



U.S. Chamber of Commerce

# Cartel Bargaining, Ballot Initiatives, and “Industrial Democracy”

How Unions are Using Government to Circumvent  
the NLRA and End Labor Market Competition

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What is a labor union if it no longer acts as a union? A generation ago, labor unions were private, voluntary organizations, whose main job was to organize workers and bargain collectively.<sup>1</sup> But today, they play a different role. They no longer pursue their goals at the bargaining table, but instead, lobby for their agendas at city hall. They write, sponsor, and implement laws to set standards for whole industries. [Unions] wield their political influence to suppress competition in the market. In short, they act less like trade unions and more like governmental cartels.<sup>2</sup>

That transformation can be seen in the tools they use. Rather than bargaining with private employers, they increasingly use public and quasi-public processes. They sponsor and staff “labor standards” boards, which develop rules for whole sectors.<sup>3</sup> They lobby for and pass sector-specific wage legislation, which raises labor costs for an entire industry.<sup>4</sup> They run wage-related ballot initiatives, which raise everyone’s costs and thus insulate unions from competition.<sup>5</sup> They extract “labor peace agreements,” which circumvent federally supervised union elections.<sup>6</sup> And they even file complaints with foreign governments, seeking to have those governments impose draconian penalties and intimidate employers on American soil.<sup>7</sup>

1 See John Commons, *American Labor History*, in *Theories of the Labor Movement* 132 (Simeon Larson & Bruce Nissen, eds., 1987) (explaining that under Samuel Gompers, the AFL rejected political involvement and widespread government intervention in labor market); Arthur S. Leonard, *The AFL-CIO’s First National Campaign*, 8 *Indus. & Lab. Rel. F.* 25, 25 (1972) (noting that the AFL studiously avoided political endorsements before the New Deal).

2 See Samuel Estreicher, *Trade Unionism under Globalization: The Demise of Voluntarism?*, 54 *St. Louis Univ. L. Rev.* 415, 418 (2010) (“We are now, however, beginning to see a qualitative change in labor’s relationship to the state: trade unionism as a supplement to politics.”).

3 See, e.g., Seattle Mun. Code ch. 14.23 (domestic workers standards board); N.Y. Lab. L. § 674-a (farm labor standards board); Cal. Labor Code § 1475 (fast food council).

4 See, e.g., West Hollywood Ord. No. 24-13 (2024) (minimum wages for hotel workers); Cal. Labor Code § 1475(d)(2)(1) (minimum wages for fast-food workers).

5 See, e.g., Washington, DC, One Fair Wage, <https://www.onefairwage.org/states> (listing state campaigns to wage minimum wages and abolish tipped wages).

6 See, e.g., N.Y. City Admin. Code § 6-145 (requiring labor-peace agreements in certain “human services” contracts); Los Angeles Bd. of Airport Commissioners Res. 23437 (Oct. 15, 2007) (requiring labor-peace agreements for certain concessions contractors in city airport); D.C. Code § 32-852 (requiring labor-peace agreements for certain real-estate development projects in which the city asserts a “proprietary interest”).

7 Press Release: UAW Files Charges in Germany Against Mercedes-Benz: Company’s Anti-Union Campaign Against U.S. Autoworkers Violates New German Law on Global Supply Chain Practices, United Auto Workers (April 3, 2024), <https://uaw.org/uaw-files-charges-in-germany-against-mercedes-benz-companys-anti-union-campaign-against-u-s-autoworkers-violates-new-german-law-on-global-supply-chain-practices/#:~:text=The%20UAW%20is%20the%20first,rights%20to%20form%20trade%20unions> [hereinafter UAW Statement].

This shift has not happened overnight. Rather, it has crept in over decades. Unions have been losing members for almost eighty years.<sup>8</sup> Though the causes of this decline are complex, unions mostly blame the National Labor Relations Act.<sup>9</sup> Passed in the 1930s, the NLRA created a system under which unions had to win recognition workplace by workplace.<sup>10</sup> That system no longer works for unions, either because they don't put funding towards new organizing campaigns or because workers don't want to be organized.<sup>11</sup> But either way, unions have decided that if they want to maintain their influence, they must do so outside of the NLRA.<sup>12</sup> And their search for new methods has increasingly led them to quasi-public, regulatory techniques.

This new approach affects more than just unions. It also affects workers, business, and free markets. When unions become regulators, they no longer need to win approval from workers. They can raise prices, reduce flexibility, and insulate themselves from competition. The result is less choice, less transparency, and less diversity in the market. It is a new kind of labor union—one that is less a voluntary association and more a government-backed cartel.

8 See Gerald Mayer, *Union Membership Tends in the United States*, Cong. Research Serv. No. RL32553, at 22–23 (Aug. 31, 2004), <https://sgp.fas.org/crs/misc/RL32553.pdf>.

9 Pub. L. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69).

10 See 29 U.S.C. § 159.

11 See Testimony of Roger King, HR Policy Ass'n Senior Lab. & Employment Counsel, to House Health, Education, Labor, and Pensions Committee (Dec. 15, 2023), <https://www.hrpolicy.org/insight-and-research/resources/2023/hr-workforce/public/12/hr-policy-association%E2%80%99s-roger-king-testifies-before/>.

12 See Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (2020), [https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537\\_CleanSlate\\_Report\\_FORWEB.pdf](https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537_CleanSlate_Report_FORWEB.pdf) (proposing series of reforms to overcome the enterprise-bargaining hurdle, including government-mediated “sectoral” bargaining).

# Labor's Long Decline

Organized labor has been shedding members for decades. In the mid-twentieth century, unions represented more than one in three wage-earning Americans.<sup>13</sup> They dominated the country's most vibrant industries, including transportation, construction, and manufacturing.<sup>14</sup> They also enjoyed enormous economic power, setting standards across whole sectors using “pattern” bargaining.<sup>15</sup> That scope allowed them to shut down entire industries through nationwide work stoppages. These work stoppages sometimes involved millions of workers; at one point in 1946, for example, nearly two million workers were on strike at one time.<sup>16</sup>

But those days are long gone. Today, unions represent only one in ten workers, less than a third of their peak.<sup>17</sup> And even that number is misleadingly high: if only private-sector workers were counted, unions would represent only 6% of wage-earning adults.<sup>18</sup> That percentage has declined steadily since the 1970s, and it shows no sign of turning around.<sup>19</sup>

This decline has been driven mostly by economic change.<sup>20</sup> In the 1950s, the economy centered on manufacturing, which supported nearly a third of all American jobs.<sup>21</sup> Manufacturing was also heavily unionized. Unions like the UAW and

13 See, e.g., Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022, U.S. Bureau of Lab. Stats. (Jan. 24, 2023), <https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm> (charting historic rates); Dan Burns, US Union Membership Rate Hits Fresh Record Low in 2023—Labor Dept, Reuters (Jan. 23, 2024), <https://www.reuters.com/markets/us/us-union-membership-rate-hits-fresh-record-low-2023-labor-dept-2024-01-23/>.

14 See Dian Katz, The Decline of the American Labor Union, GIS Reports (April 28, 2023), <https://www.gisreportsonline.com/r/decline-american-union/>.

15 Id.

16 Rich Yeselson, Fortress Unionism, Democracy (summer 2013), <https://democracyjournal.org/magazine/29/fortress-unionism/>.

17 See Union Membership Annual News Release, U.S. Bureau of Lab. Stats. (Jan. 23, 2024), [https://www.bls.gov/news.release/archives/union2\\_01232024.htm](https://www.bls.gov/news.release/archives/union2_01232024.htm).

18 See id.

19 See Burns, supra note []. See also Estreicher, supra note [] at 415–16 (observing that decline in union densities is not a strictly American phenomenon, but in fact, is seen in “nearly all developed countries”).

20 See Ronald G. Ehrenberg & Robert S. Smith, Modern Labor Economics: Theory and Public Policy 518–19 (13th ed. 2018) (attributing decline in union density to mix of trade liberalization, changing industrial mix, demographic changes, and (to some extent) increased opposition from employers facing new economic headwinds).

21 Katz, supra note [].

United Steel Workers represented workers in huge manufacturing plants, which could employ four or five thousand employees each.<sup>22</sup> But international competition, technology, and trade forced manufacturers to become more efficient and meant that some were no longer competitive. At the same time, automation and communication technologies transformed the service sector, making it easier to expand and export services.<sup>23</sup> The economy increasingly shifted from manufacturing to service, and in the process, shed millions of union jobs.<sup>24</sup>

Unions struggled to offset those losses by organizing workers in the service sector. Organizing was easier, or at least more efficient, when unions could target large plants. They could spread their organizing costs across thousands of workers and take advantage of economies of scale.<sup>25</sup>

But that scale shrank in service-sector workplaces. Service-sector workplaces could be as small as a single restaurant with a dozen employees.<sup>26</sup> And even in large services-sector workplaces, like big-box retailers, there might be only a few hundred employees.<sup>27</sup> That meant unions had to spend more money to organize each new member. By some estimates, each member now costs a union about \$3,000 in organizing expenses alone.<sup>28</sup>

Those hurdles have proven insuperable even in the best of climates. Since 2022, national unemployment has hovered around 4%. And today, about seven in ten Americans say they approve of labor unions.<sup>29</sup> In a vacuum, those factors should spur more organizing.<sup>30</sup> Yet despite the favorable headwinds, union density has continued to tick down.<sup>31</sup>

22 Yeelson, supra note [].

23 See What Drives the U.S. Services Trade Surplus? Growth in Digitally-Enabled Services Exports, White House (June 10, 2024), <https://www.whitehouse.gov/cea/written-materials/2024/06/10/what-drives-the-u-s-services-trade-surplus-growth-in-digitally-enabled-services-exports/>. See also Harris, supra note [] (noting that economy has “shifted to service-producing industries”).

24 See Katz, supra note []. See also Estreicher, supra note [], at 415 (attributing decline in union density in part to decline in manufacturing employment).

25 See Yeelson, supra note []; Suresh Naidu, Is There Any Future for a US Labor Movement?, 36 J. Econ. Perspectives 3, 16–18 (2022).

26 See Ehrenberg & Smith, supra note [], at 519 (observing that smaller size of service establishments created new barriers to organizing).

27 Id.

28 Yeelson, supra note [].

29 See Justin McCarthy, U.S. Approval of Labor Unions at Highest Point Since 1965, Gallup (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx>.

30 See Chantal Pezold, et al., Labor Market Tightness and Union Activity, Nat’l Bureau of Econ. Research No. 31988 (Dec. 2023), (concluding that “[t]ight labor markets might spur unionization”). See also Abraham L. Gitlow, Labor Economics & Industrial Relations 71 (Literary Licensing, LLC 2012) (1957) (describing historical surges of union organizing during times of high demand for labor).

31 See Burns, supra note [] (noting that union densities have hit historic lows even as people report that they support labor unions in record numbers). See also Naidu, supra note [], at 4 (noting the gap between public support for unions and union densities and suggesting that the disparity reveals “institutional friction”).

Lacking any other culprit, unions have blamed the law. Union organizing in the United States is governed by the National Labor Relations Act (NLRA).<sup>32</sup> The Act divides employees into “appropriate” election units, which then become bargaining units if the employees vote for a union.<sup>33</sup> The Act assumes that an appropriate unit is a single workplace.<sup>34</sup> So in most cases, to organize new members, a union must campaign employer by employer, workplace by workplace.<sup>35</sup>

According to unions, this workplace-by-workplace process is the main barrier to unionization.<sup>36</sup> They argue that the process is too slow, too expensive, and too ripe for employer abuse.<sup>37</sup> They say that election delays allow employers to

defeat unionization drives through hardball tactics—tactics they say sometimes drift into illegal territory.<sup>38</sup> They also argue that the NLRA’s remedies are too weak.<sup>39</sup> They complain that the law forces violators to offer backpay and reinstatement, but imposes no civil fines or penalties. True, invalid elections can be re-run.<sup>40</sup> But a new election is cold comfort to a union that has already spent too much money to organize a unit that is already too small.<sup>41</sup>

The law, unions say, is broken. It is now impossible for them to organize workers in the traditional method.<sup>42</sup> So, the argument goes, if they are to survive, much less thrive, they have to find a different path.

