly unstable. The analysis thus concludes (III.C) by examining preemption doctrine's shifting legal parameters, the opportunities and threats these shifts present to workers, and how labor advocates might navigate this evolving terrain to maximize both the scope of protections and the breadth of worker coverage.

[57] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 427-28.

A. Federal Constitutional Provisions

Legal scholars have written extensively about how the federal Constitution can anchor arguments to defend workers' rights to organize and secure dignified employment conditions. Their claims find strong support in the Constitution's structure, purpose, and history, directing particular attention to the First, Thirteenth, and Fourteenth Amendments. Taken together, they offer a compelling account for anti-oligarchy constitutional advocacy: that workers' First Amendment freedoms to collectively organize by means of speech and assembly are an essential element of the democratic order; that the Thirteenth Amendment's prohibition on involuntary servitude places obligations on legislators to empower workers' collective resistance against economic coercion; and that the Fourteenth Amendment's egalitarian guarantees entitle all workers to protection regardless of occupation or status.

1. First Amendment

As an advocacy tool, the First Amendment is perhaps the most celebrated symbol animating American popular constitutionalism, and its guarantees of free speech, free assembly, and the right to petition resonate deeply with the democratic intuitions of everyday workers. In a perverse inversion, however, the Supreme Court's recent First Amendment jurisprudence has systematically weaponized these principles against workers while denying their application to labor organizing.[58]

During the New Deal era, progressive jurists, legislators, and labor leaders broadly understood that the First Amendment protected workers' freedoms of communicative and collective action as essential features of economic democracy. Congress expressed clearly that the NLRA's purpose was to "protect[] the exercise by workers of full freedom of association," while the Act's eponymous author, Senator Robert Wagner, stressed that real choice depended on establishing genuine equality between workers and management.[59] This guarantee of equality required both safeguarding workers' collective activities and dismantling authoritarianism and coercion in the workplace.

For a time, the Supreme Court generally shared this perspective. In *Hague v. CIO* (1939), the Court held that a city ordinance used to prevent workers from meeting or

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[58] *See* Laura Weinrib, "The Right to Work and the Right to Strike," *University of Chicago Legal Forum* Art. 20 (2017), 531-33 (discussing the Court's rollback of workers' First Amendment rights from the 1940s to the 1970s). The Court's curtailments of First Amendment protections are especially stringent for public sector workers at the federal level and in most states, creating an asymmetric provision of rights that lacks any compelling legal justification. Kate Andrias, *Speaking Collectively: The First Amendment, The Public Sector, and the Right to Bargain*, Knight First Amendment Institute (Oct. 11, 2024), 18.

[59] *See* 29 U.S.C. § 151; *see also* Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 278.

distributing literature in public fora violated their "freedom to disseminate information concerning the provisions of the [NLRA]" as protected by the First Amendment's guarantees of both free speech and free assembly.[60] Similarly, in *Thornhill v. Alabama* (1940), the Court struck down a state law criminalizing labor picketing, reasoning that because labor speech was "indispensable to the effective and intelligent use of the processes of popular government," it was specifically entitled to First Amendment protection.[61] Building on its decision in *Thornhill*, the Court explicitly acknowledged a First Amendment right to organize unions in *Thomas v. Collins* (1945), overturning the criminal prosecution of a labor leader under a Texas law that imposed burdensome licensing requirements on union organizers.[62] Notably, the Court's decision in *Thomas* rested on a broad and holistic reading of the First Amendment wherein the freedoms of speech, press, assembly, and petition, "though not identical, are inseparable. They are cognate rights ... and therefore are united in the First Article's assurance."[63]

The Court proceeded to turn away from this treatment of constitutional labor rights, most conspicuously in *Abood v. Detroit Board of Education* (1977) and then further in *Janus* (2018).[64] Indeed, over the last fifty years, the Supreme Court has systematically eroded its previously robust conception of workers' speech and assembly rights, adopting what scholars sometimes term the "Lochnerization of the First Amendment."[65] During this period, both courts and the NLRB imposed extensive prohibitions on workers' means of collective action—including against sit-down strikes, secondary boycotts, and picketing for union recognition—and radically expanded the power of employers to permanently replace striking workers. As Andrias highlights, such state-imposed prohibitions against workers' expressive activities conflict sharply with established First Amendment doctrine in analogous non-labor contexts.[66]

These constitutional developments have created a regime that treats restrictions on labor protest as mere economic regulation subject to rational basis review rather than

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[60] Hague v. Committee for Industrial Organization, 307 U.S. 496, 512.
[61] 310 U.S. 88, 103.
[62] 323 U.S. 516, 533-34.
[63] 323 U.S. 516, 530 (citations omitted).
[64] Abood v. Detroit Board of Education, 431 U.S. 209 (holding that while public employees who refuse to join a labor union could still be required to pay a portion of union dues related to collective bargaining, contract administration, and grievance adjustment purposes, unions could not use the dues paid by non-members to fund "political or other ideological activities" opposed by those non-members); *Janus*, 585 U.S. 878 (2018) (overturning *Abood* and prohibiting agency-shop agreements on the basis that even the costs associated with collective bargaining amount to compelled speech and thus violate the First Amendment rights of dissenting workers).
[65] *See, e.g.*, Genevieve Lakier, "The First Amendment's Real Lochner Problem," *University of Chicago Law Review* 87, no. 4 (2020), 1241-1310.
[66] Andrias, "Constitutional Clash," 1011-12.

political speech warranting strict scrutiny. "The thrust of the new weaponized First Amendment" write Fishkin and Forbath, "is . . . to attack egalitarian forms of democratic self-government—the labor unions workers elect, the campaign finance regimes elected representatives enact—and in that way to weaken or destroy sources of countervailing power against oligarchy."[67] Anti-labor adversaries are hardly the only ones to have turned away from the New Deal's First Amendment commitments. In recent years, labor-friendly progressive jurists have generally argued in response to these First Amendment rollbacks that while public policy endorsing labor's expressive activities would be constitutionally permissible, it is not a constitutional obligation.[68]

Anti-oligarchy constitutionalists would instead begin with the proposition that the First Amendment's Free Speech Clause protects labor protest as political speech, the restriction of which demands strict scrutiny, rather than as economic activity subject to rational basis review. In this formulation, the Free Speech Clause can function as both sword and shield. Charlotte Garden contends that labor speech, because it plays such an important role promoting democratic ideals in civic discourse and the formulation of public policy, is far more akin to civil rights speech than it is to an economic transaction, thus meriting "top-tier First Amendment protection."[69] Although federal courts have previously rejected First Amendment challenges against restrictions on labor protest, the Supreme Court's more recent embrace of strict scrutiny review of economic regulation should similarly apply to labor speech rights. Following the Court's decision in *Citizens United v. FEC* (2010) recognizing corporate campaign expenditures as constitutionally protected political speech, successive rulings have widened the unexplained doctrinal asymmetry between unions and other expressive associations.[70] In response, dissenting justices have repeatedly noted the stark incoherence of affording robust protection to corporate political spending (speech the Court likes) while denying similar protection to workers' collective expression (speech the Court does not like).[71]

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[67] Fishkin & Forbath, *The Anti-Oligarchy Constitution*, 434.
[68] Andrias, "Constitutional Clash," 1066-67.
[69] Charlotte Garden, "Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech," *Fordham Law Review* 79, no. 6 (2011), 2617.
[70] Charlotte Garden, "Citizens United & the First Amendment of Labor Law," *Stetson Law Review* 43 (2014), 573. *Compare* Citizens United v. Federal Elections Commission, 558 U.S. 310 (2010) (holding that limits on corporate political expenditures violate the First Amendment), *with* Knox v. Service Employees International Union Local 1000, 567 U.S. 298 (2012) (extending the Court's agency fee jurisprudence without accounting for the First Amendment interests of unions to engaging in political speech).
[71] *See, e.g.*, *Janus*, 585 U.S. 878, 956 (2018) (Kagan, J., dissenting).

