

ESSAY

THE CHICKEN-AND-EGG OF LAW AND ORGANIZING: ENACTING POLICY FOR POWER BUILDING

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In a historical moment defined by massive economic and political inequality, legal scholars are exploring ways that law can contribute to the project of building a more equal society. Central to this effort is the attempt to design laws that enable the poor and working class to organize and build power with which they can countervail the influence of corporations and the wealthy. Previous work has identified ways in which law can, in fact, enable social-movement organizing by poor and working-class people. But there's a problem. Enacting laws to facilitate social-movement organizing requires social movements already powerful enough to secure enactment of those laws. Hence, a chicken-and-egg dilemma plagues the relationship between law and organizing: power-building laws may be needed to facilitate social-movement growth, but social-movement growth seems a prerequisite to enactment of power-building laws. This Essay examines the chicken-and-egg puzzle and then offers three potential solutions. By engaging in disruption, shifting political jurisdictions, and shifting from one branch of government to another, organizations of poor and working-class people can enact laws to enable the construction of countervailing power.

INTRODUCTION	778
I. DISRUPTION.....	787
A. Conditions for Successful Disruption.....	788
B. Labor Upheaval and the Passage of the NLRA.....	793
C. The Civil Rights Movement	797
D. Local Disruption, Local Action	805
E. Legal Protection for (or Limits on) Disruption?	807
II. STATE AND LOCAL LAW	812

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A. Partisan Federalism: Legislating Without Gridlock.....	812
B. Preemption: Limits on State and Local Capacity	818
1. Labor Law: Federal Preemption and Its Exceptions.....	818
2. Landlord–Tenant Law: State Discretion and State Preemption	821
3. Local Legislation and the Constraints of Home Rule.....	824
C. Successes at the State and Local Level.....	826
D. Dynamic Federalism: From National to Local to National Again.....	828
III. JUDICIAL AND EXECUTIVE ACTION	829
A. The Judiciary	830
B. The Executive.....	832
1. The Executive Toolkit	833
2. Successes in the Executive Branch(es)	836
C. Dynamic Government: From Executive to Legislative	844
CONCLUSION	845
APPENDIX A	847

INTRODUCTION

In an era defined by stark economic and political inequality,¹ legal scholars are devoting increased attention to the ways law might enable people to demand equality. Among the most promising of these approaches is the use of law to enable the construction of countervailing power among the poor and working class.² The idea taking root among

1. See Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 2 (2d ed. 2016); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 12 (2012); Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 *Persps. on Pubs.* 564, 572–73 (2014) (explaining that politicians adopt the policies preferred by the wealthiest Americans); Emmanuel Saez & Gabriel Zucman, The Rise of Income and Wealth Inequality in America: Evidence From Distributional Macroeconomic Accounts, 34 *J. Econ. Persps.* 3, 5, 7–13 (2020); see also *Income Inequality in the United States*, Econ. Pol’y Inst., <https://www.epi.org/multimedia/unequal-states-of-america/> [https://perma.cc/WVJ5-RSGM] (last visited Jan. 16, 2024) (noting the average annual income of the top 1% of earners is 26.3 times higher than that of the bottom 99%); Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, Pew Rsch. Ctr., (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [https://perma.cc/3EFV-QXWP] (the share of U.S. aggregate wealth held by upper-income families in 2016 was 79% and rising, while the share of U.S. aggregate wealth held by lower-income families was 4% and falling).

2. See generally Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 *Yale L.J.* 546 (2021) (proposing a series of legal reforms that would enable organizing by the poor and working class to counteract political inequality).

academics and activists is that if law can be deployed to facilitate organizing by the poor and working class, organizations of poor and working-class people can build for themselves the power they need to countervail the outsized influence of corporations and the wealthy.³

In our previous work, we argued that law can, in fact, facilitate organizing by poor and working-class people.⁴ History contains examples of the