32 Pub. L. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69).

33 29 U.S.C. § 159(a).

34 See *NLRB v. Phoenix Programs of New York, Inc.*, 2 F. App’x 166, 168 (2d Cir. 2001) (observing that when selecting an appropriate bargaining unit, the NLRB applies a “single-facility” presumption”).

35 See *id.*

36 See, e.g., Naidu, *supra* note [], at 18 (identifying NLRA’s enterprise-level election system as main hurdle to organizing).

37 See, e.g., *Pair of Pro-Union NLRB Rulings Favor Organizing, Int’l Brotherhood of Elec. Workers* (Oct. 18, 2023), <https://ibewgov.org/pair-of-new-pro-union-nlr-rulings-favor-organizing/> (“Many observers blame the tilted playing field [in NLRB elections] that overwhelmingly gives the advantage to employers for the long-term decline in union membership in the United States.”); *The Facts on the New NLRB Union Election Rule*, Jobs with Justice (Dec. 12, 2014), <https://www.jwj.org/the-facts-on-the-new-nlr-union-election-rule> (arguing that election process should be shortened to reduce employers’ opportunity to defeat union drives).

38 See Letter from Nicole G. Berner, SEIU Gen. Counsel, to Roxanne Rothschild, Deputy Executive Secretary of the NLRB, at 3 (April 18, 2018), <https://downloads.regulations.gov/NLRB-2020-0004-0104/content.pdf> (asserting that NLRB should reduce time to process elections because “expedition elections reduce opportunities for unlawful [employer] conduct”).

39 See Letter from William Samuel, Director, Government Affairs, AFL-CIO, in Support of the PRO Act (June 21, 2023), <https://aflcio.org/about/advocacy/legislative-alerts/letter-supporting-pro-act-2>.

40 See *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) (allowing re-run election when misconduct interferes with “laboratory conditions” required for “free choice”).

41 See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969) (observing that a re-run election may be an inadequate remedy for certain serious election misconduct). See also Samuel, *supra* note [] (“For too long, employers have been allowed to violate workers’ rights with impunity because the law includes no penalties for doing so.”). See also *Union Deterrence and Recent NLRB Action*, White House (Oct. 23, 2023), <https://www.whitehouse.gov/cea/writtenmaterials/2023/10/23/union-deterrence-and-recent-nlr-action/> (describing the requirement to re-run an election as a “weak” penalty). But see *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130, slip op. at 2 (Aug. 25, 2023) (expanding use of bargaining orders as remedy for election-related misconduct).

42 See Aneurin Canham-Clyne, *How the Biggest Private Sector Union Wants to Transform the Restaurant Workforce*, Restaurant Dive (May 1, 2023), <https://www.restaurantdive.com/news/how-labor-union-seiu-wants-to-transform-the-restaurant-workforce/648986/> (quoting SEIU President Kay Henry as saying that fast-food workers have “never believed” they could organize franchise to franchise).





# A Government First Strategy

Increasingly, that path has led unions to politics and government. Despite their shrinking ranks, unions still wield significant influence with elected officials.<sup>43</sup> They consistently rank among the top campaign donors in each election cycle.<sup>44</sup> And this largesse has helped them shape public policy, especially in progressive states already inclined to share their views.<sup>45</sup> For example, in California alone, unions have flexed their political muscle to push through laws on sick

leave, retirement, whistleblowing, consumer protection, infrastructure, housing, education, immigration, and criminal sentencing.<sup>46</sup> These efforts have helped them stay in the public eye, if not in the private workplace.<sup>47</sup>

But state support can get them only so far. When Congress enacted the NLRA, it intentionally nationalized labor policy.<sup>48</sup> It created a uniform system of labor relations stretching over and beyond state borders.<sup>49</sup>

43 Alex MacDonald, Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment, 22 Geo. J.L. & Pub. Pol’y 229, 261 (2024) (describing rising political contributions and corresponding political influence of private-sector labor unions).

44 See Estriecher, supra note [], at 423 n.23 (reporting that eight of the top twenty political action committees in the 2009-10 election cycle were unions).

45 See, e.g., Isabela Salas-Betsch & Karla Walter, Workers Want Unions: How States Have Strengthened Worker Power in 2023, Ctr. for Am. Progress (Nov. 1, 2023), <https://www.americanprogress.org/article/workers-want-unions-how-states-have-strengthened-worker-power-in-2023/>; Jennifer MacGilivar & Ken Jacobs, The Union Effect in California #3: A Voice for Workers in Public Policy, UC Berkley Lab. Ctr. (June 20, 2018), <https://laborcenter.berkeley.edu/union-effect-in-california-3/>; Geoffrey Lawrence et al., How Government Unions Affect State and Local Finances: An Empirical 50-State Review, Heritage Foundation (April 11, 2016), <https://www.heritage.org/jobs-and-labor/report/how-government-unions-affect-state-and-local-finances-empirical-50-state>.

46 MacGilivar & Jacobs, supra note [] (surveying success of union-backed initiatives in California since 2011).

47 See Steven Greenhouse, “The Success Is Inspirational”: the Fight for \$15 Movement 10 Years On, Guardian (Nov. 23, 2022), <https://www.theguardian.com/us-news/2022/nov/23/fight-for-15-movement-10-years-old> (observing that despite its success in raising minimum wages, the SEIU’s “Fight for \$15” campaign produced no discernable gains in union membership).

48 See, e.g., 29 U.S.C. § 151; San Diego Bldg. Trades Council, Millmen’s Union, Loc. 2020 v. Garmon, 359 U.S. 236, 242 (1959); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

49 See Jones & Laughlin, 301 U.S. at 41.

That system not only created a uniform set of rules, but also displaced inconsistent state or local regulations.<sup>50</sup> State and local governments cannot simply set up alternative labor-relations schemes.<sup>51</sup> If they tried, they would be preempted.<sup>52</sup>

So rather than design bespoke organizing schemes, unions and their state allies have searched for gaps in the federal system.<sup>53</sup> And that search has led them away from private bargaining and toward regulation.<sup>54</sup> Rather than organize workers and represent them at the bargaining table, they have decided to capture policymakers and advance their agendas at city hall.<sup>55</sup>

50 See Garmon, 359 U.S. at 242; Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 144 (1976).

51 See Cynthia Estlund, Sectoral Solutions that Work: The Case for Sectoral Co-Regulation, 98 Chicago-Kent L. Rev. \_\_\_, 541, 555–56 (forthcoming), available at <https://ssrn.com/abstract=4498546> (recognizing preemption as a barrier to state- and local-level pro-union legal reforms).

52 See Chamber of Commerce of the U.S. v. Brown, 554 U.S. 60, 65, 76 (2008) (holding that state law conditioning state funds on business's waiver of its speech rights under the NLRA was preempted). See also Ben Sachs, Anti-Union Governors and Employee Free Choice, OnLabor (June 10, 2024), <https://onlabor.org/anti-union-governors-and-employee-free-choice/> (asserting that state-level legislation aimed at regulating parties' conduct in the election process would be preempted).

53 See Estlund, *supra* note [], at 555–57 (proposing “co-regulation” schemes as a way to overcome the preemption “problem”).

54 See *id.*

55 See MacGilivar & Jacobs, *supra* note [] (arguing that unions' biggest effects come “not from negotiations between employers and workers, but instead through the labor movement's influence on public policy”).



# Ideological Roots

This strategy didn't come from nowhere. For more than 100 years, labor advocates have argued that unions can survive only by forming closer bonds with the state. In the Assumptions of Trade Unionism,<sup>56</sup> Sidney and Beatrice Webb predicted that unions would inevitably evolve into quasi-public agents. As post-industrial economies became more complex, the government would intervene more and more directly in labor markets.<sup>57</sup> It would seek to control the markets through centralized regulations and expert administration.<sup>58</sup>

And as it did, it would displace the traditional role of unions.<sup>59</sup> Unions would no longer need to bargain over wages and working conditions.<sup>60</sup> Instead, they would serve the government as advisors.<sup>61</sup> They would help government regulators by investigating and informing them about conditions in the workplace.<sup>62</sup> In effect, they would be the government's eyes and ears.<sup>63</sup> Their constituents would no longer be the workers themselves; at least, not directly. Their first loyalties would lie with the state.<sup>64</sup>

56 See Sidney & Beatrice Webb, *The Assumptions of Trade Unionism*, in *Theories of the Labor Movement 193206* (Simeon Larson & Bruce Nissen, eds., 1987) [hereinafter *Assumptions of Trade Unionism*]. See also Sidney & Beatrice Webb, *Industrial Democracy* 557–603 (1897), <http://digamoo.free.fr/webb1897.pdf>.

57 *Id.* at 199.

58 *Id.*

59 *Id.* at 202.

60 *Id.*

61 *Id.* at 204.

62 *Id.* at 203–04.

63 See *id.*

64 See *id.* (arguing that government intervention would inevitably drive unions toward more centralized, government-driven policy solutions). See also Gitlow, *supra* note [], at 55–56 (describing the Webbs' government-led theory as an alternative to private monopolization of labor markets by unions).



The Webbs were British economists; they were thinking about nineteenth-century England.<sup>65</sup> But they could just as easily have been describing twenty-first-century America. Today, the American administrative state touches nearly every part of the economy, including the workplace.<sup>66</sup> It sets rules for topics ranging from wages to workplace safety and everything in between.<sup>67</sup> And much of its growth came in the second half of the twentieth century—the period of labor’s steepest decline.<sup>68</sup>

This correlation has not been lost on labor unions or their allies. Unions know that the administrative state is here to stay. So if they want to stay relevant, they must attach themselves to the government.<sup>69</sup> That is, they must find a way to capture and control the regulatory process.<sup>70</sup>

65 See Sidney and Beatrice Webb, Britannica (April 15, 2024), <https://www.britannica.com/biography/Sidney-and-Beatrice-Webb>.

66 See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1236 (1994) (“There is now virtually no significant aspect of life that is not in some way regulated by the federal government.”).

67 See, e.g., 29 U.S.C. § 201–62 (Fair Labor Standards Act, regulating minimum wages, overtime, and child labor, among other things); 29 U.S.C. § 651–78 (Occupational Health and Safety Act, regulating workplace safety); 29 U.S.C. § 2601 (Family Medical Leave Act, regulating unpaid family and medical leave); Rest Periods/Lactation Accommodations, Cal. Dep’t of Indus. Rels. (April 2021), [https://www.dir.ca.gov/dlse/faq\\_restperiods.htm](https://www.dir.ca.gov/dlse/faq_restperiods.htm) (describing mandatory paid breaks under California law); Predictive Scheduling, Or. Dep’t of Lab. & Indus., <https://www.oregon.gov/boli/workers/pages/predictive-scheduling.aspx> (describing Oregon laws regulating notice and penalties related to changes in employee schedules). See also A.B. 2751, Reg. Sess. (Cal. 2024) (proposing to give employees the “right to disconnect” during unscheduled hours).

68 See Katz, supra note [] (noting that unions have undercut their own value by pushing for mandatory work standards). See also Alexander T. MacDonald, Permanent Replacements: Organized Labor’s Fall, Employment Law’s (Incomplete) Rise, and the Way Forward, 50 Idaho L. Rev. 19, 20, 26–27 (2013) (“[U]nions no longer occupied an exclusive position in regard to securing workplace rights; new employment laws had eroded their claim to an essential role in the American workplace.”).