The scholar Catherine Fisk points out the obvious logical imperative of extending to labor protests the same First Amendment protections that political boycotts receive.[72] If, as the *Janus* majority insisted, all union speech is political, then restrictions on union speech must be unconstitutional. The Court cannot coherently maintain the principle that union activity is so inherently political as to trigger First Amendment scrutiny when workers are compelled to pay fees, yet simultaneously treat the same activity as mere economic conduct undeserving of constitutional protection when workers engage in strikes or picketing. "If regulation of the funding that enables collective bargaining violates the First Amendment," writes Fisk, then "regulation of labor protest should too."[73] Resolving the Court's First Amendment duplicity in this way would reanimate the New Deal conception of labor speech as legitimate democratic expression (rather than as "economic coercion") and revitalize the robust constitutional safeguards afforded to boycotts and picketing in the 1960s.[74]

In addition to its speech applications, an anti-oligarchy reading of the First Amendment advises that restrictions on picketing, secondary boycotts, strikes, and group litigation conducted as part of an organizing drive violate the Assembly Clause. Unlike free speech rights, "the right of the people peaceably to assemble" directly invokes how constitutional self-government materially extends beyond the expressive activities of individuals. "Meaningful democracy," Marion Crain and Kenneth Matheny emphasize, "requires a system in which there is a right to be heard, to educate listeners, and an opportunity to persuade others to make common cause."[75] If the right of assembly possesses any substantive content, it must protect the process of forming and maintaining groups against state or private interference. A distinct right of assembly therefore "guard[s] against restrictions on group formation imposed prior to the actual act of assembly."[76] Along similar lines, Andrias points out that the right to strike flows directly from the right of association, as strikes are an essential associational activity by which union members exercise their fundamental right to organize. In other words, the absence of legal protections for strikes violates an individual worker's fundamental right to associate because it inhibits the very purpose of union association in the first place—a purpose intimately tied to the members' exercise of free speech, free assembly, and the

[72] Catherine Fisk, "A Progressive Labor Vision of the First Amendment: Past as Prologue," *Columbia Law Review* 118, no. 8 (2018), 2057-94.
[73] Fisk, "A Progressive Labor Vision of the First Amendment," 2062-63.
[74] Fisk, "A Progressive Labor Vision of the First Amendment," 2079-84.
[75] Marion G. Crain & Kenneth Matheny, "Beyond Unions, Notwithstanding Labor Law," *UC Irvine Law Review* 4, no. 2 (2014), 598.
[76] Crain & Matheny, "Beyond Unions, Notwithstanding Labor Law," 597.

> *[T]he absence of legal protections for strikes violates an individual worker's fundamental right to associate because it inhibits the very purpose of union association in the first place—a purpose intimately tied to the members' exercise of free speech, free assembly, and the right to petition.*

right to petition.[77] The Assembly Clause thus offers an alternative doctrinal sword for challenging state-imposed constraints on the different formations through which workers associate with one another and organize collectively.

2. Thirteenth Amendment

Although it may appear unorthodox to the intuitions of contemporary jurists, the Thirteenth Amendment offers robust doctrinal grounds for upholding fundamental labor rights. The scholar James Pope explains that "the legal case for a Thirteenth Amendment right to organize is simple, straightforward, and well within the range of argumentative strategies typically deployed to justify transformations in constitutional doctrine."[78] Thirteenth Amendment claims present several important advantages. As the basis for a legitimating constitutional discourse, the Thirteenth Amendment situates labor rights directly within Reconstruction commitments to democracy, freedom, and egalitarianism. In practice, Thirteenth Amendment claims are enforceable against private actors, avoiding state action requirements that commonly limit other constitutional protections. And crucially, the Supreme Court has never squarely rejected the assertion that the Thirteenth Amendment's prohibition against involuntary servitude encompasses rights of workers to organize and act collectively. In other words, "there is no on-point legislative history or Supreme Court precedent standing in the way."[79]

From its earliest treatment, courts acknowledged unambiguously that the Thirteenth Amendment extended beyond banning chattel slavery. In *Bailey v. Alabama* (1911), the Supreme Court declared that the purpose of the Amendment was "to render

[77] Andrias, *Speaking Collectively*, 15-17 ("Indeed, the rights to bargain and strike arguably merit First Amendment protection not only as a corollary to the right to associate but because the activity itself is, at bottom, activity that involves collective expression, assembly, and petitioning.").
[78] James Gray Pope, "The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century" ["Right to Organize in the Twenty-First Century"], *Rutgers Law Review* 51 (1999), 961.
[79] Pope, "Right to Organize in the Twenty-First Century," 963.

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."[80] The Court's application of the Thirteenth Amendment to workers' rights in *Bailey* reflects what Pope refers to as the "republican labor perspective," an Abolition-inflected conception in which workers attain democratic self-realization through their economic independence.[81] Within this frame, the forms of coercion curbing workers' freedom were understood primarily as manifestations of asymmetric power structures.

Even the Supreme Court could discern that individual workers were essentially helpless against the power of corporate employers, with jurists viewing the Thirteenth Amendment as a vehicle to correct massive power imbalances that threatened labor freedom.[82] Workers depended on wages to maintain their families yet lacked any meaningful bargaining power, reflecting conditions of economic coercion that the Thirteenth Amendment was specifically meant to prevent. Chief Justice Taft acknowledged as much in *American Steel Foundries v. Tri-City Central Trades Council* (1921), writing that a "[u]nion was essential to give laborers opportunity to deal on equality with their employer."[83] Soon after, in *Wolff Packing Co. v. Court of Industrial Relations* (1923), the Court recognized that collective action functions as the individual worker's "means of putting himself on an equality with his employer which action in concert with his fellows gives him."[84]

Throughout the New Deal era, the labor movement explicitly embraced the Thirteenth Amendment as a constitutional vehicle for worker organizing, with the Amendment coming to symbolize their efforts to expand economic rights as a corrective to the structural inequalities intrinsic to labor exploitation.[85] By the 1940s, worker activists and union leaders maintained that the rights to organize and strike represented the fundamental distinction between slavery and freedom. They mounted constitutional challenges to labor injunctions and anti-strike laws as violations of both the First and Thirteenth Amendments, and they undertook campaigns of noncompliance and direct

[80] 219 U.S. 219, 241.
[81] James Gray Pope, "Labor and the Constitution: From Abolition to Deindustrialization," *Texas Law Review* 65 (1987), 1071.
[82] James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," *Columbia Law Review* 102, no. 1 (2002), 17-19.
[83] 257 U.S. 184, 209.
[84] Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 540.
[85] Risa Goluboff, "The Thirteenth Amendment in Historical Perspective," *University of Pennsylvania Journal of Constitutional Law* 11 (2009), 1451.

action to vindicate those rights. Notably, they defended the Norris-LaGuardia Anti-Injunction Act as a legitimate exercise of Congress's power to enforce the Thirteenth Amendment. Workers thereby grounded their constitutional claims in the concrete necessity of collective action for achieving genuine freedom from economic domination, "defend[ing] their protest activities as essential to the attainment of labor freedom."[86]

The Supreme Court came closest to endorsing the labor movement's Thirteenth Amendment vision in *Pollock v. Williams* (1944). Overturning a Florida debt peonage statute, the Court stated that an "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."[87] The Court reasoned that the Thirteenth Amendment applies beyond formal slavery to prohibit institutional arrangements like debt peonage that create economic bondage, and that it specifically proscribes the creation of an underclass of workers pressed by the market into degrading conditions and substandard wages, which inevitably depresses labor standards for all workers.[88] The Court thus accepted the Thirteenth Amendment's structural premise that preventing labor arrangements which generate worker servility through economic coercion and exploitation is necessary for protecting individual workers' constitutional freedoms. Although a handful of judges endorsed the idea that this encompassed constitutional protection for the right to strike, the issue was never presented to the Supreme Court during the period when Thirteenth Amendment labor arguments were ascendant.[89]

Invoking the concept of free labor, Rebecca Zietlow argues that the Thirteenth Amendment protects legislative interventions that enable workers to organize against degrading working conditions and coercive economic arrangements. She points to legislation raising the minimum wage, combatting undue coercion in the workplace through strengthening unions to protect workers' schedules, and combatting pervasive discrimination based on sexual orientation and identity, all of which can be encompassed as legislative duties under the Thirteenth Amendment.[90] Utilizing the Thirteenth Amendment in this way would both shield pro-labor legislation and guide judicial interpretation. When employers challenge labor protections as violations of property rights or freedom of contract, advocates can invoke the Amendment's mandate

[86] Pope, "Right to Organize in the Twenty-First Century," 964-65. *See also* Rebecca E. Zietlow, "A Positive Right to Free Labor," *Seattle University Law Review* 39 (2016), 859-99.
[87] 322 U.S. 4, 17.
[88] 322 U.S. 4, 17-18.
[89] Pope, "Right to Organize in the Twenty-First Century," 965.
[90] Zietlow, "A Positive Right to Free Labor," 898-99.

to prevent economic arrangements that reduce workers to servitude. This defensive function is particularly significant given the Court's increasingly aggressive use of other constitutional provisions to strike down progressive legislation. Moreover, the Thirteenth Amendment's explicit grant of Congressional enforcement power provides strong grounds for defending federal labor protections as exercises of legitimate constitutional responsibility. Where statutes perform the constitutionally necessary work of preventing economic servitude, courts should interpret them broadly to facilitate that purpose, upholding the legislature's constitutional mandate to maintain genuinely free labor.