3. See *id.* at 558–59. For a collection of essays by organizers and activists discussing how law can be used to facilitate social movement organizing, see *Countervailing Power*, Am. Prospect, <https://prospect.org/topics/countervailing-power/> [<https://perma.cc/U883-4L3E>] (last visited Jan. 16, 2024); see also Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *Stan. L. Rev.* 821, 847 (2021) (describing production of legal scholarship in conversation with left social movements); Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 *Yale L.J.* 2497, 2527–31 (2023) (exploring nonreformist reforms that build mass organization and prepare the people to govern); Greg Baltz, *Resurrecting the Rent Strike Law*, 26 *U. Pa. J.L. & Soc. Change* 1, 31–34 (2023) (proposing reforms to enable tenants to leverage New York City’s Rent Strike Law); Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 *Harv. L. Rev.* 1787, 1799 (2019) (urging a focus on federal Indian law as an alternative paradigm that focuses on power rather than rights and “that envisions minority rule as a natural and integral aspect of our democracy”); Nikolas Bowie, *Antidemocracy*, 135 *Harv. L. Rev.* 160, 214 (2021) (characterizing labor law as an example of the ability of organized workers to exact concessions from the political order and highlighting how the Supreme Court’s recent jurisprudence undermines worker power); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 *Fordham L. Rev.* 1999, 2004–16 (2022) (describing the American penal system’s vulnerability to the potentially transformative power of plea bargain unions); Hiba Hafiz, *Rethinking Breakups*, *Duke L.J.* 1491, 1579–95 (2022) (proposing antitrust remedies that are attentive to facilitating countervailing worker power); Kelly Hogue & Heather K. Way, *The Role of the Law in Protecting Tenant Organizing: Opportunities for Local and State Legal Reforms*, 31 *J. Affordable Hous. & Cmty. Dev. L.* 391, 414–24 (2023) (proposing legal protections to facilitate tenant organizing); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 *Va. L. Rev.* 1483, 1516–34 (2022) (discussing the necessary preconditions for private enforcement laws to further rather than hinder eliminating structural power disparities); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. Cal. Interdisc. L.J.* 315, 333–40 (2018) (arguing for designing administrative processes in ways that enhance the countervailing power of ordinary citizens); Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 *Minn. L. Rev.* 1965, 1974–75 (2023) (joining the “growing calls for democratization and power-shifting in the criminal justice system” with proposals to curtail “the power of the law enforcement lobby”); Samantha Gowing, Note, *Rent Strikes and Tenant Power: Supporting Rent Strikes in Residential Landlord–Tenant Law*, 120 *Mich. L. Rev.* 877, 894 (2022) (arguing that legislation to benefit tenants should focus on fostering tenant power); *Laws That Create Countervailing Power*, Am. Prospect (July 7, 2022), <https://prospect.org/power/laws-that-create-countervailing-power/> [<https://perma.cc/9TV7-CN3C>] (publishing a roundtable discussion focusing on Andrias & Sachs, *supra* note 2); cf. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. Rev.* 443, 447–50 (2001) (exploring lawyers’ roles in movements for social change and collecting earlier scholarship in this vein); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 *Yale L.J. Forum* 685, 688 (2021), https://yalelawjournal.org/pdf/FiskEssay_z3d9e4jz.pdf [<https://perma.cc/WDL2-8GKR>] (exploring “the difficulties of using law to build sustainable class-based social movements”).

4. As we emphasized, law is by no means the only factor that determines the success of social movement organizing. As important, if not more so, are factors such as an

dynamic, including the role played by the 1933 National Industrial Recovery Act and the 1935 Wagner Act in enabling an explosive increase in union organizing.⁵ Theory supports the contention too. The sociological literature on movement growth and the burgeoning literature on law and countervailing power clarifies the mechanisms through which properly designed legal regimes—what we will call “organizing-enabling” or “power-building” laws—can spur organizing among poor and working-class people.⁶ In our earlier work, we delineated an ideal-type organizing-enabling legal regime with six interdependent features.⁷ We argued that an organizing-enabling law should grant collective rights explicitly; provide organizations with access to a reliable source of financial and other resources; guarantee free spaces for organizing; remove barriers to participation, including by preventing retaliation; permit organizations to make material change in members’ lives, at a scale commensurate with the problem; and allow for contestation and disruption.⁸ Another important feature of an organizing-enabling law is effective enforcement, including robust and expeditious remedies.⁹ But law can enable organizing—more or less successfully—by performing one or any combination of these (or other) features, and we use the term organizing-enabling law here to denote any such law. The key is that the legal interventions facilitate the growth, durability, and power of the social-movement organization.¹⁰

organization’s membership and leadership, its commitment to organizing, and broader political and economic conditions. But law is an important factor; indeed, the existing weakness of organizations among the poor and working class—and the comparative strength of organizations representing corporate interests—is in part a product of legal structures and rules. Andrias & Sachs, *supra* note 2, at 556–57.

5. See Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933–1941*, at 37–61 (1970); Nelson Lichtenstein, *State of the Union: A Century of American Labor* 43–48 (2013) [hereinafter Lichtenstein, *State of the Union*]; Robert H. Zieger, *The CIO 1935–1955*, at 16–17, 42 (1995).

6. See generally Andrias & Sachs, *supra* note 2; sources cited *supra* note 3.

7. See Andrias & Sachs, *supra* note 2, 560, 586–87. The precise contours of any particular organizing-enhancing legislation must depend on the social, political, and economic context in which the organizing occurs. Thus, a regime that enables organizing among workers would look different from one that enables organizing among tenants, debtors, or students.