69 See Estreicher, supra note [], at 418 (“We are now, however, beginning to see a qualitative change in labor’s relationship to the state: trade unionism as a supplement to politics. Labor’s economic objectives have not changed; the means are undergoing substantial transformation”). See also David J. Saposs, Voluntarism in the American Labor Movement, 77 Monthly Lab. Rev. 967, 967 (1954) (observing that unions have “become adherents of the concept of Government intervention in economic and social affairs and have found in profitable to engage extensively in political action”).

70 See Schuler Q&A, supra note [] (“We need to elect people, especially union members, who share our values and who put worker first. That will result in guaranteed change.”). See also The Steward as Political Organizer, Serv. Emps. Int’l Union, <https://www.seiu.org/cards/the-complete-stewards-manual/the-steward-as-political-organizer/p19> (“To protect our members’ interests, the union must be involved in electing candidates who will pass and enforce laws which will increase and protect our rights and benefits.”); Q&A: AFL-CIO President Liz Schuler on Organizing, Infrastructure, Diversity, and How Proud She Is of Her Home Union, IBEW.org (Aug. 8, 2022), [http://www.ibew.org/media-center/Articles/22Daily/2208/220808\\_AFL-CIOPresident](http://www.ibew.org/media-center/Articles/22Daily/2208/220808_AFL-CIOPresident) [hereinafter Schuler Q&A] (“We can’t just get out the vote every four years[;] we have to be active participants in every voting cycle. And that is where our focus lies.”).

# Regulatory Tactics

That insight has birthed a variety of regulatory tactics. While the tactics themselves differ in their details, they all rely on public processes to maintain union power. And because, they argue, none of them involves bargaining in the traditional sense, they can all—at least on the surface—avoid federal preemption.

## Labor standards boards

First among these tactics are “labor standards” boards. Labor-standards boards are quasi-private, quasi-public regulatory bodies. They include representatives from unions, employees, employers, and the government. These representatives “negotiate” over wages and working conditions for a specified sector. The resulting agreement then goes to some public entity for final approval. If that entity approves, the agreement becomes binding law—just like any other regulation.<sup>71</sup>

This model is not new. Standards boards were popular during the Progressive movement and the early New Deal.<sup>72</sup> They made appearances in early state wage laws, as well as the ill-fated National Industrial Recovery Act (NIRA).<sup>73</sup> They even showed up in the original Fair Labor Standards Act (FLSA).<sup>74</sup> But largely, they were seen as policy failures. The NIRA’s boards were dominated by entrenched businesses, which used the regulatory process to disadvantage their rivals.<sup>75</sup> And the FLSA’s boards were often stacked with union officials, even in industries with few unionized workers.<sup>76</sup> They were quickly disbanded and forgotten for much of the twentieth century.<sup>77</sup>

71 See generally Estlund, *supra* note [] (describing tripartite standards-board model); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 *Yale L.J.* 616 (2019) (describing model as it functioned under the original FLSA).

72 See Frank T. de Vyver, *Regulation of Wages and Hours Prior to 1938*, 6 *L. & Contemporary Problems* 323, 327 (1939) (describing tripartite boards convened to set minimum wages in Massachusetts, Wisconsin, Minnesota, Oregon, California, Utah, Colorado, Nebraska, and District of Columbia). See also Michael Lotito et al., *California Could Revive the Industrial Welfare Commission*, *Littler Insight* (June 26, 2023), <https://www.littler.com/publication-press/publication/california-could-revive-industrial-welfare-commission> (describing California’s history of wage regulation through tripartite board procedures).

73 See National Industrial Recovery Act, Pub. L. 73-67, §§ 3, 7(a), 48 Stat. 195 (1933) (authorizing creation of private codes of fair competition to govern, among other things, minimum wages within an industry, as approved by the president).

74 See Fair Labor Standards Act of 1938, ch. 676, § 8(a)–(e), 52 Stat. 1060, 1064 (establishing tripartite industry boards to set sectoral wage levels).

75 See Andrias, *supra* note [], at 657. See also James Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law 1933-37*, at 66 (1974) (observing that tripartite “partisan” structure used under original National Labor Board was also widely seen as a failure).

76 See Andrias, *supra* note [], at 671 (noting that every single “employee” representative was chosen from a union, even in largely nonunion industries). Cf. Gross, *supra* note [], at 87 (observing that contemporary employers mistrusted the tripartite National Labor Board because they suspected that only employer representatives with union sympathies were chosen).

77 See César F. Rosado Marzán, *Can Wage Boards Work in America?*, *LPE Project* (April 3, 2023) (commenting on repeal of FLSA boards in the 1940s).

But now, unions are reviving them with alacrity.<sup>78</sup> In 2016, the SEIU pushed New York lawmakers to reconvene a long-dormant wage board to set minimum pay for the fast-food industry.<sup>79</sup> And other states quickly followed suit. Since 2018, no fewer than six states and three local governments have adopted their own quasi-public standards boards:

## Seattle

Seattle has been the most active player. Even before New York convened its wage board, Seattle created a wage-setting scheme for rideshare drivers.<sup>80</sup> Though styled as a collective-bargaining system, the scheme functioned less like bargaining and more like a standards board. It required “driver coordinators” to bargain with a union about compensation and terms of work. Those terms were then reviewed by a city official. And if the terms met certain criteria, the official promulgated them as regulations.<sup>81</sup>

This scheme was struck down in 2018 for violating federal antitrust law.<sup>82</sup> But the city was undeterred. The same year, it created the Domestic Workers Standards Board.<sup>83</sup> This new board had thirteen members representing a mix of government, domestic workers, and service recipients. It also included members from organizations “representing” workers.

Collectively, the board was instructed to develop and propose new laws for the city council. And in its first set of proposals, it recommended more funding for “community groups” to organize workers.<sup>84</sup> It also recommended that the city explore new ways to promote collective bargaining.<sup>85</sup>

78 See David Madland, Sectoral Bargaining Can Support High Union Membership, Ctr. for Am. Progress (May 30, 2024), <https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership/> (describing recent burst of standard-board laws at state and local levels).

79 See Minimum Wage for Fast Food Workers, N.Y. State Dep’t of Labor, <https://dol.ny.gov/minimum-wage-fast-food-workers-frequently-asked-questions>. See also Rosado Marzán, *supra* note [] (describing effort).

80 See Seattle Ord. No. 124968 (2015).

81 *Id.* See also For-Hire Driver Representation and Collective Bargaining, Seattle Fin. & Admin. Servs. (June 2017), <https://www.seattle.gov/documents/Departments/FAS/RegulatoryServices/collective-bargaining/general-information.pdf> (describing bargaining and regulatory scheme).

82 Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769, 788 (9th Cir. 2018).

83 See Seattle Mun. Code ch. 14.23.

84 also Seattle Domestic Workers Standards Board: 2020-22 Workplan, <https://www.seattle.gov/documents/Departments/LaborStandards/DWSB%202020-2022%20Workplan%20Final.pdf>.

85 Seattle Domestic Workers Standards Board: Report and Recommendations to City Council and Mayor (April 2021), [https://www.seattle.gov/documents/Departments/LaborStandards/DWSB%20Recs\\_FINAL\\_040621.pdf](https://www.seattle.gov/documents/Departments/LaborStandards/DWSB%20Recs_FINAL_040621.pdf).

## New York

Not to be outdone, New York state created its own new board—the Farm Laborers Wage Board.<sup>86</sup> This board was charged with investigating conditions in the agricultural industry and recommending regulations to the state labor commissioner. It was supposed to base those recommendations on evidence gathered from the workers themselves. But in practice, few workers participated in the board’s hearings.<sup>87</sup> Most testimony came from worker “advocates” and left-of-center policy groups.<sup>88</sup>

Lack of evidence aside, the board recommended that the state increase minimum compensation by reducing the legal overtime thresholds.<sup>89</sup> The commissioner then accepted those recommendations without change and adopted them as regulations.<sup>90</sup>

86 N.Y. Lab. L. § 674-a.

87 See Farm Laborers Wage Board: Final Report 17 (2022), <https://dol.ny.gov/system/files/documents/2022/09/farm-workers-wage-report-and-recommendations-final.pdf>

88 See *id.* at 12–13 (identifying, among others, the National Employment Law Project and the Economic Policy Institute).

89 *Id.* at 19.

90 Order of Commissioner of Labor Roberta Reardon on the Report and Recommendations of the 2022 Farm Laborers Wage Board (Sept. 22, 2022), [https://dol.ny.gov/system/files/documents/2022/09/fwwb\\_signed\\_order\\_093022.pdf](https://dol.ny.gov/system/files/documents/2022/09/fwwb_signed_order_093022.pdf).

## Philadelphia

The same year, Philadelphia enacted the Domestic Workers Standards and Implementation Task Force.<sup>91</sup> Like other standards boards, the Task Force included representatives from local government, workers, and employers. It was directed to investigate working conditions and recommend new laws to the city council. But unlike other boards, it made no effort to hide its pro-union structure. It explicitly assigned seats on the board to a specific labor organization—the Domestic Workers Alliance.<sup>92</sup>

91 See City of Philadelphia, Resolution Calling for the Creation of a Domestic Workers Standards and Implementation Task Force (2019), <https://phlcouncil.com/wp-content/uploads/2019/10/Domestic-Workers-Standards-and-Implementation-Task-Force-1.pdf>.

92 *Id.*



## Colorado

Two years later, Colorado set up the Agricultural Advisory Board.<sup>93</sup> The board had nine members, including three employer representatives, two worker representatives, and two “advocates of worker rights.” The remaining members came from the Colorado Legal Services Division of Migrant Rights—effectively ensuring that employers would be outvoted.<sup>94</sup>

Colorado also created a board for “direct care” workers.<sup>95</sup> This board included employer, worker, and public representatives. It was empowered to investigate industry conditions and recommend new legislation. And uniquely, it was instructed to consider any standards set by collective-bargaining agreements.<sup>96</sup>

## Nevada

The same year, Nevada created a board for home-care workers.<sup>97</sup> This board included representatives from employers, employees, care recipients, and the government. It was empowered to subpoena records, hold hearings, take testimony, and recommend policies to a state commissioner.<sup>98</sup> Among its first recommendations was to raise the minimum wage to \$15 an hour—money that would come largely from the taxpayers.<sup>99</sup>

## Detroit

In 2021, Detroit authorized “industry standards boards.”<sup>100</sup> These boards could be convened for “any industry.”<sup>101</sup> And once convened, a board could investigate the industry, hold hearings, take testimony, and recommend new regulations to the mayor and city council.<sup>102</sup> These recommendations might include wages, working conditions, benefits, and to ways to improve “compliance” with city and state laws.<sup>103</sup>

93 Colo. Rev. Stat. § 8-13.5-205.

94 Id. § 8-13.5-205(1)(a).

95 Colo. Rev. Stat. § 8-7.5-104.

96 Id. § 8-7.5-104(1)(b)(IV).

97 Nev. Rev. Stat. 608.640.

98 Id.

99 Letter from Cody Phinney Chair of the Home Care Employment Standards Board Deputy Administrator, to Director Richard Whitley, MS, Department of Health and Human Services (June 29, 2022), <https://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/Programs/HCESB/Recommendation%20to%20Director%20Rates%20and%20Wages.pdf>.

100 Detroit Ord. No. 2021-42 (Nov. 3, 2021), <https://detroitmi.gov/sites/detroitmi.localhost/files/2022-04/Industry%20Standards%20Ordinance.pdf>.