Anti-oligarchy constitutional advocates can also wield the Thirteenth Amendment as a sword. Laws prohibiting strikes, restricting picketing, or enabling the permanent replacement of striking workers violate the Thirteenth Amendment insofar as they effectively compel workers to accept whatever conditions employers impose—precisely the forms of "control by which the personal service of one man is disposed of or coerced for another's benefit" that the *Bailey* Court identified as involuntary servitude. The Amendment can provide especially powerful grounds for challenging restrictions on the organizing rights of immigrant workers, who are disproportionately vulnerable to employer exploitation, immobility, and servitude due to their immigration status.[91]

When employers challenge labor protections as violations of property rights or freedom of contract, advocates can invoke the Amendment's mandate to prevent economic arrangements that reduce workers to servitude. This defensive function is particularly significant given the Court's increasingly aggressive use of other constitutional provisions to strike down progressive legislation.

3. Fourteenth Amendment

The Fourteenth Amendment's Equal Protection Clause offers additional grounds for asserting workers' fundamental rights, particularly when invoked in tandem with due process rights. Like the Thirteenth Amendment, the Fourteenth Amendment locates labor's fundamental rights in Reconstruction's egalitarian commitments, underscoring

[91] Goluboff, "The Thirteenth Amendment in Historical Perspective," 1473.

the constitutional entwinement of free labor and civil rights. In contrast, however, it is constrained by state action doctrine, limiting its application to discrimination by state entities and private parties whose conduct is attributable to the government.[92]

Numerous legal scholars have marshalled anti-oligarchy readings to show how the Equal Protection and Due Process clauses guarantee rights to minimum economic entitlements such as livable wages and measures of workplace democracy.[93] They point to labor advocacy prior to the New Deal, when workers invoked the Fourteenth Amendment (along with the First and Thirteenth Amendments) to argue that a minimum baseline of economic rights was necessary for the equal enjoyment of legal protection. Such a baseline, the workers argued, could only be secured by protecting their rights to associate, assemble, and unionize and by alleviating power asymmetries with managers in the workplace. As the courts generally spurned labor's Fourteenth Amendment arguments, workers instead repeatedly brought their claims to Congress and state legislatures.[94] While courts have generally subjected labor-related legislation to rational basis review, the recognition of how laws systematically discriminate against workers in their capacity to organize draws attention to the state's role in creating caste-like distinctions that implicate workers' fundamental rights to equal protection.

From this perspective, the Fourteenth Amendment's guarantee of equal protection proscribes the arbitrary exclusion of workers from labor protection regimes, and where such exclusions exist, courts should review them with strict scrutiny. Operating predominantly as a sword, this principle can inform three areas of acute anti-worker discrimination. The first is the categorical exclusion of entire worker classifications from labor protections—namely, agricultural workers, domestic workers, and independent contractors. These exclusions often track historical patterns of racial and gender subordination, as the workers denied organizing rights are disproportionately women, immigrants, and people of color.[95] When states extend collective bargaining rights to some workers while systematically denying them to others based on occupational categories that track racial and gendered hierarchies, they entrench the very subordination the Fourteenth Amendment was enacted to eliminate. Labor advocates can thus argue that these exclusions warrant heightened scrutiny because they burden the fundamental right to organize, perpetuate subordination of

[92] *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
[93] *See* Kate Andrias, "Building Labor's Constitution," *Texas Law Review* 94, no. 7 (2016), 1602, n.59.
[94] Andrias, "Building Labor's Constitution," 1602.
[95] *See* Rebecca Dixon & Amy Traub, *Desegregating Opportunity: Why Uprooting Occupational Segregation is Critical to Building A Good-Jobs Economy*, National Employment Law Project (May 13, 2024).

vulnerable groups along suspect lines, and create economic castes incompatible with equal citizenship.

The second application targets statutory restrictions that specifically curtail the rights of public sector workers. Federal government employees are prohibited from striking, and some states go even further by barring their public sector employees from engaging in collective bargaining.[96] These prohibitions straightforwardly abridge the speech, assembly, and petition rights of workers employed by the government. Although weaker First Amendment protections for public sector workers may be defensible in certain cases based on specific public welfare concerns, "no compelling justification exists for a complete and categorical ban on all public sector bargaining and strikes."[97] Labor advocates have strong grounds to argue that these statutes violate the Equal Protection Clause because the unqualified denial to public sector workers of fundamental rights afforded to private sector workers reflects a disparate treatment that is grossly overbroad relative to any particular compelling government interest the law ostensibly seeks to advance.

The third application concerns so-called "right to work" laws promulgated by conservative legal activists in several states to ban union security agreements. Many such statutes selectively target certain unions while exempting others (particularly law enforcement unions), demonstrating discriminatory intent hidden behind facially natural language. In her analysis of equal protection arguments for labor rights, Michelle Berger shows how equal protection claims can be used against anti-labor legislation even in the absence of racial motive.[98] When animus toward particular groups of workers or their organizations motivates legislators to enact an anti-union law, workers may be able to win an equal protection challenge using rational basis review. Illustrating how this would work in practice, in 2023 the Ninth Circuit was persuaded to reinstate a federal equal protection challenge to a California statute regulating how the plaintiffs classify their workers because the law's intent could be explained by the state legislature's animus toward the plaintiffs.[99] The plaintiffs in that case were private companies, but Berger points out that the Ninth Circuit's reasoning could just as well be deployed by labor in instances where legislative action is motivated by anti-union animus.[100] Despite their

[96] Andrias, *Speaking Collectively*, 1-2.
[97] Andrias, *Speaking Collectively*, 18-19 (noting that "[n]umerous state court judges have condemned the categorical ban on public sector strikes").
[98] Michelle Berger, Equal Protection Arguments for Workers' Rights, *OnLabor* (Nov. 13, 2023).
[99] *See* Olson v. California, 62 F.4th 1206 (9th Cir. 2023).
[100] Berger, Equal Protection Arguments for Workers' Rights.

When animus toward particular groups of workers or their organizations motivates legislators to enact an anti-union law, workers may be able to win an equal protection challenge using rational basis review.

persuasiveness on doctrinal grounds, however, these kinds of equal protection arguments have tended to gain far more traction in the states.

B. State Constitutional Provisions

State constitutions offer a deep reservoir for constructing anti-oligarchy legal arguments. Labor advocates have generally not relied heavily on state constitutional provisions in recent decades, in part because of federal preemption under the NLRA,[101] and legal scholars have produced relatively few works of deep academic study into the history of constitutional politics at the state level. While it is certainly true that federal courts treat workers' rights claims with unwarranted skepticism, the strategic imperative of state constitutional advocacy is about much more than forum shopping. In her book, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (2013), the political scientist Emily Zackin shows how state constitutions have historically functioned as essential laboratories for positive rights that federal constitutional jurisprudence lacks. Tracing labor movement efforts during the Gilded Age and Progressive Era to fortify protections for workers and remove doubts about the authority of state governments to legislate on their behalf, Zackin illustrates that while workers waged their struggles at both the state and national levels, they found greater success in many of the states.[102] Each state constitution is unique, but many contain explicit guarantees for collective bargaining, equal protection, employment, and access to remedies. Where they mirror similar federal provisions, state constitutions often exceed their federal counterparts in scope and specificity. Thus, despite the relative dearth of attention they receive, state constitutions furnish labor advocates with materials for activating state legislative action, shaping favorable judicial precedents, and cultivating a popular embrace of labor federalism.

[101] *See infra* Section III.C.
[102] Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton University Press, 2013).