8. See *id.* at 560.

9. We thank Sharon Block for emphasizing the importance of disaggregating enforcement as a key factor of any organizing-enabling law. On the importance of enforcement generally, see Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 699 (“The law in books is different from the law in action. Enforcement determines the distance between the two.” (footnote omitted) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910), as reprinted in *American Legal Realism* 39, 39–40 (William W. Fischer III, Morton J. Horwitz, & Thomas A. Reed eds., 1993))); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1787–95 (1983) (explaining deficiencies in the NLRA remedial regime and their contribution to organizing failures).

10. Critically, the focus is on building countervailing *organizations* that have the capacity to exercise sustained political power. This is not necessarily the same as facilitating

There is, however, a problem: Enacting laws designed to facilitate social-movement organizing generally requires social-movement organizations already influential enough to secure the enactment of those laws.¹¹ Thus, the relationship between law and social-movement organizing by the poor and working class is plagued by a chicken-and-egg problem: Organizing-enabling laws may often be needed to facilitate social movements, but social movements are needed to enact organizing-enabling laws.¹²

Although the problem is a general one, a contemporary example usefully illustrates the puzzle that this Essay attempts to solve. The labor movement, and labor scholars, have long argued that labor law reform is needed to revitalize union organizing in the United States.¹³ A bill currently pending in Congress, the Protect the Right to Organize Act (PRO Act), would go a long way toward accomplishing the goal of facilitating a significant increase in successful unionization.¹⁴ The problem is that the labor movement does not currently possess enough legislative influence to secure enactment of the PRO Act. Hence, the chicken-and-egg dilemma: The labor movement needs the PRO Act to build power, but enactment of the PRO Act depends on the labor movement having already built more of that power. The same dynamic would undoubtedly confront tenant organizers who sought a tenant organizing law, welfare rights organizers who sought legal reforms to enable welfare rights organizing, debtor organizers and student organizers who sought laws to facilitate organizing among borrowers and students, and many other groups.

mass protest or diffuse social movements. See generally Vincent Bevins, *If We Burn: The Mass Protest Decade and the Missing Revolution* (2023) (detailing the failures of mass protest movements undertaken without organization).

11. For discussion of financial elites' disproportionate power over political decisionmaking in the absence of countervailing organization, see, e.g., Bartels, *supra* note 1, at 2 (describing the increasing influence of wealthy actors, and the decreasing influence of public interest groups, in the political process); Gilens, *supra* note 1, at 12 (noting the "enormous inequalities in the responsiveness of policy makers to the preferences of more- and less-well-off Americans").

12. Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 *U. Chi. L. Rev.* 1743, 1747–49 (2013) (critiquing public law literature for offering deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while subsequently issuing an optimistic proposal for public-spirited solutions).

13. There is a voluminous amount of literature on this point. See, e.g., Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2, 8 (2016) [hereinafter Andrias, *New Labor Law*] (collecting sources and urging fundamental reform of labor law, including sectoral bargaining); Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* 11–12 (2020), <https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf> [<https://perma.cc/6YEJ-7NRL>] (arguing that comprehensive reform that "enable[s] workers to build collective organizations that can countervail corporate power wherever that power impacts workers' lives" is necessary).

14. Richard L. Trumka, *Protecting the Right to Organize Act of 2023*, H.R. 20, S.567, 118th Cong. (2023) (strengthening labor law by making it harder to misclassify workers as independent contractors, providing greater protection for the rights to organize and strike, providing for first contract arbitration, and augmenting penalties for violations of law).

This Essay identifies three potential solutions to this chicken-and-egg problem: disruption, jurisdiction shifting, and changing branches of government.¹⁵ The first approach—disruption—flows from the observation that, in certain contexts, social movements that lack traditional political power may possess significant (if untapped) disruptive capacity to elicit a response from government. Put simply, social-movement organizations can solve the chicken-and-egg dilemma by translating their disruptive capacity into the political power necessary to enact organizing-enabling laws.¹⁶ In their now-classic formulation, Professors Francis Piven and Richard Cloward describe disruption as follows:

Factories are shut down when workers walk out or sit down; welfare bureaucracies are thrown into chaos when crowds demand relief; landlords may be bankrupted when tenants refuse to pay rent. In each of these cases, people cease to conform to accustomed institutional roles; they withhold their accustomed cooperation, and by doing so, cause institutional disruptions.¹⁷

Crucial to the analysis here, when important-enough social institutions are disrupted to a sufficient extent, government may be forced to respond so as to secure the continued functioning of the institution. This response can take multiple forms, including, of course, repression. But, in certain contexts, when the disruption is significant and widespread enough, and repression is not a feasible response, the government may respond by offering legislative concessions to ensure the return to social cooperation—to end the ongoing disruption.¹⁸ Such cycles of disruption and concession are not common in U.S. history, but they have been present at highly significant political moments. For example, the National Labor Relations Act (NLRA) likely would not have been enacted if not for the strike wave of 1934; the Civil Rights Act of 1964 and the Voting Rights Act of 1965 likely owe their enactment to the sit-ins, boycotts, and mass

15. Much of what this Essay explores is relevant to social-movement organizations generally—including organizations that represent the interests of diverse economic groups—and not exclusively to organizations of the poor and working class. Indeed, at various points in the Essay we make reference to the environmental movement, the LGBTQI+ movement, and the cannabis legalization movement, among others, and these groups might also pursue some of the strategies analyzed below. Our focus is on movements of the poor and working class, however, because of the essential role that such groups can play in redressing economic and political inequality. See Andrias & Sachs, *supra* note 2, at 562–77.