101 Detroit City Code § 12-11-4(a).

102 Id. § 12-11-61.

103 Id. § 12-11-63(4).

# California

Finally, in 2023, California created the Fast Food Council.<sup>104</sup> The Council was a statewide, tripartite body with the power to develop standards for the fast-food industry. It included members ostensibly representing employees, employee advocates, franchisors, and franchisees, as well as the government.<sup>105</sup>

In many ways, the Council's powers were broader than those of other boards. The Council could promulgate standards on wages, hours, and working conditions for every covered restaurant in the state.<sup>106</sup>

Those standards were to be sent to the state labor commissioner, who could review them only to ensure they met statutory criteria.<sup>107</sup> If they met the criteria, the commissioner would promulgate them as regulations through the state's administrative process.<sup>108</sup>

But broad as those powers were, they were modest compared to the Council's original design. Adopted in 2021, the original Council would have had the power to "establish sectorwide minimum standards on wages, working hours, and other working conditions."<sup>109</sup> Those standards would have preempted any conflicting regulations issued by state agencies.<sup>110</sup>

104 AB 1228 Reg. Sess. (Cal. 2023).

105 Id. See also AB 1228 – Fast Food Council, Cal. Dep't of Indus. Rels., <https://www.dir.ca.gov/AB1228/AB1228.html> (last visited June 11, 2024) (describing composition and function of council).

106 Cal. Lab. Code § 1475.

107 Id. § 1475(d)(1)(C)(iii).

108 Id.

109 AB 275, Reg. Sess. (Cal. 2022–23).

110 Id.



But the restaurant industry recoiled at the prospect of a union-led regulator, and it launched a referendum to repeal the law.<sup>111</sup> Lawmakers negotiated with the industry and agreed to scale back the Council’s authority.<sup>112</sup> They also agreed to remove a provision that would have made franchisors jointly liable with franchisees—but only once the industry withdrew its referendum.<sup>113</sup>

These boards are unlikely to be the last of their kind. Others have already been proposed, some with even broader authority. For example, California is considering a new board for janitorial services with powers much like the Fast Food Council.<sup>114</sup> New York is considering a nail-salon board with authority not only over wages and working

conditions, but also minimum prices.<sup>115</sup> And Minneapolis is considering a board that will reportedly have power over a broad range of industries, including childcare, construction, and food service.<sup>116</sup>

At first, it may seem odd that these boards would attract so much energy from labor. They offer few immediate financial rewards. While they often allocate seats to union representatives, the seats pay only a modest per diem at best. Nor do the boards give unions any immediate new members.<sup>117</sup> New members are a union’s lifeblood: they pay the dues that keep unions afloat.<sup>118</sup> But the boards force no one to join a union, much less to pay dues.<sup>119</sup> This is what some in labor call the “business model” problem.<sup>120</sup>

111 See Aneurin Canham-Clyne, Restaurant Groups Push to Repeal California’s Fast Food Council Law, *Restaurant Dive* (Sept. 8, 2022), <https://www.restaurantdive.com/news/california-fast-food-organizes-referendum-ab-257/631395/>.

112 See California Increases Minimum Wage Protections for Fast-Food Workers, Governor Gavin Newsom (Sept. 28, 2023), <https://www.gov.ca.gov/2023/09/28/california-increases-minimum-wage-protections-for-fast-food-workers/> (describing the deal).

113 See Michael Lotito et al., New California Worker Law Would Raise the Minimum Wage, Establish a “Fast Food Council,” and No Longer Fund the Industrial Welfare Commission, *Little Insight* (Sept. 12, 2023), <https://www.littler.com/publication-press/publication/new-california-fast-food-worker-law-would-raise-minimum-wage-establish#:~:text=The%20law%20created%20a%20%E2%80%9CFast,of%20fast%20food%20restaurant%20workers.>

114 See AB 2364, Reg. Sess. (Cal. 2024). See also Oppose AB 2364 and AB 2374, Cal. Bus. Properties Ass’n, <https://cbpa.com/Janitorial-Bills> (describing bill and proposed council).

115 SB S1800 Reg. Sess. (N.Y. 2023-24). See also News Release: Ramos, Bronson Introduce New Legislation to Establish Minimum Standards Council for Nail Salon Industry (Jan. 26, 2022), <https://www.nysenate.gov/newsroom/press-releases/2022/jessica-ramos/immediate-release-ramos-bronson-introduce-new> (describing prior version of the same legislation).

116 See Report to the City Council from the Pub. Health & Safety Committee (Feb. 14, 2024), <https://lms.minneapolismn.gov/Download/CommitteeReport/3596/PHS-02142024-CommitteeReport.pdf> (stating that ordinance would create “a new Article VIII creating a process to establish a Labor Standards Board study and report on working conditions in specific industries”). See also Susan Du & Katelyn Vue, Minneapolis Mayor, City Council Members Propose New Labor Board to Address Worker Dissatisfaction, *Minneapolis Star Tribune* (June 15, 2022), <https://www.startribune.com/minneapolis-mayor-city-council-members-to-create-a-new-labor-board-to-address-worker-dissatisfaction/600182460/> (describing proposal).

117 See Madland, *supra* note [] (describing worries among labor advocates that the boards do not lead directly to new members, and may even discourage people from joining unions).

118 See Gitlow, *supra* note [], at 108 (observing that unions receive the vast bulk of their funding from membership dues). See also James Sherk, Unions Charge Higher Dues and Pay their Officers Larger Salaries in Non-Right-to-Work States, *Heritage Foundation* (Jan. 26, 2015), <https://www.heritage.org/jobs-and-labor/report/unions-charge-higher-dues-and-pay-their-officers-larger-salaries-non-right> (describing unions as a business like any other and relying on the revenues they collect from membership dues).

119 See Madland, *supra* note [].

120 Estlund, *supra* note [], at 586.



But many in labor think standards boards do have a business model—albeit an indirect one. While the boards may not force anyone to join a union, they do give unions access to potential members.<sup>121</sup> Unions can use the boards’ investigative powers to learn more about unorganized firms and contact those firms’ employees.<sup>122</sup> They can also leverage the prestige they get from their official board sets. Once they’re on the board, they’re no longer just private organizations: they’re quasi-public officials with governmental authority. That authority lends them a sheen of legitimacy, which they can use to attract new members.<sup>123</sup>

Unions can also use the standard-setting process as a focus for organizing. For example, in Nevada, the SEIU rallied thousands of homecare workers to advocate for new work standards.<sup>124</sup> That effort helped it organize new members and win a series of elections.<sup>125</sup> And learning from that experience, the union is using a similar strategy in California. Even before the Fast Food Council had its first meeting, the SEIU sought to benefit from the Council’s influence by launching a new affiliate—the “California Fast Food Workers Union.”<sup>126</sup>

121 See Madland, *supra* note [] (describing boards and other sectoral systems as tools for organizing).

122 See, e.g., Nev. Rev. Stat. § 608.640 (giving board broad investigatory powers, including power to subpoena records); S.B. S1800, Reg. Sess. (N.Y. 2023-24) (same).

123 *Id.* (arguing that sectoral systems like wage boards incentivize workers to join unions so they can influence the union’s activities at the sectoral level). See also California Fast Food Workers Union Launched!, SEIU (Feb. 22, 2024), <https://www.seiu.org/blog/2024/2/california-fast-food-workers-union-launched> (announcing launch of new affiliate union to coincide with first meetings of Fast Food Council).

124 See McKenna Ross, Nevada Workers in Growing Health Care Industry and Unionizing, *Las Vegas Rev.-J.* (Aug. 31, 2023), <https://www.reviewjournal.com/business/nevada-workers-in-growing-health-care-industry-are-unionizing-2896793/>.

125 *Id.* See also Madland, *supra* note [] (describing the organizing effort).

126 See The Fast Food Council, Fast Food Workers Union, <https://californiafastfoodworkersunion.org/about/the-fast-food-council/> (last visited June 11, 2024) (landing page for the Fast Food Workers Union using the Fast Food Council as a rallying point). Ironically, this “California” union has a mailing address in Washington, D.C. *Id.*

Beyond organizing, standards boards also help unions in another way: they suppress competition. Unionized firms often have higher labor costs than their nonunion competitors.<sup>127</sup> They sometimes pay above-market wages and benefits, which means they have higher costs for each unit of labor.<sup>128</sup> But standards boards set minimum costs for all firms, union and nonunion alike.<sup>129</sup> In other words, they help erase cost disadvantages and protect union jobs.<sup>130</sup>

At bottom, then, standards boards are an anticompetition strategy. They homogenize labor standards across an industry and therefore eliminate competition over labor.<sup>131</sup> This loss of competition may raise prices and harm consumers.<sup>132</sup> But to unions, it is a feature, not a bug. The unions' goal is not to improve competition, or even control it. Their goal is to eliminate it.<sup>133</sup>

127 See Laura Feiveson, Labor Unions and the U.S. Economy, U.S. Dep't of Treasury (Aug. 28, 2023), <https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy> (describing this difference as a “union wage premium”).

128 See James Sherk, What Unions Do: How Labor Unions Affect Jobs and the Economy, Heritage Foundation (May 2009), <https://www.heritage.org/jobs-and-labor/report/what-unions-do-how-labor-unions-affect-jobs-and-the-economy> [hereinafter What Unions Do]. See also Haufeng Chen et al., Labor Unions, Operating Flexibility, and the Costs of Equity, 46 J. of Fin. & Quantitative Analysis 25, 26 – 26 (2011) (concluding that unionized firms have higher on average equity costs because of reduced operating flexibility).

129 See Bruce Western & Jake Rosenfeld, Unions, Norms, and the Rise in U.S. Wage Inequality, 76 Am. Sociological Rev. 513, 518–19 (2011) (arguing that standards boards and “prevailing wage” laws promote “distributional equality” and “reduce[] the difference between union and nonunion wages”).

130 See Madlund, supra note [] (explaining that sector-wide standards promote unionism by reducing or eliminating competition over labor costs); Estlund, supra note [], at 559 (same).

131 See Estlund, supra note [], at 559 (“Sectoral standards can partially avoid the Achilles’ heel of enterprise-based collective bargaining by constraining labor-cost-based competition from non-union firms, including new entrants, and by forcing firms to compete instead through higher productivity, quality, and innovation.”).

132 See What Unions Do, supra note [] (explaining that unions “function as labor cartels” and “retard economic growth and delay recovery from recession”).

133 See Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940) (explaining that “an elimination of price competition based on differences in labor standards is the objective of any national labor organization”); Gitlow, supra note [], at 146 (“Their aim is to reduce or eliminate competition, from the supply side, in the labor market.”).

## Sectoral wages

Beyond standards boards, unions have also suppressed competition with more traditional legislation. A familiar example is the minimum wage. Unions have long supported higher minimum wages.<sup>134</sup> Minimum wages tend to raise pay throughout the jurisdiction (even for people who already make more than the minimum wage).<sup>135</sup> And by the same token, they also tend to reduce wage competition.<sup>136</sup>

But recently, unions have refined that strategy by pushing for wage increases in specific industries. These industries are often those where unions have tried and failed to organize workers before.<sup>137</sup> Unions think that by raising wages throughout an industry, they can reduce employers' resistance to organizing.<sup>138</sup>

After all, if everyone has to pay high wages, union-scale wages are less of a competitive albatross.<sup>139</sup> And that means employers have less incentive to fight union campaigns.

Again, California offers the clearest examples. The state's unions have lobbied for—and passed—legislation to raise the minimum wage in the healthcare, hospitality, and fast-food industries. In West Hollywood, some hotels must now pay almost \$20 an hour.<sup>140</sup> In the fast-food industry, employers must also pay \$20 an hour.<sup>141</sup> And across the state, healthcare facilities must soon pay \$25 an hour.<sup>142</sup> These wages range from 22% to 48% higher than the statewide minimum (now \$16).<sup>143</sup> And all of them are set to rise in lockstep with inflation.<sup>144</sup>

134 See, e.g., Workers in the Fight of \$15 and a Union Help Announce the 2021 Raise the Wage Act with Members of Congress, SEIU (Jan. 28, 2021), <https://www.seiu.org/blog/2021/1/workers-in-the-fight-for-15-and-a-union-help-announce-the-2021-raise-the-wage-act-with-members-of-congress>; Letter Supporting Legislation that Would Raise Wages, AFL-CIO (July 18, 2019), <https://aflcio.org/about/advocacy/legislative-alerts/letter-supporting-legislation-would-raise-wages>.