1. Rights to Collective Bargaining

Constitutions in six states—Florida, Hawaii, Illinois, Missouri, New Jersey, and New York—explicitly affirm the right to collective bargaining, providing the most direct constitutional foundation for protecting workers' rights to engage in concerted activity.[103] Under the prevailing federal preemption regime, these provisions provide little additional protection to workers covered under the NLRA. They are, however, ideal vehicles for expanding labor protections in three contexts. First, they can be used to support collective bargaining rights for non-covered workers, including agricultural workers, domestic workers, and public sector employees. Second, they can be used to extend labor protections to increasingly fissured workplaces, where growing ranks of workers are misclassified as independent contractors. And third, they can create a constitutional basis for state legislatures to develop alternative forms of collective power for excluded groups, including sectoral bargaining, worker representation on corporate boards, and support for worker centers that organize across traditional employment boundaries. For all three contexts, state constitutional collective bargaining rights can function as both sword and shield—striking down exclusionary legislation while protecting affirmative labor protections against constitutional attack.

Case law on the reach of state constitutional protections for collective bargaining is relatively sparse, presenting advocates with the opportunity to press for expansive legislation and favorable precedents in state courts. The judicial precedents that do exist focus on bargaining rights for non-covered workers. In 1989, the Supreme Court of New Jersey interpreted the state's constitutional language guaranteeing collective bargaining rights as imposing an affirmative obligation on employers to recognize and bargain with farmworker unions. The court's reading of the New Jersey Constitution framed the right as a positive entitlement structuring private employment relationships.[104] Following similar reasoning, in the *Hernandez* decision in New York, an appellate court held that the state constitution's guarantee that "employees shall have the right to organize and to bargain collectively" required strict scrutiny of farmworkers' longstanding exclusion from state labor protections, leading the legislature to enact the Farm Laborers Fair Labor Practices Act in 2019.[105] *Hernandez* highlights in particular the fundamental

[103] *See* Fla. Const. art. I, § 6; Haw. Const. art. XIII, § 2; Ill. Const. art. I, § 25; Mo. Const. art. I, § 29; N.J. Const. art. I, ¶ 19; N.Y. Const. art. I, § 17.
[104] Comite Organizador de Trabajadores Agricolas v. Molinelli, 114 N.J. 87, 106 (1989).
[105] *See supra* notes 49-51.

nature of these constitutional guarantees, bolstering the demand for strict judicial scrutiny for laws infringing on workers' collective bargaining rights.

In 2022, Illinois voters passed the Illinois Workers' Rights Amendment, amending the state constitution to affirm that "employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work," including the specification that "no law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively."[106] At the time of its passage, observers recognized that the new law could "open[] the door for new groups of formerly excluded workers to unionize and press for stronger legal protections to do so."[107] But even more salient in the context of a midwestern state, the amendment's broad language established constitutional protection against two legislative strategies employed by conservatives to undermine workers' organizing rights: efforts to eliminate or weaken collective bargaining protections for public-sector employees; and attempts to restrict private-sector bargaining through "right-to-work" laws that bar unions and employers from negotiating union security agreements into their contracts.[108] Illinois thus offers a model for how other states can entrench anti-oligarchy constitutional bulwarks against likely future assaults on workers' collective bargaining rights.

2. Equal Protection Principles

State constitutional guarantees of equal protection offer potent tools for challenging the exclusion of workers from labor and employment protections. While state-level equal protection analyses hew closely to their federal analogue, they offer advocates an independent textual basis and a more insulated judicial forum, leading to stronger protections especially when combined with states' explicit recognition of labor and employment rights. By demonstrating how statutory exclusions in labor and employment schemes violate the fundamental rights of excluded workers, labor advocates can use equal protection principles to broaden legal protections to workers who are not covered by the NLRA.

In the New York *Hernandez* decision discussed above, the court reasoned that because the state constitution broadly stipulated that all employees have the right to join

[106] Ill. Const. art. I, § 25 (effective Jan. 1, 2023).
[107] Jennifer Sherer, Illinois Workers' Rights Amendment sets new bar for state worker power policy, Economic Policy Institute (Dec. 7, 2022).
[108] Sherer, Illinois Workers' Rights Amendment sets new bar for state worker power policy.

unions and collectively bargain, the right was not only officially sanctioned but fundamental. The court therefore concluded that the statutory exclusion violated agricultural workers' rights to equal protection under New York's constitution, as it could find no compelling justification for the exclusion.[109] In Florida and Missouri, state courts have similarly upheld challenges against exclusions of non-NLRA-covered workers, such as workers with supervisory responsibilities and graduate students, from state collective bargaining statutes.[110]

State constitutions offer fertile grounds for a labor jurisprudence grounded in egalitarian and anti-discrimination principles. When the Washington Supreme Court invalidated the exclusion of agricultural workers from overtime provisions in the state's Minimum Wage Act in 2020, for example, the judges relied on the state constitution's privileges or immunities clause. In *Martinez-Cuevas v. DeRuyter Bros. Dairy* (2020), the court concluded that the clause was meant to "prevent favoritism and special treatment [in the provision of fundamental rights of state citizenship] for a few to the disadvantage of others."[111] Finding that statutory protection against dangerous and toilsome labor conditions constituted a fundamental right pertaining to the privileges of state citizenship, the court held that the legislature lacked any reasonable basis for failing to extend its guarantee of protected overtime pay to agricultural workers.[112] Notably, the concurring opinion in *Martinez-Cuevas* looked instead to the Washington constitution's equal protection clause. Invoking the history of racial animus underlying agricultural workers' exclusion from labor protection regimes across the country, the concurrence found that Washington's overtime provisions discriminated against a vulnerable group. It therefore would have struck down the exclusion as a violation of equal protection under an intermediate scrutiny standard, rather than locating fundamental rights in the statute itself.[113]

Although it is certainly advantageous, state equal protection arguments do not always require showing discrimination against vulnerable groups and can sometimes succeed on rational basis review. For example, when advocates challenged a Missouri

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[109] *Hernandez*, 99 N.Y.S.3d 795, 802 (App. Div. 2019).
[110] *See* Coastal Florida Police Benevolent Association v. Williams, 838 So. 2d 543, 547 (Fla. 2003) (affirming that public employees possess the same broad collective bargaining rights as private employees under Florida's constitution); Coalition of Graduate Workers v. Curators of the University of Missouri, 585 S.W.3d 809, 813–15 (Mo. Ct. App. 2019) (finding that graduate assistants are public employees with the right to organize and bargain collectively under Missouri's constitution); *see also* Andrew Elmore, "Confronting Structural Inequality in State Labor Law," *Maryland Law Review* 83 (2024), 1239.
[111] 196 Wash. 2d 506, 475 P.3d 164, 171.
[112] 196 Wash. 2d 506, 475 P.3d 164, 173-74.
[113] 196 Wash. 2d 506, 475 P.3d 164, 175-179 (González, J., concurring).

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statute restricting collective bargaining rights for all public sector unions except those representing public safety workers, the trial court applied strict scrutiny review, striking down the law on constitutional grounds because it infringed on state employees' "exercise of the fundamental right to organize and to bargain collectively."[114] However, Missouri's Supreme Court, while reaching the same conclusion, instead reasoned that that the statutory restriction violated the state's equal protection clause. The court upheld the lower court's decision but employed rational basis review, finding that not only do state employees have a state constitutional right to bargain collectively but the state could put forward no rational justification for exempting public safety workers.[115] The majority decision and concurrence in *Martinez-Cuevas*, as well as the lower court and Supreme Court rulings in Missouri, illustrate the distinct approaches labor advocates can use to advance arguments based in state constitutions' equality guarantees.

3. Rights to Employment

Numerous state constitutions contain provisions protecting various aspects of employment that can ground arguments for workers' organizing rights. While some states constitutionalize specific entitlements, such as minimum wage guarantees, others express broader declarations of principle. Examples include Alaska ("all persons have a natural right to the enjoyment of the rewards of their own industry"[116]), Illinois ("all persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer"[117]), and North Carolina (echoing the Declaration of Independence in affirming that all persons possess inalienable rights, including "the enjoyment of the

[114] Missouri Corrections Officers Association vs. Missouri Office of Administration, 662 S.W.3d 26, 38-41 (Mo. Ct. App. 2022). *See also* Kate Andrias, "Constitutional and Administrative Innovation through State Labor Law" ["Innovation Through State Labor Law"], *Wisconsin Law Review* (2024), 1506-07.
[115] Missouri National Education Association v. Missouri Department of Labor & Industrial Relations, 623 S.W.3d 585, 596 (Mo. 2021).
[116] Alaska Const. art. I, § 1.
[117] Ill. Const. art. I, § 17.

fruits of their own labor"[118]). These employment rights provisions can be particularly useful in defending workers who engage in concerted activities against employer retaliation for protected conduct.