16. See, e.g., Frances Fox Piven, *Challenging Authority: How Ordinary People Change America* 16–18 (2008) (describing multiple instances where disruptive power was used to enact reform).

17. Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 24 (1977) [hereinafter Piven & Cloward, *Poor People's Movements*] (emphasis omitted).

18. *Id.* at 29 (describing the “placating efforts” of governments in this position, including legislative concessions).

demonstrations of the Civil Rights Movement, leading up to and including the protests in Birmingham and Selma.¹⁹

In our context, then, a social movement may lack sufficient political influence to ensure enactment of organizing-enabling legislation through ordinary political advocacy but may nonetheless possess sufficient disruptive power to secure enactment in the form of legislative concessions meant to restore social order. To return to the previous example, the labor movement today lacks enough supportive votes in Congress to pass labor law reform,²⁰ but it might change those political facts by disrupting key sectors of the U.S. economy with a wave of strike actions. Lest the approach seem fanciful, this is in fact what happened in the 1930s: Strikes disrupted the national economy to such an extent that Congress was forced to respond with the NLRA.²¹ A similar dynamic may nearly have played out toward the end of 2022. If the railroad unions had carried out their threat to strike over the lack of paid sick leave, the consensus view was that they would have shuttered huge sectors of the national economy.²² What might

19. See, e.g., Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 436, 440 (2004); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 *Am. Pol. Sci. Rev.* 1257, 1273–77 (1989) [hereinafter Goldfield, *Worker Insurgency*].

20. See Emily DiVito, *The Filibuster Strikes Again: How It Inhibited Workers’ Rights in the 117th Congress*, *Roosevelt Inst.* (Jan. 3, 2023), <https://rooseveltinstitute.org/2023/01/03/the-filibuster-strikes-again-how-it-inhibited-workers-rights-in-the-117th-congress/> [<https://perma.cc/5TMN-X8YL>] (describing the PRO Act’s failure to advance after House passage because of a threatened filibuster by Republicans in the Senate).

21. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 28–29. As Piven and Cloward write,

[W]hen the disrupted institutions are central to economic production or to the stability of social life, it becomes imperative that normal operations be restored if the [government] is to maintain support among its constituents. Thus when industrial workers joined in massive strikes during the 1930s, they threatened the entire economy of the nation Under these circumstances, government could hardly ignore the disturbances.

Yet neither could government run the risks entailed by using massive force to subdue the strikers in the 1930s. It could not, in other words, simply avail itself of the option of repression.

Id. See also *National Labor Relations Act of 1935*, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

22. See, e.g., Stephanie Lai, *Congress Moved to Avert a Rail Strike. Here’s How and Why*, *N.Y. Times* (Dec. 2, 2022), <https://www.nytimes.com/article/railroad-strike-explained.html> (on file with the *Columbia Law Review*) (noting that the strike would have caused “dire economic damage”). Or consider the Teamsters who threatened to strike UPS, which handles about one-quarter of the tens of millions of parcels shipped each day in the United States, Noam Scheiber, *UPS Workers Authorize Teamsters Union to Call Strike*, *N.Y. Times* (June 16, 2023), <https://www.nytimes.com/2023/06/16/business/economy/ups-union-workers-strike.html> (on file with the *Columbia Law Review*), or the dockworkers who nearly crippled the importation of goods into the United States, Lori Ann LaRocco, *Tentative Agreement Ends Worker Slowdowns and Stoppages that Crippled West Coast*

Congress have offered had the unions engaged in such an exercise of disruptive power with the goal of achieving power-building legislative reform? Looking forward, too, perhaps the political prospects of labor law reform will improve if the recent strike wave continues to build.²³

If the first approach to resolving the chicken-and-egg dilemma is disruption, the second approach is more conventional: It involves shifting the attempt to secure organizing-enabling legislation from one level of government to another. More specifically, this approach involves refocusing political effort from a level of government where the social movement lacks sufficient influence to a level of government where the movement possesses adequate legislative power. Typically, this will involve shifting from the federal government to state or local jurisdictions where partisan alignments favor the social movement.