135 See How Increasing the Federal Minimum Wage Could Affect Employment and Family Income, Cong. Budget Office (Jan. 30, 2024), <https://www.cbo.gov/publication/55681#:~:text=In%20general%2C%20increasing%20the%20federal,their%20family%20income%20would%20fall> (describing effect of higher minimum wages through multiple levels of income distribution).

136 See Estlund, *supra* note [], at 559 (explaining that sector-wide and sector-specific minimum wages tend to suppress competition over wages, albeit to different degrees).

137 See Madland, *supra* note [] (arguing that sectoral standards help unions most in “jobs that are inherently hard to organize, such as those with many small employers or heavily contracted, fissured industries” (internal quotation marks omitted)).

138 See *id.* (arguing that raising minimum standards across a sector reduces employers' incentive to fight union drives, “which can make organizing workers easier”).

139 See Estlund, *supra* note [], at 561, 562–63 (describing sector-specific wages as “opportunistic” ways to reduce employer opposition to unions in certain industries).

140 West Hollywood Ord. No. 24-13 (2024).

141 AB 1228 Reg. Sess. (Cal 2022) (codifying new wage rate at Cal. Labor Code § 1475(d)(2)(1)).

142 SB 525 Reg. Sess. (Cal. 2023–24) (codifying new wage rates at Cal. Labor Code §§ 1182.14–1182.15).

143 See News Release: California's Minimum Wage to Increase to \$16 per hour in January 2024 (Sept. 26, 2023), <https://www.dir.ca.gov/DIRNews/2023/2023-66.html>.

144 See Cal. Labor Code § 1475; Cal. Labor Code §§ 1182.14–1182.15; West Hollywood Ord. No. 24-13. See Estlund, *supra* note [], at 562–63 (explaining that higher standards “muffle” employer resistance and lead to more organizing. See also Ehrenberh & Smith, *supra* note [], at 523–24 (making a similar point about standard-setting through regulation).

Unions have not, however, limited their efforts to the Golden State. They have used the same tactic against unorganized industries in other places. For example, in New York City and Seattle, they pushed through minimum wages for app-based rideshare and delivery workers.<sup>145</sup> Though these workers tend to be independent contractors, both cities now require network companies to pay them an hourly minimum wage.<sup>146</sup> Those wages were also designed to mirror the minimum wage for employees.<sup>147</sup> That is, they were written to ensure that independent contractors could not offer a cost advantage over unionized (or union eligible) employees.<sup>148</sup>

Again, unions support these sector-specific wages in part to blunt competition.<sup>149</sup> But they also think high minimum wages will help them organize new members. They think that when workers know they can earn high wages in similar jobs, they're more likely to take risks with their current jobs—risks that might include protesting, picketing, or going on strike.<sup>150</sup> And that means hard-to-organize workers might be more willing to join unions.<sup>151</sup>

145 See Seattle Mun. Code §§ 14.33.050 (minimum compensation for “transportation network company” (TNC) drivers), 8.37.050 (minimum compensation for other app-based workers); N.Y. City Admin. Code §§ 19-549 (minimum compensation for for-hire drivers), 20-1522 (minimum compensation for app-based delivery workers).

146 See, e.g., Seattle Mun. Code § 14.33.050; N.Y. City Admin. Code § 20-1522.

147 See PayUp Legislation, Seattle City Council, <https://www.seattle.gov/council/issues/past-issues/payup> (stating that legislation was designed to pay app-based workers a “minimum wage”); N.Y. City Dep’t of Consumer & Worker Protection, Final Rule: Minimum Pay for Food Delivery Workers (July 12, 2023), <https://rules.cityofnewyork.us/rule/minimum-pay-for-food-delivery-workers-updated/> (explaining Department’s methods for calculating minimum-pay rates for app-based delivery workers).

148 See Caitlin Vega, What’s the Real Story on Dynamex?, Cal. Labor Fed’n (Aug. 13, 2018), <https://calaborfed.org/whats-the-real-story-on-dynamex/> (arguing that businesses who partner with independent contractors “unfairly” undercut firms that hire employees because they are able to take advantage of lower labor costs).

149 See, e.g., Cynthia Estlund, Part II: Why Sectoral Co-Regulation? OnLabor (May 22, 2024), <https://onlabor.org/part-ii-why-sectoral-co-regulation/> (“Sectoral labor standards . . . can also address the Achilles’ heel of enterprise-based bargaining by constraining labor-cost-based competition within the sector, and by forcing firms to compete instead through higher productivity, quality, and innovation.”). See also Alexander T. MacDonald, Fast Food, Minimum Wages, and the Pervasive Myth of Benevolent Unions: Why the Labor Movement Pushes for Stricter Labor Laws, FedSoc Blog (April 9, 2024), <https://fedsoc.org/commentary/fedsoc-blog/fast-food-minimum-wages-and-the-pervasive-myth-of-benevolent-unions-why-the-labor-movement-pushes-for-stricter-labor-laws> (explaining that unions support higher minimum wages to prevent competition from lower-cost substitutions).

150 See Cynthia Estlund, Part III: Some Questions About Sectoral Co-Regulation and Its Future, OnLabor (May 23, 2024), <https://onlabor.org/iii-some-questions-about-sectoral-co-regulation-and-its-future/> (arguing that sector-wide standards give workers more “leverage” and so may promote traditional organizing).

151 See Madland, supra note [] (arguing that higher minimum sectoral standards can boost labor organizing).

## Ballot initiatives

Unions have also pursued these same goals through ballot initiatives. In some states, a private group can put an initiative on an election ballot by collecting a certain number of signatures.<sup>152</sup> If voters approve the initiative, it becomes a law.<sup>153</sup> Unions have used that tool perhaps as much as any other single group.<sup>154</sup> And in fact, they have often used it to enact some of their most aggressive policies—policies that made even their usual legislative allies balk.<sup>155</sup>

A good example is the so-called tipped wage. The tipped wage is an alternative minimum wage paid to employees who also receive tips.<sup>156</sup> These employees can be paid less than the standard minimum wage as long as tips make up the difference.<sup>157</sup> In practice, tipped employees often earn much more than the minimum wage, in part because customers tip well to reward good service.<sup>158</sup> But unions dislike tipped wages for the same reason they dislike low minimum wages in general: they expose unionized firms to wage competition.<sup>159</sup> So unions have sponsored and funded tip-credit ballot initiatives in half-a-dozen states, as well as DC, to eliminate them.<sup>160</sup>

152 See Initiative and Referendum Processes, Nat'l Conference of State Legislatures (Jan. 4, 2022) (surveying state voter-initiative processes).

153 See, e.g., Cal. Const. art. II, § 10; Mass. Const. art. XLVIII.

154 See Majority Rules: The Battle for Ballot Initiatives, Ctr. for Work & Democracy, <https://cwg.asu.edu/projects/majority-rules-battle-ballot-initiatives> (last visited June 11, 2024) (collecting research).

155 See *id.* (reporting that in recent years, unions “have used citizen initiatives to pass policies that redistribute wealth, rights, and decisionmaking power”—policies often “treated as unrealistic or impractical in partisan politics”).

156 See, e.g., 29 U.S.C. § 203(m) (establishing alternative tipped wage under FLSA); Md. Lab. & Empl. Code § 3-419 (establishing alternative tipped wage under Maryland law).

157 See Md. Lab. & Empl. Code § 3-419.

158 See Keep the Tip Credit, Restaurant Ass'n of Md., <https://www.marylandrestaurants.com/save-the-tip-credit> (last visited June 11, 2024) (reporting that tip-earning servers in Maryland restaurants earn an average of \$27 an hour).

159 Cf. Naidu, *supra* note [], at 18 (“The simplest policy tool for mitigating the incentives for firms to fight unionization is to take labor standards out of competition by legislative action. Thus, higher minimum wages and employment regulations that bind even nonunion employers are effectively a pro-union policy.”); Estlund, *supra* note [], at 562 (explaining that unions support higher sectoral wages to “to capture a fair share of firm revenues, in firms and sectors where higher productivity and the structure of product-market competition allowed” and “to narrow the gap left by the decline of collective bargaining”).

160 See also Peter Romero, Keeping the Tip Credit Emerges as a Top Restaurant Concern for 2024, *Restaurant Bus.* (Feb. 7, 2024), <https://www.restaurantbusinessonline.com/workforce/keeping-tip-credit-quickly-emerges-top-restaurant-concern-2024> (noting that even some progressive jurisdictions have responded to business concerns about ending tip credit). But see Fact Sheet: Biden-Harris Administration Issues an Executive Order to Raise the Minimum Wage to \$15 for Federal Contractors, White House (April 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/fact-sheet-biden-harris-administration-issues-an-executive-order-to-raise-the-minimum-wage-to-15-for-federal-contractors/#:~:text=Eliminate%20the%20tipped%20minimum%20wage,level%20of%20the%20minimum%20wage> (ordering end to tipped minimum wage for federal contractors).



These initiative campaigns have often been misleading. Unions have attacked tipped wages as “subminimum” wages without explaining that tipped workers often earn far more than the statutory minimum.<sup>161</sup> They have also failed to note that without a tipped wage, employers often eliminate tips altogether, causing a net drop in workers’ earnings.<sup>162</sup> And in fact, even the initiatives themselves have sometimes been inaccurate. In Michigan, unions collected signatures on a petition that misdescribed which employers a new minimum wage would apply to. State election officials blocked the initiative for that reason, and the state supreme court affirmed.<sup>163</sup>

These initiatives have also devastated restaurants. In 2018, unions pushed through a ballot initiative banning the tipped wage in Washington, D.C.<sup>164</sup> The city council, however, saw the danger to restaurants and reinstated tipped wages.<sup>165</sup> Unions then returned to the ballot in 2021 and pushed through another ban.<sup>166</sup> The city council, in turn, scrambled to find other ways to help restaurants, such as by cutting the price of liquor licenses.<sup>167</sup> But the damage was already done: many restaurants fled the new policy and relocated out of the city.<sup>168</sup>

161 See Press Release: Poor People’s Campaign, One Fair Wage & SEIU Join Forces for Raise the Wage Moral Monday (Feb. 7, 2021), <https://www.poorpeoplescampaign.org/about/press/social-justice-leaders-police-policy-deaths/poor-peoples-campaign-one-fair-wage-seiu-join-forces-for-raise-the-wage-moral-monday/> (calling for “an end to the subminimum wage for tipped workers” alongside “expansion of union rights for all”); New Data: On Average, Tipped Workers Report Earning More than \$15-Per-Hour, Minimum Wage Facts & Analysis (April 15, 2021), <https://minimumwage.com/2021/04/15-per-hour-earnings-are-already-here-for-tipped-workers/>.

162 See Renee Hickman, How Tipped Minimum Wage Bans Have Shaken Out Across the U.S., *Eater* (Sept. 15, 2023), (noting that restaurants have responded to laws ending tip credits by raising prices, ending tipping policies, and adding service fees). Cf. also William E. Evan & David A. Macpherson, The Effect of the Tipped Minimum Wage on Employees in the U.S. Restaurant Industry, 80 *So. Econ. J.* 633, 634 (2014) (concluding that eliminating the tip credit reduces overall employment for tipped workers in restaurant industry).

163 See *Raise the Wage MI v. Board of Canvassers*, No. 166312, slip op. at 3–4 (Mich. May 31, 2024) (summarizing the controversy and resulting litigation and affirming the board’s decision to exclude the initiative).

164 See D.C. Initiative 77 (2018). See also Washington, DC, One Fair Wage, <https://www.onefairwage.org/washingtondc> (landing page for union-backed campaign).

165 See D.C. Law 22-196 (repealing Initiative 77). See also Fenit Nirappil, It’s Official: D.C. Council Has Repealed Initiative 77, Which Would Have Raised Pay for Tipped Workers, *Wash. Post* (Oct. 16, 2018), [https://www.washingtonpost.com/local/dc-politics/its-official-dc-council-has-repealed-initiative-77/2018/10/16/0532341a-d0b5-11e8-b2d2-f397227b43f0\\_story.html](https://www.washingtonpost.com/local/dc-politics/its-official-dc-council-has-repealed-initiative-77/2018/10/16/0532341a-d0b5-11e8-b2d2-f397227b43f0_story.html).