An increasingly dysfunctional NLRA, theorizes the legal scholar Benjamin Sachs, has generated a kind of "hydraulic effect" wherein workers' growing demands for collective action find alternative legal channels to traditional labor law. Workers are thus turning to employment law "not only for the traditional purpose of securing the substantive rights provided by those laws, but also as the legal architecture that facilitates their organizational and collective activity."[119] Sachs notes, for instance, that when factory workers in Brooklyn organized to demand overtime pay required by the Fair Labor Standards Act, they relied on that statute rather than the NLRA to protect themselves from employer retaliation.[120] Likewise, when a group of Colorado construction workers undertook a campaign against workplace discrimination, they turned to Title VII's anti-discrimination provisions, with the Equal Employment Opportunity Commission finding that Title VII protected the workers' collective activity and that the employer's retaliatory measures thus violated the Civil Rights Act.[121] This link to anti-retaliation measures can prove especially impactful for securing workers' rights given that employment law often offers more robust remedies than traditional labor law—including private rights of action, immediate injunctive relief, and meaningful damages.[122]

Although scholarly discussions on how anti-retaliation principles can protect worker organizing have focused on statutory interpretation, state constitutional employment protections can provide even stronger foundations for such arguments. Where a state constitution's employment-related provision enumerates a specific right such as to a minimum wage or to employment free from discrimination, the provision should be interpreted to protect workers from employer retaliation when they engage in collective organizing for the purpose of vindicating that right. (In this regard, Florida's constitution appears somewhat unique in that its guarantee of a minimum wage explicitly includes anti-retaliation language.)[123] Even in the absence of specific enumerated rights, advocates can rely on state constitutions' more general employment

[118] N.C. Const. art. I, § 1.
[119] Benjamin I. Sachs, "Employment Law as Labor Law," *Cardozo Law Review* 29 (2008), 2687.
[120] Sachs, "Employment Law as Labor Law," 2708-09.
[121] Sachs, "Employment Law as Labor Law," 2715-21.
[122] Sachs, "Employment Law as Labor Law," 2747.
[123] Fla. Const. art. X, § 24(d).

rights language, such as Alaska's "right to the enjoyment of the rewards of their own industry," to guide state courts toward interpreting employment statutes broadly as legitimate means by which to achieve constitutional ends, reading the statutory protections into the constitutional text, or extending anti-retaliation protections to those statutes.

Labor advocates can also turn to state constitutions' equal protection principles to broaden the coverage of employment law protections. Where employment statutes exclude certain categories of workers from protection against retaliation, a state constitutional employment protection can strengthen the claim that such exclusions burden fundamental rights and therefore warrant heightened scrutiny. The *Martinez-Cuevas* decision in Washington, for instance, clarifies the interaction effects between different labor constitutional strategies. Because the overtime provisions in Washington's Minimum Wage Act included an anti-retaliation clause,[124] the court's extension of those provisions to agricultural workers now offers them a path to defend their collective organizing rights using employment law principles.

4. Rights to Remedy[125]

Forty state constitutions include some version of a right to remedy clause guaranteeing the means to vindicate private rights between individuals.[126] A typical example is Illinois, where the constitution provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."[127] The right to remedy can be understood as encompassing three interlocking guarantees: (1) the existence of a legal remedy for injuries; (2) access to the courts; and (3) the timely and complete delivery of justice.[128] State courts have generally interpreted these guarantees as substantive, rather than merely procedural, rights, thereby constraining legislative authority to curb established common law remedies.[129] Although

[124] *See* Wash. Admin. Code § 296-128-770.
[125] *See* Divya Nimmagadda, A Right to a Remedy — Another State Pathway? (Part 1), *OnLabor* (May 14, 2025); A Right to a Remedy — Another State Pathway? (Part 2) *OnLabor* (May 19, 2025). By permission from the author, who also provided research assistance for this report, certain passages from these blog posts have been reproduced here without additional citation.
[126] *See* Thomas R. Phillips, "The Constitutional Right to a Remedy," *New York University Law Review* 78 (2003).
[127] Ill. Const. art. I, § 12.
[128] *See* Michael J. DeBoer, "The Right to Remedy by Due Course of Law – A Historical Exploration and an Appeal for Reconsideration," *Faulkner Law Review* 6, no. 1 (2014).
[129] *See, e.g.*, Westphal v. City of St. Petersburg, 194 So. 3d 311, 312 (Fla. 2016) (finding that a statutory cap on temporary total disability benefits under the state's workers' compensation scheme was unconstitutional because it failed to provide a "reasonable alternative" to traditional tort remedies).

One way labor advocates can invoke a state's constitutional right to remedy is to argue for extending remedial coverage to undocumented immigrant workers.

in most states the remedy clause covers only those rights traditionally recognized by common law, courts in other states have used the clause to support the proposition that remedies must be provided for constitutional violations.[130]

One way labor advocates can invoke a state's constitutional right to remedy is to argue for extending remedial coverage to undocumented immigrant workers. While in *Hoffman Plastic Compounds v. NLRB* (2002) the Supreme Court effectively closed off undocumented workers' access to remedies for unfair labor practices based on policy conflict with the Immigration Reform and Control Act,[131] remedy clauses can support extending that access at the state level. In *Escamilla v. Shiel Sexton Company* (2017), the Indiana Supreme Court invoked the state's remedy clause to rule that *Hoffman*'s holding did not prevent a state court from providing a common law remedy to an undocumented worker who suffered a permanently disabling workplace injury.[132] The court rejected the claim that the employer could not be found liable for compensation due to the worker's undocumented status, reasoning that it "cannot read the Open Courts Clause's 'every person' guarantee to exclude unauthorized immigrants." Rather, "[w]hen Indiana law affords a remedy—like recovering decreased earning capacity—the Open Courts Clause does not permit us to close the courthouse door based solely on the plaintiff's immigration status."[133] With regard to federal precedent, the court maintained that "*Hoffman*'s issue—whether federal immigration law under IRCA limited remedies for National Labor Relations Act violations—was only about reconciling two federal statutes. *Hoffman* thus is a narrow decision that does not touch on state common law."[134] In *McKean v. Yates Engineering Corp.* (2016), the Mississippi Supreme Court interpreted the state's remedy clause in a similar manner to that of Indiana, and other states may follow suit.[135] Although *Escamilla* and *McKean* both concerned compensation claims,

[130] Phillips, "The Constitutional Right to a Remedy," 1335-39.
[131] 535 U.S. 137.
[132] 73 N.E.3d 663, 669 (Ind. 2017).
[133] 73 N.E.3d 663, 667 (Ind. 2017).
[134] 73 N.E.3d 663, 668 (Ind. 2017).
[135] 200 So. 3d 431 (Miss. 2016).

their logic would apply with equal force to protections against retaliatory firings under a wrongful dismissal tort, particularly for workers excluded from federal coverage.

The application of remedy rights to retaliation claims is not limited to undocumented workers. Where states fail to provide statutory protections against retaliatory dismissals, advocates can turn to common law principles prohibiting terminations that violate public policy. This common law exception applies most commonly when an employer fires a worker for actions that are legally protected or socially valuable—such as serving on a jury or reporting illegal activity—and generally requires that the source of public policy be found in a statute, regulation, or constitutional provision.[136] On occasion, lower state courts have invoked the constitutional right of individuals to seek legal redress as a public policy interest in support of tort claims for wrongful termination.[137] If courts were to more frequently recognize the right to remedy as a public policy interest, the effect would be to recast the right as a substantive employment protection, grounding retaliatory termination claims not in narrow statutes but in broad constitutional values. In the labor organizing context, a capacious theory of constitutional remedy entitlements would prove especially useful in retaliation cases where workers are disciplined or fired for actions such as filing an unfair labor practice charge, reporting workplace safety violations, or testifying on behalf of another worker.

By asserting a state constitution's right to remedy alongside due process and equal protection claims, advocates can press courts to address both the denial of remedies and discriminatory access to those remedies. Together these rights articulate the principle that not only are all workers entitled to labor protections, but those protections must be accessible, enforceable, and free from arbitrary or discriminatory limitations. This approach to remedial gaps can be especially productive in states where remedial access is considered a fundamental right, the abrogation of which would trigger strict judicial scrutiny.