This deployment of “partisan federalism” depends on two primary factors for its viability.²⁴ First, the movement that lacks power to enact organizing-enabling legislation at the national level must nonetheless possess enough legislative influence in some state or locality to make enactment of the legislation feasible there. These political conditions are not guaranteed, of course, but it is frequently the case that a movement will be unable to move legislation in Congress and yet succeed in doing so in state legislatures or city councils.²⁵ Second, the relevant legislation must not only be *politically* feasible at the state or local level—it also must be

Ports, CNBC (June 15, 2023), <https://www.cnbc.com/2023/06/15/tentative-agreement-ends-worker-slowdowns-and-stoppages-that-crippled-west-coast-ports.html> [<https://perma.cc/3MQV-DS87>].

23. See Brennan Doherty, How ‘Strike Culture’ Took Hold in the US in 2023, BBC: Worklife (Sept. 27, 2023), <https://www.bbc.com/worklife/article/20230927-how-strike-culture-took-hold-in-the-us-in-2023> [<https://perma.cc/4YKT-Q6EE>] (predicting that strikes are “poised to become a common part of American workers’ playbooks as they negotiate working conditions”); Labor Action Tracker, Cornell Univ. Sch. Indus. & Lab. Rels., <https://striketracker.ilr.cornell.edu/> [<https://perma.cc/LA3K-EJE7>] (last visited Jan. 17, 2024) (showing active labor strikes across the United States).

24. We borrow the term from Professor Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1080 (2014) [hereinafter Bulman-Pozen, Partisan Federalism] (“Partisan federalism . . . involves political actors’ use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic.”); see also Jessica Bulman-Pozen, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 Yale L.J. 1920, 1948–49 (2014) [hereinafter Bulman-Pozen, From Sovereignty and Process].

25. The contemporary Fight for \$15 campaign provides a relevant analogue: Unable to secure a national minimum wage of \$15/hour, that movement was enormously successful in enacting \$15/hour minimum wage laws in states and cities across the country. See, e.g., Andrias, New Labor Law, *supra* note 13, at 51 (noting that Fight for \$15 achieved the passage of minimum wage laws across the country, including in major cities like Chicago, San Francisco, and Seattle). Among the many other recent examples are marriage equality, marijuana legalization, and emissions controls. See *infra* notes 199–203 and accompanying text.

legally permissible at that level, thus implicating questions of home rule along with federal and state preemption.²⁶

As we will describe, there are two major variants of this jurisdiction-shifting approach to resolving the chicken-and-egg dilemma. The first involves a static transition from federal to state or local policymaking: Accepting that the social movement is unable to secure a federal law that facilitates organizing growth, it instead tailors its vision and pursues change in a smaller jurisdiction. The second variant is a more dynamic one. Here, the social movement abandons federal legislative change only for the present. On this approach, once the social movement secures organizing-enabling legislation in a state or city, it uses that legislation to build power that it exports across jurisdictional lines, potentially to enact similar laws in other states or cities. Ultimately, the social movement can use state and local legislation to build sufficient power so that it can return to the federal government and move the legislation that it previously was too weak to enact.²⁷

The third approach we offer involves shifting political effort from one branch of government to another: most likely from the legislative to the executive branch. The viability of this approach depends on a social movement possessing enough influence to obtain administrative rulemakings or other executive branch actions with organizing-enabling effects. In some instances, a social movement might also be able to shift its efforts from the political branches to the judiciary. Indeed, conservative social movements have done just that with great success,²⁸ as have some

26. Under current rules, this poses a significant barrier for the labor movement, but less of a hurdle for other social movements where states and cities maintain significant authority to legislate in the relevant subject areas—housing law, for example, remains largely the province of state and local governments. Or, at least, state governments. See *infra* section II.B. As discussed below, state law is increasingly being used to preempt local discretion in some areas of concern to us here. See *infra* notes 243–245 and accompanying text.

27. Although she does not consider organizing-enabling legislation or its effect of growing social-movement power, Professor Bulman-Pozen makes a related observation when she writes, “Because it is easier to pass new state laws than new federal laws, time and again states prove more accessible fora for nationwide movements to promote their ultimately national agendas.” See Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951; cf. Jamila Michener, *Medicaid and the Policy Feedback Foundations for Universal Healthcare*, 685 *Annals Am. Acad. Pol. & Soc. Sci.* 116, 125–30 (2019) (showing that well-designed laws enacted in progressive states and localities can demonstrate the efficacy and plausibility of reform, create administrative capacity, and expand supportive constituencies in ways that increase the likelihood of reform both in other states and at the national level).