166 D.C. Initiative 82 (2022).

167 *Romeo*, supra note []. See also D.C. Act 25-427, § 201 (March 25, 2024) (directing the mayor to launch a publicity campaign to inform voters about the effects of the new ban on tipped wages, including “what consumers and businesses can expect in terms of implementation and any changes to existing practices and behaviors”).

168 See DC Restaurants Lost Hundreds of Jobs Since Initiative 82 Began, *Emp. Policies Inst.* (Nov. 2023), <https://epionline.org/release/dc-restaurants-lost-hundreds-of-jobs-since-initiative-82-began/>.

In other cases, voters have seen the risks ahead of time. In California, the SEIU-United Health Workers tried (and failed) for years to organize workers in dialysis clinics.<sup>169</sup> Finding no success, the union decided to pressure the industry with three successive ballot initiatives.<sup>170</sup> These initiatives would have damaged the industry in multiple ways, such as by capping a company’s profits and imposing minimum-staffing levels.<sup>171</sup> But the public saw the risk to dialysis services overall and voted each initiative down.<sup>172</sup> The last vote was especially resounding, with nearly seven in ten voters rejecting the union’s proposal.<sup>173</sup>

But those setbacks haven’t soured unions on the tactic. To the contrary, this election cycle, unions will launch a flurry of new initiatives.<sup>174</sup> In Ohio, they will ask voters

to end tipped wages.<sup>175</sup> In Oregon, they will ask voters to require “labor peace agreements” in the cannabis industry.<sup>176</sup> And in Massachusetts, they will ask voters to create a sectoral-bargaining scheme for app-based rideshare drivers<sup>177</sup>—the first since Seattle’s failed attempt in 2015.<sup>178</sup>

None of these initiatives will gain unions members immediately. Rather, they will follow labor’s anti-competition strategy. They will raise labor costs, depress competition, and (in labor’s view) seed the ground for future organizing.<sup>179</sup> They will be yet another way that unions are using public processes to expand their influence outside the NLRA.

169 Cathie Anderson, SEIU-UHW Swings a Dialysis Industry Giants: 500+ Workers Strike 21 Clinics Over 2 Days, Sacramento Bee (Sept. 25, 2023), <https://www.sacbee.com/news/local/health-and-medicine/article279798509.html>.

170 See Proposition 29: Dialysis Clinic Requirements Initiative (2022), [https://ballotpedia.org/California\\_Proposition\\_29,\\_Dialysis\\_Clinic\\_Requirements\\_Initiative\\_\(2022\)](https://ballotpedia.org/California_Proposition_29,_Dialysis_Clinic_Requirements_Initiative_(2022)). See also Samantha Young, Déjà Vu for California Voters on Dialysis, KFF Health News (Oct. 26, 2020), <https://kffhealthnews.org/news/california-voters-proposition-23-dialysis/>.

171 See Cal. Legislative Analyst’s Office, Analysis of Prop 29 (Nov. 2022), <https://lao.ca.gov/BallotAnalysis/Proposition?number=29&year=2022> (describing proposition’s requirements, including minimum staffing levels).

172 Election Results 2022 California – AP Projects: Californians Reject Prop 29, Law Requiring Medical Staff at Dialysis Centers, CBS News (Nov. 8, 2022), <https://www.cbsnews.com/losangeles/news/californians-projected-to-reject-prop-29-law-requiring-medical-staff-at-dialysis-centers/>.

173 See id.

174 See State Campaigns, One Fair Wage, <https://www.onefairwage.org/about> (listing half a dozen active campaigns).

175 See Initiative Petition: Raise the Wage Ohio (2024), [https://www.ohioattorneygeneral.gov/getattachment/3d285cd7-aeaa-4c65-948c-b1cea8a2da3a/Raise-the-Wage-Ohio-\(Re-Submission\).aspx](https://www.ohioattorneygeneral.gov/getattachment/3d285cd7-aeaa-4c65-948c-b1cea8a2da3a/Raise-the-Wage-Ohio-(Re-Submission).aspx).

176 See Initiative Petition: United for Cannabis Workers (Or. 2024), <https://sos.oregon.gov/admin/Documents/irr/2024/035text.pdf>.

177 See Initiative Petition 23-35: An Act Giving Transportation Network Drivers the Option to Form a Union (Mass. 2023), <https://www.mass.gov/doc/initiative-petition-for-an-act-giving-transportation-network-drivers-the-option-to-form-a-union-and-bargain-collectively/download>.

178 See City of Seattle, 890 F.3d at 788 (concluding that Seattle’s bargaining scheme for for-hire drivers violated federal antitrust law).

179 Naidu, *supra* note [], at 18 (arguing that “legislative action” to reduce competition is a “pro-union policy” because it blunts employer opposition).

## Labor peace agreements

Another common tactic to avoid the NLRA is so-called labor peace agreements.<sup>180</sup> These “agreements” are agreements in name only; they are often extracted as a condition of a government license or permit. But they are no less binding on employers or dangerous to employees. Once in place, they can give unions free access to employees and allow them to skip the federal election process entirely.<sup>181</sup>

In a nutshell, a labor-peace agreement is a contract under which a union and an employer agree to waive some of their rights under federal law.<sup>182</sup> For example, the union may

waive its right to picket or otherwise protest the employer’s business.<sup>183</sup> And the employer, for its part, may agree to stay neutral during an organizing campaign.<sup>184</sup> It may also let the union onto its property, give the union time to speak with employees, or even recognize the union based on signed authorization cards without a secret-ballot election.<sup>185</sup>

Unions like these agreements for obvious reasons. The agreements neutralize employer opposition, streamline organizing campaigns, and sidestep NLRA elections.<sup>186</sup> In effect, they make organizing easier and unionization more likely.<sup>187</sup>

180 See generally U.S. Chamber of Commerce, *Labor Peace Agreements: Local Government as Union Advocate* (2016), <https://www.uschamber.com/assets/archived/images/documents/files/laborpeaceagreements.pdf> [hereinafter *Local Government as Union Advocate*].

181 *Id.* at 1 (surveying common features and explaining that some jurisdictions have required them as a condition of participating in a city project).

182 *Id.* See also *What Is a Labor Employment Agreement?*, Cornell Inst. Lab. Rels., <https://www.ilr.cornell.edu/labor-and-employment-law-program/cannabis-and-workplace/what-labor-peace-agreement-under-mrta> (last visited June 11, 2024).

183 See Cal. Bus. & Prof. Code § 2000 (defining “labor peace agreement” as an agreement requiring, among other things, an agreement requiring a union to refrain from disrupting employer’s business).

184 *Id.* (“This agreement means that the applicant has agreed not to disrupt efforts by the bona fide labor organization to communicate with, and attempt to organize and represent, the applicant’s employees.”).

185 *Id.* See also *Mulhall v. Unite Here Loc. 355*, 667 F.3d 1211, 1213 (11th Cir. 2012) (describing private labor-peace agreement requiring, among other things, access to property and neutrality in organizing campaign).

186 *Mulhall*, 667 F.3d at 1214 – 15 (concluding that neutrality agreement was sufficiently valuable to union to potentially constitute a “thing of value” under section 302 of the Labor Management Relations Act).

187 See Richard Epstein, *The Case Against the Employee Free Choice Act 30–39* (2009) (explaining how card-check agreements advantage unions during organizing, in part by avoiding a secret-ballot election where employees can express their preferences without social pressure from organizers).



For the same reasons, most employers won't sign them. So to get them, unions have to apply political pressure.<sup>188</sup> But that kind of pressure requires a delicate legal balance. States and cities can't just demand that all employers sign labor-peace agreements; that kind of requirement would be preempted by the NLRA.<sup>189</sup> So instead, local governments have crafted labor-peace requirements under a little-known exception for "market participants."<sup>190</sup>

The market-participant exception stems from the logic behind preemption. The NLRA preempts inconsistent local regulations.<sup>191</sup> But it does not preempt the choices local governments make in the market.<sup>192</sup> When a government buys goods or services, it can generally choose to require that the seller meet certain labor-related standards.<sup>193</sup> Those standards are not regulations, per se; they are conditions the government puts on its own contracts. And because the standards relate to the government's own market activity, the argument is that they are not preempted by federal law.

188 See Press Release: UFCW Statement on Cannabis Resolution, UFCW (Aug. 4, 2023), <https://www.ufcw.org/press-releases/ufcw-statement-on-naacp-cannabis-resolution/> (endorsing emergency proposal to require labor-peace agreements in cannabis industry).

189 See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (holding that city could not condition renewal of license to operate can business on business's waiver of right to use economic pressure under NLRA). But see AB 2183 Reg. Sess. (Cal. 2022) (requiring "labor peace contracts" as a condition for secret-ballot elections in certain agricultural workplaces not covered by the NLRA).

190 See *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226–27 (1993).

191 *Brown*, 554 U.S. at 65.

192 *Bldg. & Const. Trades Council*, 507 U.S. at 226–27.

193 See *id.* (holding state's decision to condition participation in Boston Harbor cleanup project on project-labor agreement was not preempted because state was acting not as a regulator, but a market participant).

The first city to see the potential of that potential loophole was San Francisco. In 1980, the city required a major hotel chain to agree to “labor peace” as a condition of a development contract.<sup>194</sup> The city then extended this labor-peace requirement to other projects, including restaurant and hospitality developments.<sup>195</sup> The city squeezed those developments into the “market participant” exception by claiming that it had a “proprietary interest” in the projects’ success.<sup>196</sup> That interest typically came from a city property right or investment—leases, loans, and other financial incentives.<sup>197</sup> But regardless of the form, they were all used as excuses to sidestep preemption.<sup>198</sup>

That trick then spread to other states and cities. Pittsburgh amended its charter to require city contractors to sign labor-peace agreements.<sup>199</sup> New York state did the same for certain hotels and convention centers.<sup>200</sup> And Maryland extended the agreements to “video lottery terminals” (e.g., casino slot machines).<sup>201</sup>

194 See San Francisco Admin. Code § 23.51(10). See also Local Government as Union Advocate, *supra* note [], at 5.

195 See Local Government as Union Advocate, *supra* note [], at 5 (discussing additional requirements). See also City & Cnty. of San Francisco Airport Commission Rules and Regulations 12.1 (2023) [hereinafter SF Airport Regulations] (requiring certain city contractors at airport to sign labor-peace agreements).

196 See, e.g., SF Airport Regulations 12.1(A) (citing city’s interest in avoiding disruption to airport’s “smooth operations” and the “protection of [its] proprietary and financial interests”); San Francisco Admin. Code § 23.50(1) (citing city’s “proprietary interest” in certain real-estate developments).

197 See Local Government as Union Advocate, *supra* note [], at 5.

198 *Id.*

199 Home Rule Charter of the City of Pittsburgh § 161.30.1.

200 N.Y. Pub. Authorities L. § 2879-b(1)(c).

201 Md. State Govt. Code § 9-1A-07.

For years, these requirements were haphazard and sporadic.<sup>202</sup> But recently, they have exploded in the cannabis sector. Cannabis remains a controlled substance under federal law.<sup>203</sup> But in the states, it is increasingly legal: since 2012, twenty-four states and the District of Columbia have legalized or decriminalized its recreational use.<sup>204</sup> These states typically regulate cannabis businesses heavily and require firms up and down the supply chain to get licenses.<sup>205</sup> And many states have used those licenses to promote “labor peace.”<sup>206</sup>

Of the twenty-five that have legalized recreational use, eight now either require or incentivize a labor-peace agreement.<sup>207</sup> So almost overnight, the agreements have become a fixture of the cannabis industry.<sup>208</sup>

202 See, e.g., N.Y. City Admin. Code § 6-145 (requiring labor-peace agreements in certain “human services” contracts); Los Angeles Bd. of Airport Commissioners Res. 23437 (Oct. 15, 2007) (requiring labor-peace agreements for certain concessions contractors in city airport); D.C. Code § 32-852 (requiring labor-peace agreements for certain real-estate development projects in which the city asserts a “proprietary interest”).