To be sure, state constitutional doctrine on right to remedy provisions is massively underdeveloped. In a handful of states, courts have occasionally applied heightened or strict scrutiny when a statute or government action interferes with the constitutional

[136] Matthew Bodie, "The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy," *University of Illinois Law Review* 2017, no. 1 (2017), 250-51.
[137] *See, e.g.*, Fortunato v. Office of Stephen M. Silston, D.D.S., 856 A.2d 530, 533 (Conn. Super. 2004) ("It seems to this Court that in the arena of constitutional/public policy interests sufficient to support a tort action for wrongful termination, one such interest is the unfettered right of legal/court redress…").

By asserting a state constitution's right to remedy alongside due process and equal protection claims, advocates can press courts to address both the denial of remedies and discriminatory access to those remedies. Together these rights articulate the principle that not only are all workers entitled to labor protections, but those protections must be accessible, enforceable, and free from arbitrary or discriminatory limitations.

guarantee of a remedy.[138] However, courts have yet to clearly define when heightened scrutiny applies under the remedy clause. Some link it to the fundamental nature of the right at stake, while others distinguish between procedural and substantive denials. More generally, however, the right to remedy presents a valuable opportunity for labor advocates to develop novel anti-oligarchy constitutional arguments precisely because the jurisprudence is so thin. Especially in the absence of federal guidance, a robust right to remedy doctrine developed in one state would create an important foundation for proliferation among peer jurisdictions.

C. The Preemption Puzzle

In its embrace of state constitutions as vehicles for enshrining workers' rights to collective action, anti-oligarchy labor strategy encounters a significant obstacle to its purview in federal labor preemption. Although the NLRA contains no express preemption provision, the Supreme Court has interpreted the Supremacy Clause to create a preemption regime for state labor regulations more expansive than that pertaining to virtually any other area of Congressional intervention.[139] American labor law includes multiple preemption doctrines, but two are most directly relevant here. Under *Garmon* preemption, states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Garmon* directs that courts apply a balancing test weighing the importance of asserted state or local interests against potential harms to the federal regulatory scheme—namely, that state action could negate the federal government's exclusive jurisdiction over private-sector collective bargaining

[138] *See, e.g.*, Mitchell v. Moore, 786 So.2d 521 (Fla. 2001); Gibby v. Hobby Lobby Stores, 404 P.3d 44 (Okla. 2017).
[139] Benjamin I. Sachs, "Despite Preemption: Making Labor Law in Cities and States," *Harvard Law Review* 124 (2011), 1154.

and that state regulations could create conflicting standards that confuse employers, employees, and unions operating across jurisdictions.[140] Under *Machinists* preemption, states may not regulate areas intended to be left to "the free play of economic forces," i.e., zones that Congress left unregulated in the NLRA because of their importance to the collective bargaining process.[141] This is generally taken to mean that states may not add to employers' federal legal obligations when they bargain with unionized employees, even in areas where federal law is silent. The Supreme Court's far-reaching preemption doctrines under *Garmon* and *Machinists* are designed to prevent state and local governments from intruding upon the NLRA's regulatory jurisdiction over most private sector labor relations, meaning that courts generally bar state bodies from promoting unionization and collective bargaining for workers under NLRA coverage.

Despite imposing significant legal limitations on efforts to activate state constitutions as wellsprings of fundamental labor rights, prevailing interpretations of preemption doctrine have left open several important avenues for state constitutional labor advocacy. As discussed above, states can still promulgate comprehensive labor protections for the millions of workers excluded from NLRA coverage. Preemption notwithstanding, labor advocates have effectively used state constitutional arguments in legislatures and the courts to extend organizing rights to farmworkers, create bargaining frameworks for domestic workers, establish collective participation mechanisms for workers misclassified as independent contractors, and strengthen protections for public sector workers.[142]

States also continue to promulgate generally applicable employment standards, even when such standards facilitate collective voice among workers. The key distinction here is between laws that directly regulate the collective bargaining process, which are preempted, and laws that establish minimum employment standards applicable to all workers regardless of union status. Minimum wage laws, paid sick leave requirements, workplace safety standards, and fair scheduling laws all fall within this exception. Moreover, marking a revival of Progressive Era and New Deal innovations in state labor regulation, some states have taken to delegating official or advisory authority over industry standards to tripartite boards comprised of workers, employers, and public representatives. These worker standards boards address wages, benefits, training, and other employment conditions, operating on the formal basis of democratic deliberation

[140] *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
[141] *See* Lodge 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Committee, 427 U.S. 132 (1976).
[142] Andrias, "Innovation through State Labor Law," 1507.

rather than adversarial bargaining.[143] Blurring traditional boundaries between employment law and labor law, the boards can encompass NLRA-covered workers and feasibly withstand preemption challenges insofar as they function apart from the traditional collective bargaining framework. State constitutional employment provisions support expansive interpretations of labor-inflected employment regulations, in both their traditional and more novel forms, particularly when framed in terms of fundamental rights requiring legislative protection.

The function of state governments as buyers or sellers in a market adds another important context in which state action can fall outside federal labor preemption. The Supreme Court has allowed states to retain authority over setting labor standards when acting as market participants rather than as regulators. That is, when states purchase services, award contracts, or provide subsidies, they can attach labor standards as conditions specific to the project, so long as the conditions serve the state's proprietary interests and are not so broad as to constitute de facto regulation of the private labor market.[144] This market participant exception, while narrowly construed by courts, has created space for states and cities to mandate that employers pay a prevailing wage, enter into "labor peace" agreements with unions, and abide by worker-friendly contract standards and community benefit agreements. As Andrias documents, "[u]nions like the Communication Workers of America (CWA) have used these contracting provisions to seek agreements that enable union organizing in new manufacturing industries like offshore wind and electric vehicles."[145]

Withstanding the constraints imposed by federal preemption doctrine, labor advocates have achieved significant advances by wielding state constitutional arguments in courts, legislatures, and public fora. Notably, whether in extending protections to non-NLRA-covered workers, promulgating employment standards to facilitate worker power, or leveraging the state's role in private contracting, workers consistently gain their upper hand when they locate their specific interest in the fundamental rights to organize and bargain collectively. But while existing legal pathways provide for meaningful advocacy, federal preemption has severely limited the power of states to effectively champion labor constitutionalism. That calculus may be changing, however,

[143] Since 2018, six states and three local governments have enacted such policies, creating twelve new worker standards boards, with several covering industries long excluded from traditional labor law. Andrias, "Innovation through State Labor Law," 1491.
[144] *See* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983); Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993).
[145] Andrias, "Innovation through State Labor Law," 1484-85.

as mounting pressures on the NLRA's basic enforcement capacities question the applicability and stability of federal labor preemption moving forward.

To be sure, the NLRA has long been a moribund vehicle for vindicating workers' rights. Critics point to numerous aspects of the federal scheme that routinely blunt the freedom of workers to collectively organize and bargain with employers. In practice, the NLRA regime offers relatively minimal rights to unions to communicate with workers while granting wide latitude to employers who disrupt workers' self-organization efforts. Furthermore, the NLRB's interminable election machinery empowers employers to use delay and attrition tactics against organizing campaigns, and its anti-retaliation remedies are ineffectual, as is its enforcement of collective bargaining rules given that the Board cannot impose contract terms as a remedy when employers fail to meet their obligation to bargain in "good faith."[146] Add to those longstanding deficiencies a series of extremely well-resourced legal attacks seeking to dismantle the Board on non-delegation and major questions grounds.[147] While utterly implausible just a few years ago, the Supreme Court's holdings in 2024 in *Loper Bright*, *Corner Post*, and *Jarkesy* signal a judicial assault on federal administrative agencies that could well annihilate the NLRB, much less undermine its capacity to function constructively as the exclusive regulator of private sector labor relations.[148]

Meanwhile, the Trump administration is not waiting to see how current litigation will play out before moving to debilitate federal labor enforcement. The president has promised severe budget cuts to the NLRB and threatened additional workforce reductions through DOGE-like redundancy initiatives.[149] Most alarmingly, he took the unprecedented step of illegally removing Board member Gwynne Wilcox without cause, and although the D.C. Circuit blocked the firing, the Supreme Court later stayed the decision.[150] Leaving the NLRB with only two seated members—below the three-member quorum required for the agency to function—the agency was, for a significant duration, a "Zombie Board" lacking the legal authority to issue decisions, conduct elections, or enforce labor law in any meaningful way.[151]

In short, the NLRA faces existential threats from multiple directions: the tools it provides to the Board are insufficient for fulfilling Congressional intent, its very

[146] Sachs, "Despite Preemption," 1162-63.
[147] *See supra* note 12 and accompanying text.
[148] *See supra* note 11 and accompanying text.
[149] Josh Eidelson, White House Pushed Job Cuts at Agency That's Clashed With Musk, *Bloomberg* (Apr. 29, 2025).
[150] *See* Trump v. Wilcox, 605 U.S. ___ (2025) (per curiam).
[151] *See* Sharon Block, Seema Nanda, and Raj Nayak, "The NLRA Under Attack," 77 *Democracy Journal* (2025).

existence on the books is under constitutional attack by anti-worker employers, and the executive branch is ensuring that the law cannot function even if it does survive constitutional challenge.