28. See Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution* 147–56 (2015) (detailing the Federalist Society’s efforts to change Court jurisprudence and to lock in conservative power); Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* 221–64 (2012) (describing the conservative movement’s focus on transforming the courts and legal doctrine to achieve political power); Mary Zeigler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* 11–81, 205–12 (2022) (detailing the antiabortion movement’s court-centered strategy, including its efforts to transform campaign finance law, to build more political power).

civil rights movements.²⁹ Yet, at least as presently constituted, the judiciary is less likely to be a hospitable forum for advancing the agendas of poor and working-class social movements, nor is it as well suited to crafting the legal regimes necessary for facilitating durable organization.³⁰

The viability of the branch-shifting approach is, in part, simply a question of political power. And, again, it is not uncommon for political actors to succeed in securing favorable administrative action when legislation is beyond reach.³¹ The viability of this third approach, though, also depends on a less contingent factor, namely the *capacity* of administrative action to facilitate organizing. As noted above, we have described six interdependent features of organizing-enabling laws.³² Accomplishing such a comprehensive organizing-enabling law likely requires legislation; it is highly unlikely that any administrative action could, by itself, produce such a regime. Nevertheless, executive action—including rulemakings; adjudications by administrative agencies; and federal, state, or local procurement-related action by executive actors—can undoubtedly perform some of the organizing-enabling functions we sketched. To the extent that such partial interventions fuel movement growth, this third approach constitutes a viable means to escape the chicken-and-egg dilemma.

It is worth emphasizing that these three approaches—disruption, jurisdiction switching, and branch shifting—are not only dynamic over time but can also be used in combination with one another. For example, movements may persuade the federal executive branch to partner with state actors to achieve organizing-enhancing ends that could not be achieved with either party acting alone. Meanwhile, to produce local and state legislation or executive action, disruption may be necessary, albeit on a smaller scale.

A few other points bear mention at the outset. First, the three paths out of the chicken-and-egg dilemma on which this Essay focuses are not the only plausible paths. For example, there are numerous political contexts in which a social movement lacks the requisite influence to secure legislative change when acting on its own but would possess sufficient power if it were part of a coalition of organizations from across movements or in alliance with components of a fractured opposition.³³ Likewise, social

29. See generally Klarman, *supra* note 19 (detailing the transformation of Supreme Court jurisprudence in response to efforts by the Black Civil Rights Movement).

30. See *infra* notes 293–298 and accompanying text.

31. Indeed, this dynamic is in play today: The PRO Act is stalled in Congress, but the NLRB (and particularly the NLRB General Counsel) is doing what it can, within existing statutory constraints, to reshape labor law so as to better facilitate union organizing. See *infra* section III.B.

32. See *supra* notes 7–8 and accompanying text.

33. See, e.g., David S. Meyer & Suzanne Staggenborg, *Thinking About Strategy*, in *Strategies for Social Change* 14 (Gregory M. Maney, Rachel V. Kutz-Flamenbaum, Deana A. Rohlinger eds., 2012) (discussing how building coalitions can increase movement

movements may increase their political power through effective use of media and social media³⁴ that helps garner enough public support to shift legislative alignments. So too, external factors—like international conflict or economic crisis—can affect the power and influence of social movements in a given historical moment.³⁵ Although this Essay will not address those dynamics in any detail, they are often critical to winning legal reforms that facilitate social-movement organization.³⁶ Finally, it is important to note that while the three approaches outlined here can be attempted under existing legal frameworks, there are a set of legal design features that make the approaches more or less viable.³⁷ Although we note some possible legal changes that could facilitate the securing of organizing-enabling laws, we leave a full discussion of those possibilities for another day.

I. DISRUPTION

Disruption is often frowned upon as antithetical to the rule of law.³⁸ Yet social-movement disruption in the form of strikes, protests, boycotts,

influence). This Essay has less to say about coalition building than about the three approaches described above. But that should not imply that coalition work across social movements is anything less than essential to securing organizing-enabling legislation.

34. See Jane Hu, *The Second Act of Social Media Activism*, *New Yorker* (Aug. 3, 2020), <https://www.newyorker.com/culture/cultural-comment/the-second-act-of-social-media-activism> (on file with the *Columbia Law Review*) (describing how digital tactics, such as organized use of hashtags, can have “material consequences”).

35. See, e.g., Daniel S. Lucks, *Selma to Saigon: The Civil Rights Movement and the Vietnam War 8* (2014) (describing the “profound and tragic consequences” of the Vietnam War on the American Civil Rights Movement).

36. As discussed throughout the Essay, our three paths out of the chicken-and-egg dilemma require social movements to possess differing types and degrees of political power. But each of our three paths also requires different types of movement *capacity*: membership, resources, skills, relationships, and know-how necessary to enable movements to operationalize political power in different lawmaking and regulatory contexts. (For example, moving legislation at the state level requires social movements to possess capacities specific to state-level politics, and securing administrative policy change requires movements to have capacities specific to the administrative context.) We assume for purposes of this discussion that movements will have or develop the capacities and infrastructure necessary to take advantage of the paths we describe. But future work in cognate fields might usefully delineate the capacities necessary for movements to do so.