203 See Kate Bryan, Cannabis Overview, Nat’l Conf. of State Legislatures (April 9, 2024) (noting that although many states have legalized recreational use, it remains a schedule I illegal substance under federal law).

204 Id.

205 See, e.g., How to Get Licensed, State of Rhode Island Dep’t of Health, <https://health.ri.gov/licenses/detail.php?id=280> (last visited June 11, 2023) (detailing cannabis licensing requirements); How to Apply for a License, Cal. Dep’t of Cannabis Control, <https://cannabis.ca.gov/applicants/how-to-apply/> (last visited June 11, 2023) (same). See also What are the Business License Requirements for a Cannabis Business, Wolters Kluwer (Jan. 25, 2023), <https://www.wolterskluwer.com/en/expert-insights/what-are-business-license-requirements-for-cannabis-businesses> (surveying requirements).

206 See, e.g., Frequently Asked Questions (FAQs) of the Medical Marijuana Final-Form Regulations, Pa. Dep’t of Health (March 8, 2023), <https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/OMM%20Perm%20Reg%20FAQs%20by%20Chapter.pdf>

(“Q: Can a medical marijuana organization be sanctioned for failure to comply with an executed labor peace agreement submitted with the permit application? A. Yes. . . . Failure to comply with an executed labor peace agreement submitted with the permit application is one non-exclusive example of a falsification that may result in a suspension or revocation of the permit.”); Labor Peace FAQs, Cal. Dep’t of Cannabis Control, <https://cannabis.ca.gov/labor-peace-agreements-for-cannabis-businesses/#:~:text=Who%20is%20required%20to%20enter,enter%20into%20labor%20peace%20agreements> (last visited June 11, 2024) (“Compliance with the terms of a labor peace agreement is a condition of state cannabis licensure.”).

207 Parker Purifoy, Cannabis Industry Mandates to Stay Union Neutral Come Up Short, Bloomberg Law (March 14, 2024), <https://news.bloomberglaw.com/daily-labor-report/cannabis-industry-mandates-to-stay-union-neutral-come-up-short>.

208 See, e.g., Cal. Bus. & Professions Code § 26051.1(a) (B) (“Compliance with the terms of an applicable labor peace agreement is a condition of licensure.”); 28 Pa. Code § 1141a.47(a)(1)(v) (authorizing suspension of license if applicant fails to maintain labor-peace agreement); 410 Ill. Comp. Stat. § 705/15-30 (c)(6) (giving five points to applicant that describes plan to enter labor-peace agreement); Del. Code tit. 4, § 1334 (requiring labor-peace agreement in cultivation facilities); Del. Code tit. 4, § 1337 (same in compassion centers); Del. Code tit. 16, § 4915A (same in compliance facilities); R.I. Gen. Laws § 21-28.11-12.2 (requiring labor-peace agreements for licensed facilities); N.Y. Cannabis Law §§ 64 (same for applicants), 66(5) (same for license renewals).

Not everyone agrees that states can do this. At least two cannabis companies have sued to invalidate the labor-peace requirements.<sup>209</sup> The companies have argued that the requirements are preempted by federal law, in part because the states are not truly acting as market participants. Rather, the states are using cannabis licenses to regulate labor relations.<sup>210</sup>

As of this writing, the lawsuits are still pending. But they have not slowed labor-peace agreements down. At least three more states are considering labor-peace requirements for cannabis companies.<sup>211</sup> These requirements are being pushed by unions, who see them as a gateway into an emerging industry.<sup>212</sup> The requirements represent yet another example of how unions are leveraging state power to sidestep federal law.

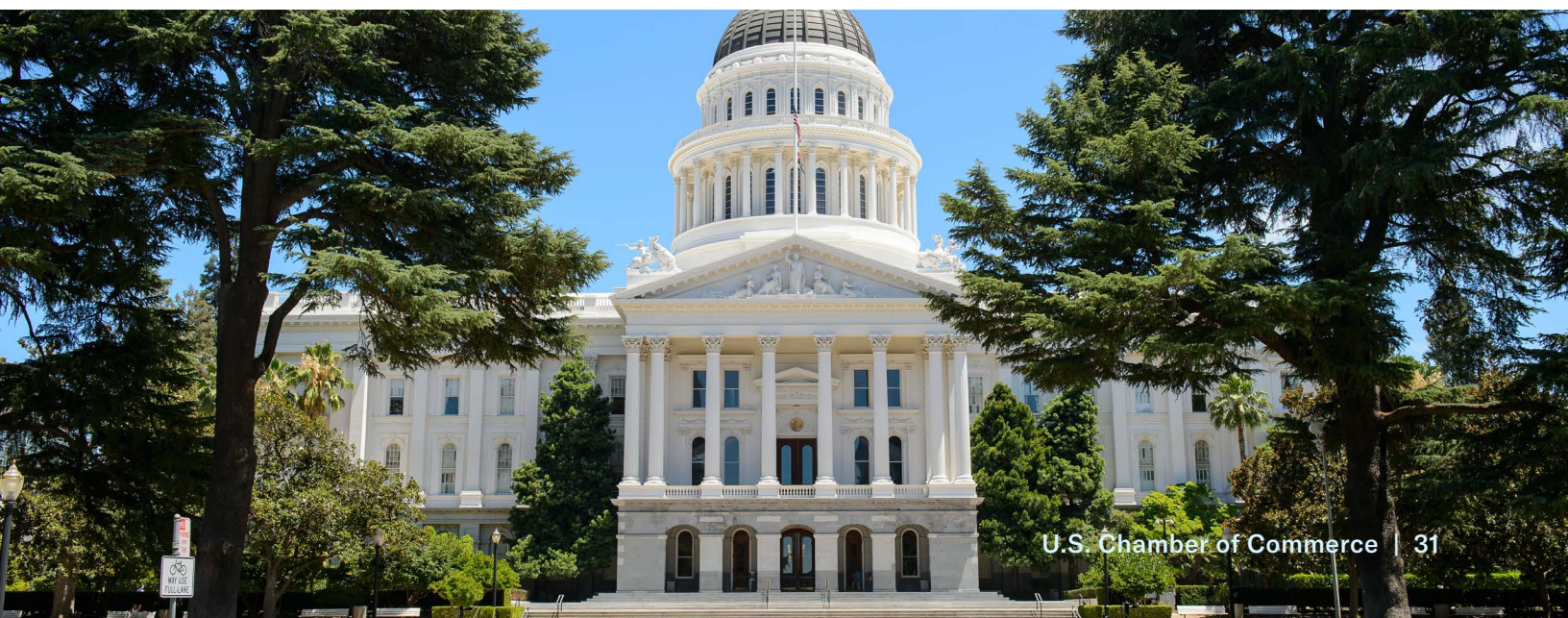
209 Compl., *Ctrl Alt Destroy, Inc. v. Elliot*, No. 3:24-cv-00753-LL-JLB (S.D. Cal. April 26, 2024); Compl., *Greenleaf Compassionate Care Center, Inc. v. Santacroce*, No. 1:23-cv-00282 (D. RI July 10, 2023).

210 See Compl., *Ctrl Alt Destroy*, No. 3:24-cv-00753-LL-JLB, ECF No. 1 ¶ 23 (“The LPA Sections constitute an attempt by [the state] to regulate [the company’s] labor relations in violation of the NLRA, which preempts such efforts.”); Compl., *Greenleaf Compassionate Care*, No. 1:23-cv-00282, ECF No. 1 ¶ 42 (“[T]he LPA Mandate clearly and necessarily infringes upon the balance struck by the NLRA and conflicts with its provisions, and therefore the Cannabis Act is preempted.”).

211 See SB 2598 Reg. Sess. (Mass. 2024) (“An Act to facilitate labor peace among the cannabis workforce.”); Md. Alco. Bev. Code § 36-402(e)(1) (directing state agency to develop regulations to “protect the State’s interests” by prohibiting a union from disrupting cannabis businesses and requiring the businesses to “negotiate in good faith with employees and any legitimate labor organization recognized by the [agency]” by July 1, 2024); Initiative Petition: *United for Cannabis Workers* (Or. 2024), <https://sos.oregon.gov/admin/Documents/irr/2024/035text.pdf>.

212 See, e.g., Comments of Kayla Mock, Political & Legislative Director United Food and Commercial Workers Union, Local 400, to the Honorable Chair Wilson, Vice Chair Crosby, and Members of the House Economic Matters Committee (Feb. 15, 2023), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/ecm/1gBps8TGpHlmtSbXtkTHZmlbII9TwP6FW.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/ecm/1gBps8TGpHlmtSbXtkTHZmlbII9TwP6FW.pdf); Ademola Oyefeso, Commentary: Labor Union Calls for Worker Protections in Final Cannabis Bill, *Maryland Matters* (April 3, 2023), <https://marylandmatters.org/2023/04/03/commentary-labor-union-calls-for-worker-protections-in-final-cannabis-bill/>.

See also Alexandra Sanderson, Will Cannabis Workers Be Able to Organize Using Labor Peace Agreements? A New Bill Would Say Yes, *Power at Work* (April 16, 2023), <https://poweratwork.us/labor-peace-agreement-story> (describing UFCW support for Massachusetts legislation).



## Foreign law

Nor have unions limited their efforts to domestic law. Increasingly, they have sought to avoid federal safeguards by using international law.

A recent example comes from a charge by the United Auto Workers (UAW) under the new German Supply Chain Due Diligence Law. The Supply Chain Due Diligence Law came into effect in 2023.<sup>213</sup> It requires large German companies to monitor their international operations and ensure that these operations comply with certain “human rights” principles.<sup>214</sup> The principles include some straightforward rules, such as rules against child and forced labor.<sup>215</sup> But they also include more nuanced concepts, such as the freedom of association and the right to form trade unions.<sup>216</sup>

In April 2024, the UAW became the first American union to file a complaint under the law.<sup>217</sup> The union was then campaigning to organize a Mercedes-Benz plant in Vance, Alabama. The union alleged that Mercedes-Benz violated the Supply Chain Law when it opposed the union’s efforts.<sup>218</sup> It claimed that, among other things, the company opposed unionization in a letter to the company’s employees.<sup>219</sup> It also alleged that the company held two mandatory meetings to address the union’s campaign.<sup>220</sup> That conduct was, of course, legal under federal labor law—not only legal, but protected.<sup>221</sup> Yet the union still claimed that it violated German law.<sup>222</sup>

213 See Supply Chain Act, Federal Ministry of Labor and Social Affairs, <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> (last visited June 11, 2024).

214 Id.

215 Id.

216 Id. See also Glenn Spencer, UAW Files Complaint with German Authorities Prior to Alabama Election, U.S. Chamber of Commerce (April 26, 2024), <https://www.uschamber.com/employment-law/unions/uaw-files-complaint-with-german-authorities-prior-to-alabama-election> (describing difficulty of applying freedom to form trade unions when domestic law, such as United States law, allows an employer to express its position on unionism).

217 Press Release: UAW Files Charges in Germany Against Mercedes-Benz: Company’s Anti-Union Campaign Against U.S. Autoworkers Violates New German Law on Global Supply Chain Practices, United Auto Workers (April 3, 2024), <https://uaw.org/uaw-files-charges-in-germany-against-mercedes-benz-companys-anti-union-campaign-against-u-s-autoworkers-violates-new-german-law-on-global-supply-chain-practices/#:~:text=The%20UAW%20is%20the%20first,rights%20to%20form%20trade%20unions> [hereinafter UAW Statement].