But if labor preemption doctrine is fundamentally premised on protecting the NLRA's near-exclusive jurisdiction over private sector labor relations, what befalls preemption when the NLRA is non-existent, whether formally or functionally? Indeed, the situation raises the unmistakable contradiction that the same conservative elements that have long weaponized preemption to block state labor protections are simultaneously destroying the federal system that justifies preemption in the first place. Observing how legal actors are navigating that irony for their own strategic ends, Gail Racabi notes the persistent asymmetry between employers and workers: "Employers' strategy of destroying the NLRA with the one hand, and using its preemption regime to suffocate local regulations on the other hand, is explicit and effective; labor advocates have not been as explicit about their strategies."[152]

With preemption becoming increasingly untethered from doctrinal assumptions and institutional realities, workers have various advocacy pathways at their disposal. One is to press Congress to pass legislative reform superseding the judge-made preemption doctrine. When Congress was considering the PRO Act in 2021, the Clean Slate for Worker Power Project at Harvard Law School issued a number of recommendations for preemption reform to be included in the bill.[153] A key principle animating the recommendations was that federal labor law should explicitly authorize states to provide additional protections while preventing them from undermining existing collective bargaining relationships—in other words, that federal preemption provide a floor rather than a ceiling.[154]

With preemption becoming increasingly untethered from doctrinal assumptions and institutional realities, workers have various advocacy pathways at their disposal.

[152] Gali Racabi, "In Lieu of the NLRA," Cornell Law Faculty Working Papers No. 158 (2025), 18.
[153] *See* Clean Slate for Worker Power, *Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level*, Center for Labor and a Just Economy at Harvard Law School (May 1, 2021).
[154] Clean Slate for Worker Power, *Overcoming Federal Preemption*, 7.

The Clean Slate Project's co-director, Professor Benjamin Sachs, has also suggested that advocates can reshape the preemption landscape by turning to the NLRB. He points specifically to Section 14(c) of the NLRA, which in his reading grants the Board significant discretion to cede its jurisdiction over an industry to a state if it determines that doing so would be unlikely to substantially affect interstate commerce because the state regulation would minimize labor disputes. Activating Section 14(c) could effectively "unpreempt" state regulation over a wide range of labor disputes, creating new terrains for labor constitutionalism in the states. But, Sachs cautions, it would also empower the Board to cede its jurisdiction to those states where policymakers seek to further diminish workers' already-scant entitlements.[155]

In the courts, labor advocates can seek to reform preemption doctrine based on the theory that the NLRA's dysfunction negates its jurisdiction over labor relations. This argument has acute significance for situations resembling the recent "Zombie Board." Absent a functioning regulatory regime, argues Sachs, the rationale for *Garmon* preemption evaporates. Because the Board, lacking a quorum, cannot protect or prohibit any conduct under the NLRA, state-level interventions do not present any risk of conflicting or interfering with federal enforcement. Indeed, it was surely not Congress's intention to create a regulatory void where workers have neither federal nor state protection. So although *Machinists* preemption would persist, *Garmon* would no longer apply.[156] Such reasoning, however, does not necessarily rely on the NLRB lacking a quorum. Instead, the continued breakdown in federal labor enforcement due to attacks from both the judicial and executive branches lends credence to the proposition that when the NLRB demonstrates on a persistent basis that it is no longer discharging its statutory obligations, preemption doctrine no longer applies. Years-long delays in processing unfair labor practice charges, the practical unavailability of meaningful remedies, and the Board's inability to adapt to changing workplace realities all undermine the doctrine's foundational premises.[157] To bolster this argument, labor advocates can develop a record of significant and pervasive NLRB dysfunction showing that federal law provides no meaningful alternative to labor regulation by the states.

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[155] Benjamin Sachs, Unpreemption: The NLRB's Untapped Power to Authorize State Experimentation, *OnLabor* (Dec. 24, 2022); 29 U.S.C. § 164(c). Section 14(c) contains a restrictive proviso, but according to Sachs, the relevant test would be to "ask whether the volume-of-business in that sector is above the relevant threshold and whether state law regulating the sector will minimize labor disputes to the extent that such disputes will not have a substantial effect on commerce." *See* Sachs, Unpreemption.

[156] Benjamin Sachs, Did Trump Just Empower States and Cities to Regulate Labor Relations?, *Law and Political Economy Blog* (Feb. 6, 2025).

[157] Racabi, "In Lieu of the NLRA," 19-21.

With so much uncertainty surrounding the NLRA's future, the upshot for labor advocates is to continue advancing their objectives through pathways unhindered by preemption while simultaneously pushing for a more favorable preemption regime. Defining the desired outcome for preemption can be challenging, especially as certain reform efforts towards a more federalist system of labor regulation would be accompanied by a serious risk of freeing anti-labor states to impose new restrictions on organizing and collective action. Thus, determining one's goals for preemption reform and selecting the means for achieving them involves a careful strategic assessment of potential opportunities and threats. It would be a serious mistake, however, to reflexively assume that the preemption status quo strikes the best balance for future labor advocacy efforts.

In addition to direct advocacy, labor advocates must prepare for the possibility that the NLRA could be struck down entirely or rendered effectively inoperative. This could transpire in several different permutations. One plausible scenario is that the Supreme Court all but eviscerates the NLRB on non-delegation and/or major questions grounds while keeping today's preemption doctrine in place. The consequences of this outcome would be devastating to American workers and would call for a generational response by the labor movement involving direct action and Congressional reform.

Another scenario is that the Court overturns the Act completely, or at least repeals key provisions, removing preemption doctrine's statutory basis altogether. State constitutional advocacy protecting collective bargaining and workers' rights would assume new urgency in that post-NLRA world. No longer merely expressive or limited to non-covered workers, state constitutions would become operative foundations for comprehensive labor relations systems. Recent research conducted by Professor Racabi shows that nineteen states have dormant state-level labor relations statutes that were superseded by federal law but never repealed. Should federal preemption disappear, these laws would spring back to life as a critical backstop, providing immediate statutory frameworks for organizing, collective bargaining, and dispute resolution under state law.[158]

Labor advocates can begin planning now for this possibility by developing model legislation, administrative structures, and enforcement mechanisms that could be rapidly implemented. Recent legislative advances in a handful of states represent one

[158] Racabi, "In Lieu of the NLRA," 7 (referencing Alabama, Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin).

promising approach. Over the past year, California, New York, and Washington have all passed legislation expanding the jurisdiction of their state labor boards in instances where the NLRB is unable or unwilling to exercise its federal enforcement powers.[159] State governments can also coordinate their efforts through interstate compacts to prevent a race to the bottom while fostering constructive experimentation in local approaches. Of course, labor advocates would also be compelled to organize their forces against new modes of worker repression by anti-labor state officials. Irrespective of the NLRA's uncertain future, the path forward invites advocates to move beyond defensive responses to federal preemption towards an affirmative vision of labor federalism that treats the current instability not only as a threat to be managed but as an opportunity to effectuate new vehicles for labor democracy.

[159] Assem. Bill 288, 2025–2026 Reg. Sess. § 1 (Cal. 2025); S. 8034A, 2025–2026 Reg. Sess. (N.Y. 2025); H.B. 2471, 69th Leg., Reg. Sess. (Wash. 2026).