37. With respect to disruption, for example, law might impose stricter or weaker sanctions for disruptive activity or law might actually protect disruptive activity. With respect to the federalism approach, preemption and home-rule powers determine exactly how much organizing-enabling legislation can be enacted at the state and city level. And with respect to the executive branch approach, administrative and constitutional law help determine the robustness of potential organizing-enabling lawmaking that administrative agencies are empowered to conduct. Throughout the Essay, we consider the ways that law can alter the viability of each approach to securing organizing-enabling laws.

38. See Burke Marshall, *The Protest Movement and the Law*, 51 *Va. L. Rev.* 785, 785–92 (1965) (arguing that the Civil Rights Movement of the 1960s may have negative

and civil disobedience can be a potent tool for achieving legal change.³⁹ In certain political, social, and economic contexts, a social movement can translate its disruptive capacity into institutional political power and secure legislation that otherwise would be out of reach.⁴⁰ This is true even when existing law proscribes such disruptive activity. Indeed, as this Part recounts, this dynamic describes in large part the history of federal labor and civil rights law in the United States as well as numerous victories at the local level. It also describes the first way that social movements can resolve the chicken-and-egg problem that plagues organizing-enabling law.

A. *Conditions for Successful Disruption*

The basic political mechanism of disruption is, in theory, straightforward: First, a social movement disrupts an institution or facet of socioeconomic life; and then the government, to end the disruption and restore normal socioeconomic functioning, grants political concessions that the movement seeks.⁴¹ If those concessions take the form of

consequences for societal regulation because it was “depende[nt] upon and fostering . . . disrespect for law”); Jennifer Nou, *Civil Servant Disobedience*, 95 *Chi.-Kent L. Rev.* 349, 368–69 (2019) (arguing that civil disobedience by civil servants must be a measure of last resort to be even potentially legitimate); Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 *Wash. & Lee L. Rev.* 205, 205 (1966) (arguing that “[o]ne would have supposed that lawyers . . . [would] denounce civil disobedience as fundamentally inconsistent with the rule of law”).

39. A normative defense of disruption as a means of democratic change is beyond the scope of this paper. For exploration of this issue, see Daniel Markovits, *Democratic Disobedience*, 114 *Yale L.J.* 1897, 1936–37 (2005) (arguing that disruption and lawbreaking can end up serving democracy and that “democratic disobedience” is a natural part of the democratic process); see also Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 25–29 (2004) (describing lawbreaking and popular uprisings in colonial America as efforts by citizens to protect their liberty interests and protest laws they perceived as unjust); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 *U. Pa. L. Rev.* 1095, 1103–04 (2007) (arguing that property rights are inextricable from analyses of protest movements and that high penalties for violations of property rights can stifle democratic deliberation that civil disobedience and other disruption generates).

40. For the sociological literature on disruption, see generally Doug McAdam, Sidney Tarrow & Charles Tilly, *Dynamics of Contention* 6 (2001) (searching for and analyzing “causal mechanisms and processes in a wide variety of struggles”); William A. Gamson, *The Success of the Unruly*, in *Readings on Social Movements: Origins, Dynamics and Outcomes* (Doug McAdam & David A. Snow eds., 2d ed. 2010) (analyzing the success of movements using disruptive methods).

41. See Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 *Am. Socio. Rev.* 735, 735–36 (1983) [hereinafter McAdam, *Tactical Innovation*] (describing this phenomenon); see also Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, *The Nation* (May 2, 1966), reprinted in Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, *The Nation* (Mar. 8, 2010), <https://www.thenation.com/article/archive/weight-poor-strategy-end-poverty/> (on file with the *Columbia Law Review*) (“We tend to overlook the force of crisis in precipitating legislative reform By crisis, we mean publicly visible disruption in some institutional

organizing-enabling legislation, the dilemma has been resolved. But, it bears emphasis at the outset, the historical and political factors required for successful disruptive action of this kind are uncommon. The basic challenge stems from the fact that the viability of this approach to resolving the chicken-and-egg dilemma depends on the existence of a social movement that cannot secure the desired legislation through traditional political means and yet possesses sufficient disruptive capacity to do so. In most historical moments, most social movements simply lack this type of disruptive capacity.

To see why, it is helpful to delineate factors that contribute to successful disruptive actions—the conditions under which disruption can in fact have its desired political effect. As Piven and Cloward explain, disruption is more likely to lead to political or legislative reform when the movement (1) organizes or mobilizes participation by the relevant population sufficient to (2) disrupt the operation of a social or economic institution that (3) is important enough such that the government is forced to respond to restore normal operation of the institution and (4) to respond with concessions to the disrupting group rather than with repression.⁴²

The first factor is the basic challenge of social-movement organizing, which, for reasons that are well known, is a significant challenge indeed, perhaps particularly among those “who are the most oppressed by inequality.”⁴³ We have both explored the challenges of organizing in previous work,⁴⁴ and the key point here is that the threshold for successful disruptive action involves a level of movement participation that is difficult to achieve.⁴⁵ The second factor requires that participants, even if mobilized, have a social or economic position through which they can in fact disrupt a social institution. Of course, even those without such a social

sphere. . . . Public trouble is a political liability, it calls for action by political leaders to stabilize the situation.” (emphasis omitted)).