218 Id.

219 Id.

220 Id.

221 29 U.S.C. § 158(c); Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948) (confirming that employer may require attendance at meeting during work time to convey its position on unionism).

222 UAW Statement, supra note [].



That claim carried serious potential consequences. A company that violates the Supply Chain law faces heavy fines—€8 million or 2% of the company’s global annual turnover, whichever is more.<sup>223</sup> The company can also be barred from contracting with the German government.<sup>224</sup> So even if a charge has little substantive merit, its mere existence can exert significant pressure.<sup>225</sup>

But the UAW was not taking its chances with the mere possibility of pressure. It also exerted pressure directly through its allies in the Biden administration. According to media reports, UAW President Shawn Fain asked the administration to step in and press the German government to investigate the union’s charge.<sup>226</sup> And the administration duly obliged, sending U.S. National Security Advisor Jake Sullivan to lobby German authorities.<sup>227</sup>

The episode was sordid enough to attract attention from the press.<sup>228</sup> But that attention is unlikely to cool unions’ enthusiasm for international law. Germany is far from the only country with a supply-chain law; similar laws exist in the Netherlands and France.<sup>229</sup> And the European Union has approved a new directive on this issue to cover the entire bloc, which is intended to come into effect in 2026.<sup>230</sup> These laws offer unions yet another way to circumvent federal labor law.<sup>231</sup> And with a friendly administration in power, they can leverage their political influence to maximize the effect.

223 Supply Chain Act, Fed. Ministry of Lab. & Soc. Affairs, <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> (last visited June 11, 2024) (describing penalties).

224 *Id.*

225 See *id.* See also Harold Meyerson, American Workers Get Some Help from an Enlightened German Law, *Am. Prospect* (April 8, 2024), <https://prospect.org/labor/2024-04-08-american-workers-german-law-uaw-unions/> (describing pressure complaint could put on American employers).

226 See Ian Kullgren & Courtney Rozen, National Security Adviser Pressed Germany at UAW Chief’s Request, *Bloomberg Law* (June 7, 2024), <https://news.bloomberglaw.com/daily-labor-report/national-security-adviser-pressed-germany-at-uaw-chiefs-request>.

227 *Id.*

228 See *id.*

229 German Companies Fret About a New Supply-Chain Law, *Economist* (Jan. 12, 2023), <https://www.economist.com/business/2023/01/12/german-companies-fret-about-a-new-supply-chain-law>.

230 *Id.*

231 See Meyerson, *supra* note [] (arguing that Supply Chain Law allows unions to impose penalties on employers unavailable under the NLRA and thus exert greater pressure in organizing campaigns).

# Abusing the Proxy Process

Each year, public companies hold annual shareholder meetings to evaluate a company's performance, elect board directors, and discuss the business's priorities for the year ahead. At these meetings, companies consider proposals from shareholders interested in guiding corporate decision-making, and the company, in turn, relies on its broader shareholder base to vote on the merits of a proposal. Enabled by the current leadership at the Securities and Exchange Commission (SEC), public companies are increasingly forced to consider proposals from a handful of special interest, politically-motivated activist shareholders who do not have the long-term success of a company in mind.

Unions have long advocated using the shareholder proxy process to put pressure on the companies they target. For example, in the late 1990s, as the United Food and Commercial Workers (UFCW) was attempting to organize Albertson's grocery stores, the union purchased shares in the company – of which they needed as little as \$2,000 - and used them to file hostile shareholder resolutions at the

company's annual meeting.<sup>232</sup> As another example, the International Brotherhood of Teamsters used their shares to introduce a ban on “poison pill” defenses at Fleming Companies as early as 1996.<sup>233</sup>

Since that time, the AFL-CIO has introduced a series of proxy voting guidelines, describing their use of shareholder activism and listing proposed shareholder resolutions they support.<sup>234</sup> Examples of favored resolutions in the 2012 guidelines (the most recent posted on their website) include requiring companies to adopt codes of conduct focused on international labor standards (as opposed to following the NLRA), to impose supplier codes of conduct, to follow the CERES principles on environmental standards, to publicly disclose political contributions, to allow say-on-pay votes, and Board diversity to name a few.<sup>235</sup> The idea of the proxy voting guidelines is to encourage other unions and proxy voting services, such as Glass Lewis and ISS, to follow them, harnessing the power of numbers to amp up the pressure on targeted businesses.

232 “Realigning Corporate Governance: Shareholder Activism by Labor Unions,” Stewart J. Schwab and Randall S. Thomas, *Michigan Law Review*, Volume 96 Issue 4, 1998.

233 *Ibid.*

234 AFL-CIO Proxy Voting Guidelines, 2012.

235 *Ibid.*

The AFL-CIO also provides a list of “key votes” each proxy season.<sup>236</sup> In 2024, key votes covered issues like freedom of association, lobbying disclosure, tax transparency, climate change just transition, living wage, racial equity audits, and safety and staffing levels, among others.<sup>237</sup> Going further, the AFL-CIO then ranks investment managers against their key votes in an effort to pressure those managers to toe the union line.<sup>238</sup>

Individual unions also utilize shareholder advocacy to advance their goals. In addition to the two examples mentioned above, the Service Employees International Union (SEIU) is heavily engaged in shareholder activism through its Capital Stewardship program. One of its specific goals is to “offer workers greater opportunities for a voice on the job and pay fair wages and benefits.”<sup>239</sup>

Union shareholder resolutions tend to generate low levels of support. For example, a proposal to require Amazon to create a Board committee to oversee AI received just 9.6 percent of the vote, while a proposal by the IBT to require Tenet Health Care to integrate ESG considerations into executive compensation received just 5.35 percent.<sup>240</sup> Other proposals can score higher, although they still fall well short of a majority.

For example, an AFL-CIO proposal to require Wells Fargo to perform a third party audit of “respect for freedom of association and collective bargaining” received just over 30 percent of the vote, and an SEIU proposal at Eli Lilly to require a report on lobbying netted 25.5 percent.<sup>241</sup>

Whether these resolutions have anything to do with increasing shareholder value is, in many ways, beside the point for unions. Rather, they are meant to apply pressure on targeted companies regardless of whether they are ever adopted. In some cases, proposals that ultimately are withdrawn can be just as, if not more, effective as those that come to a vote. A prime example of this was the SEIU’s attempt to force a vote on their own board of director candidates at Starbucks in the 2024 proxy season. The SEIU and a partner, called the Strategic Organizing Center, nominated three director candidates. This occurred at a time when an SEIU offshoot, Starbucks Workers United, was unsuccessfully attempting to negotiate contracts with a number of Starbucks locations that had voted to unionize.<sup>242</sup> The nominations were withdrawn shortly before the announcement of a new negotiating framework between the company and Starbucks Workers United.<sup>243</sup>

236 AFL-CIO Key Votes 2024 Proxy Season available at [https://aflcio.org/sites/default/files/2024-03/2024\\_AFL-CIO\\_Key\\_Votes\\_as\\_of\\_3-11-2024.pdf](https://aflcio.org/sites/default/files/2024-03/2024_AFL-CIO_Key_Votes_as_of_3-11-2024.pdf)

237 Ibid.

238 AFL-CIO Key Votes Survey: How Investment Managers Voted in the 2023 Proxy Season, available at [https://aflcio.org/sites/default/files/2024-02/AFL-CIO\\_Key\\_Votes\\_Survey\\_2023.pdf](https://aflcio.org/sites/default/files/2024-02/AFL-CIO_Key_Votes_Survey_2023.pdf)

239 “All About Retirement Security,” SEIU website at <https://www.seiu.org/cards/all-the-educational-resources-you-need-to-be-a-leader>

240 Proxy Monitor, 2024 scorecard, at <https://www.proxymonitor.org/ScoreCard2024.aspx>

241 Ibid.

242 “Union-Backed Group Pushes Its Own Board of Director Candidates,” U.S. Chamber of Commerce at <https://www.uschamber.com/employment-law/unions/union-backed-group-pushes-its-own-board-of-directors-candidates>

243 Restaurant Dive, March 5, 2024.

Unfortunately for shareholders, the federal government has made this pressure tactic more effective in two important ways. First, on November 17, 2021, the Securities and Exchange Commission (SEC) adopted amendments to the proxy rules to require publicly-traded companies to use a universal proxy statement.<sup>244</sup> This became effective on January 31, 2022.<sup>245</sup> The result of this policy change was that it is now far easier for unions and other activists to nominate board of director candidates. Critics warned that the SEC's policy would "encourag[e] special-interest groups to conduct highly disruptive proxy fights."<sup>246</sup> As the Starbucks example shows, the critics were right. In future years, unions will almost certainly increase their use of board of director campaigns to gain leverage over employers, at the expense of retail investors and other market participants.

Second, the SEC has raised the bar for issuing so-called "no-action" letters to exempt shareholder proposals from consideration. In 2021, the SEC rescinded three Staff Legal Bulletins (SLB), replacing them with SLB 14L.<sup>247</sup> Prior to this action, shareholder proposals were required to have some business nexus to the company, in other words to have some potential for

increasing shareholder value. Companies receiving frivolous shareholder proposals could ask the SEC to issue a no-action letter, meaning the proposals did not have to be included on the company's proxy statement.

Under SLB 14L, the SEC changed the criteria for determining the relevance of shareholder proposals. The new standard asks: "whether the proposal raises issues with a broad societal impact, such as that they transcend the ordinary business of the company."<sup>248</sup> In other words proposals could now cover almost anything, including proposals that would have a negative impact on the company's performance. The result was that consideration of environmental and social proposals, including those advocated by unions, shot up by more than 50% by the 2023 proxy season.<sup>249</sup>

Prior to SLB 14L, unions had to make at least some sort of argument that their proposals were related to promoting shareholder value at a targeted company. Now, however, that safeguard has been erased. This has given organized labor another tool to pressure companies into granting concessions, at the expense of other shareholders, and another way to promote organizing outside of the NLRA.

244 SEC at [SEC.gov](https://www.sec.gov) | [Universal Proxy](#)

245 Ibid.

246 U.S. Chamber of Commerce letter to the SEC, 10/27/21

247 See SEC, Staff Legal Bulletin 14L at <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?>

The three rescinded bulletins were SLB's 14I, 14J and 14K.

248 Ibid.

249 U.S. Chamber letter to the SEC, 4/3/24 at [U.S.-Chamber-of-Commerece-Comments14a-8ProposalSupplemental-Final.pdf \(uschamber.com\)](#).



# The Future: Unions as Regulator

In 1897, Sidney and Beatrice Webb wrote that “political democracy will inevitably result in industrial democracy.”<sup>250</sup> By “industrial democracy,” they meant that workplaces would be governed less by private contracts and more by public regulations. The government would increasingly set working conditions by regulatory fiat. And unions, as their agents, would increasingly rely on government force.<sup>251</sup>

That observation seems prescient today. Through various tools, unions have used public processes to advance their agendas.<sup>252</sup> They have lobbied for standards boards,

pushed through wage legislation, sponsored ballot initiatives, extracted labor-peace agreements, leveraged foreign-supply chain laws, and even pressed companies through shareholder-proxy laws. These efforts may at first seem diffuse, but they share a common theme: they sidestep traditional organizing and federal law by leveraging public power.<sup>253</sup>

This is the model predicted by Sidney and Beatrice Webb. It is a new labor movement built not on organizing but on regulating. And like labor’s long membership decline, it shows no sign of reversing.

<sup>250</sup> Assumptions of Trade Unionism, *supra* note [], at 206.

<sup>251</sup> *Id.* at 203 (predicting that unions would inevitably migrate away from setting standards through bargaining and toward setting them through legislation).

<sup>252</sup> Estreicher, *supra* note [], at 518.

<sup>253</sup> *Id.* (concluding that modern unions function as “political organizations”). See also Naidu, *supra* note [], at 18 (“The simplest policy tool for mitigating the incentives for firms to fight unionization is to take labor standards out of competition by legislative action.”).





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