IV. THE ROAD AHEAD FOR CONSTITUTIONAL LABOR RIGHTS

American democracy faces a perilous moment. The tyranny and injustice of explosive inequality are manifestations of a political economy in which extreme wealth entrenches itself in the machinery of the people's government. Oligarchic rule emerges as both a cause and effect of our constitutional politics. For decades, corporate interests have poured resources into capturing the federal judiciary, and judges in turn have transformed constitutional meaning into a vehicle for solidifying corporate power over the demos. There is no conceivable path to reclaiming a democratic order in the United States without the labor movement. The collective action of workers is perhaps the only durable countervailing force Americans have to wrest back their constitutional entitlements from the forces of reaction. As it weathers extreme, coordinated attacks from mega-corporations, conservative activists, the Supreme Court, and the White House, the labor movement has two choices regarding its engagement in constitutional politics—cede our constitutional traditions as inevitable playthings of the wealthy few or lead working people in the fight for constitutional democracy. If it chooses the latter, it needs a good strategy.

While that strategy must emanate from the labor movement itself, the anti-oligarchy framework elaborated in this report (and relying on the intellectual work of a great many thinkers) can perhaps be a helpful resource. It is guided by a deep-seated history of constitutional labor politics and seeks to marshal previous struggles in service of informing our own. As in past episodes of anti-labor repression, it locates in constitutional texts and traditions resources for vindicating commitments to solidarity, egalitarianism, and universal dignity in the American system.

The specific provisions discussed above can thus be read more as mutually reinforcing elements of constitutional democracy than as a compendium of standalone propositions. The arguments presented here are not even strictly *legal* claims, though they certainly have purchase in the register of law. Instead, they are constitutional both in a narrow legalistic sense and as claims upon the institutional structures and practices through which our economy takes concrete form. Their purpose is not merely to enhance labor's standing in the courtroom but to reorient how Americans collectively conceive of constitutional self-government and the central role workers play within it. That cannot happen if workers submit to the idea that constitutional meaning rests with the Supreme Court alone. This report's call for labor advocates to adopt a structural constitutional style, shift the sphere of constitutional argument to legislatures and the public, and

embrace state constitutions as a key source for their claims thus marks an appeal to democratize constitutional politics—an imperative that is at once ethical and strategic.

Underlying the anti-oligarchy framework is the observation that legal advocacy is most effective when it is subordinated to movement strategies rather than the other way around. Progressives are learning across a range of key issues that clever litigation alone will not get the job done. Instead, as James Pope reminds us, rights consciousness and direct popular action were essential to every major advance in the legal protection of collective labor rights during the twentieth century—a dynamic that was well understood by labor activists, but not by their allies among legal professionals and middle-class reformers.[160] This perspective does not dismiss the importance of the courts, which remain crucial advocacy venues, but it recognizes that what happens inside the courtroom moves in tandem with what happens outside of it.

Successful social movements frequently make constitutional claims even when their arguments depend on changing the prevailing legal doctrines, but their invocations rarely begin with the courts. Instead, writes Andrias, "law reform and social change efforts are essential prerequisites to the development of court-based constitutional labor rights. Without the political and legal changes the movements urge, it is inconceivable that common law courts—faithful to precedent, incremental in approach, and drawn from the elite—will adopt the constitutional arguments that progressive legal scholars urge."[161] Effectively articulating those labor movement demands as constitutional claims cannot be a one-off effort. It takes a sustained, long-term commitment to normalizing an alternative constitutional discourse that can generate enough pressure to permeate official institutions as legitimate legal arguments.

Though never transpiring in a straightforwardly linear way, the process of changing constitutional doctrine typically flows inward from the outer flanks of civil society—originating with workers and their organizations, gaining traction with the public, pressuring and persuading legislators, and then inflecting judicial expectations. Each step along this path demands tactical flexibility and persistent movement energy, often including direct action by workers asserting their rights. The best defense of constitutional labor rights is a strong offense built on worker organizing. In her assessment of the dire challenges workers face under the new presidential administration, the NLRB's former general counsel Jennifer Abruzzo recently suggested that "[i]t's going to take a real groundswell to hold our representatives accountable. And

[160] James Gray Pope, "Labor's Constitution of Freedom," *Yale Law Journal* 106 (1997), 956.
[161] Andrias, "Building Labor's Constitution," 1596.

not just rallies, but boycotts, sit-ins, strikes: There needs to be that sort of real collective action on a broad scale in order to shift our government to where it needs to be."[162] While the courage of workers is paramount to waging a renewed offensive for labor democracy, resolute labor allies in government office play a critical role facilitating the movement's constitutional advances.

In that regard, state attorneys general bear a uniquely heavy responsibility. Although specific functions of the office of attorney general vary by state, they all possess a broad range of tools to wage vigorous constitutional advocacy on behalf of workers. In both state and federal courts, they can wield anti-oligarchy arguments for workers' rights by suing exploitative employers, litigating constitutional defenses and challenges to statutes, suing the federal government when it undertakes anti-labor interventions, and submitting amicus curiae. Their investigative and enforcement authorities enable them to collaborate with the NLRB to safeguard collective action by workers and establish dedicated worker protection bureaus that affirmatively pursue workers' rights cases rather than relying solely on referrals by state agencies. Leveraging their relationships with Congress and state legislatures, they can propose, draft, and advocate for legislation designed to guarantee workers' fundamental rights to organize, and they can issue formal opinions and advisory guidance affirming that legislators have the constitutional duty to safeguard those rights by statute. State attorneys general can further reinforce the constitutional stakes of labor advocacy through training programs and strategic enforcement partnerships with state labor bureaus, unions, and worker centers. So too can they make unrelenting use of their bully pulpit to make the case for labor constitutionalism in public statements, op-eds, reports, press releases and conferences, and labor roundtables with workers and union representatives. And crucially, state attorneys general have one another, with whom they can seek deeper multistate coordination to hone and fortify their efforts.[163]

Many state attorneys general are already performing these tasks, but a key takeaway from the anti-oligarchy framework is that their tools are not to be understood as discrete initiatives. A serious commitment to transforming our constitutional politics involves the multi-pronged deployment of resources and energies across the judicial,

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[162] Quoted in Harold Meyerson, Trump's Labor Wreckers, *The American Prospect* (May 21, 2025).

[163] *See* Emily Myers & National Association of Attorneys General (Eds.), *State Attorneys General Powers and Responsibilities* (4th Ed., 2018), 11; AG Studies Staff and Policy Fellows, *The Role of State Attorneys General In The Fight For Workers' Union Rights*, Leadership Center for Attorney General Studies (2022); CLJE:Lab, *Building Worker Power in Cities & States: Structural Reforms and Strategic Enforcement*, Center for Labor and a Just Economy at Harvard Law School (Sep. 1, 2024); Terri Gerstein & Marni von Wilpert, *State attorneys general can play key roles in protecting workers' rights*, Economic Policy Institute (May 7, 2018).

legislative, and public arenas. The power of each tactic emerges from their mutual interdependence within a programmatic advocacy strategy. Effectuating such a strategy, and especially sustaining it over time, can prove extremely challenging. Strategic constitutional transformation is a long, iterative process encompassing a wide range of advocacy actors. The challenge of arranging these actors in concert invites the labor movement and state attorneys general to consider how they might reshape their immediate advocacy ecosystem. New institutional capacities may be necessary to facilitate coordination, delegation, and resource-sharing among labor unions, legal officers, legislators, academic researchers, the labor press, and community organizations. When bound by shared constitutional commitments and the necessary resource infrastructures, these advocates secure a far stronger foundation for an anti-oligarchy program that can respond to both long-term aspirations and immediate threats.

V. CONCLUSION

This report has aimed to inform how labor advocates can strategically hone their engagement with constitutional politics. The crises now imperiling the nation's core institutions are creating new opportunities to democratize American political economy. Within this complex terrain, the labor movement can proceed from a position of relative strength when it marshals compelling legal arguments with shrewd institutional strategies that place workers at the center of our constitutional order. The road ahead is long and arduous, as it has always been, but the democracy of opportunity tradition serves to remind us of each generation's responsibility to carry on the arduous work necessary for building a free society. It is a commitment that requires solidarity, courage, and clarity of purpose—all without guarantees of outcome against formidable opponents. There is no future prospect of constitutional democracy in the United States without the labor movement, yet workers cannot go it alone. They need determined allies, especially among government officials. State attorneys general carry a unique responsibility owing to their place in our constitutional structure as the linchpins holding together popular democracy and the rule of law. The anti-oligarchy framework thus provides a prospective blueprint for how state attorneys general can assume their critical role in the fight for worker's fundamental constitutional rights.

ABOUT THE AUTHOR

Sanjay Jolly is an attorney and researcher based in Philadelphia. From 2023 to 2025, he was the executive director of the Program on Law and Political Economy at Harvard Law School.

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