42. See Piven & Cloward, *Poor People’s Movements*, supra note 17, at 24, 27–30 (describing in greater detail the factors influencing each step of this framework).

43. *Id.* at 6. Although such participants generally have the most to gain and generally are the populations that most often have to resort to disruption to protect their interests, they also often “have little defense against the penalties that can be imposed for defiance.” *Id.*

44. E.g., Andrias, *New Labor Law*, supra note 13, at 13–39; Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 *Harv. L. Rev.* 655, 664–67, 697–700 (2010); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 *Tex. L. Rev.* 351 (2017).

45. To Piven and Cloward, the distinction between organizing participation and mobilizing participation would be highly relevant. See Piven & Cloward, *Poor People’s Movements*, supra note 17, at 5 (distinguishing “mass movement[s]” from the “formalized organizations” that arise from them). In fact, the authors were highly critical of the effects of “organization” and far more optimistic about less organized forms of participation that would be better characterized as mobilization. *Id.* For present purposes, what matters is that ensuring the requisite level of participation in disruptive action—whether through organizing or mobilizing—is a hurdle to the viability of the approach.

or economic position may have the capacity to cause sufficient disruption by interfering with social life—for example, by occupying public spaces or blocking streets and bridges.⁴⁶ But those who perform functions marginal to major social or economic institutions may have a harder time causing disruption than their counterparts whose social or economic position places them at the heart of key institutions.⁴⁷ The third factor requires that participants, even if mobilized and able to disrupt a social institution, disrupt a social or economic institution whose functioning is significant enough that the government will be forced to respond to the disruption.⁴⁸ And, again, this is often not the case: If a group of workers succeeds in disrupting the operation of a garment sweatshop, or a group of tenants manages to disrupt the operation of a substandard apartment building, the relevant political authorities often simply ignore the disruption.⁴⁹

Finally, if the disruption is significant enough to prompt governmental response, the response—to constitute a win for the disrupters—must come in the form of political concessions desired by the disrupters and not in successful repression of the social movement. Predicting when governments will respond to disruption with concessions is difficult, but Piven and Cloward offer three relevant variables that, when present, make concessions a likely outcome. According to these theorists, concessions are most likely to be granted (1) when the social institution being disrupted is “central to economic production or to the stability of social life,” (2) at a time when the “political leadership [is] unsure of its support,” and (3) when the disrupters have “aroused strong sympathy among groups that [are] crucial supporters of the regime.”⁵⁰ In such contexts, the government is unlikely to be able to quell disruption through the use of force because doing so would risk alienating critical political support and escalating disruption through “the reactions of other aroused groups.”⁵¹

More recent work in sociology attempts to develop additional hypotheses as to when and how disruption produces the kind of legislative

46. See *infra* section I.C (describing disruption by civil rights protesters). Piven and Cloward, for example, write, “[S]ome [poor people] are sometimes so isolated from significant institutional participation that the only ‘contribution’ they can withhold is that of quiescence in civil life: they can riot.” Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 25.

47. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 25.

48. The institution disrupted could be an arm or office of the government itself. See, e.g., Nick Kotz & Mary Lynn Kotz, *A Passion for Equality: George A. Wiley and the Movement 266–70* (1977) (detailing the actions of the National Welfare Rights Organization).

49. See, e.g., Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 27. Such actions may still build power for the social movements, but they do not result in *legal change* that facilitates organizing.

50. *Id.* at 28–29.

51. *Id.* at 29.

concessions sought by participants.⁵² In their study of the effect of Vietnam-era antiwar protests on congressional voting, for example, Professors Doug McAdam and Yang Su hypothesize various mechanisms through which protest activity can impact legislative outcomes, several of which are relevant for present purposes.⁵³ For example, McAdam and Su explore whether the disruptive “intensity” of protest activity might account for the success of the disruption in moving legislators to act.⁵⁴ And, in this regard, the authors consider whether the use of violence by protesters or the use of violence by police in response to protests impacts legislative outcomes.⁵⁵ The authors also study whether disruption functions not only directly, by forcing legislators to act to quell the disruption, but also *indirectly*, by contributing to shifts in public opinion on the subject being protested.⁵⁶ Finally, McAdam and Su take up the interaction between these two dynamics, looking at whether the use of violence by demonstrators or by police might shift public opinion in ways that ultimately move legislators to act.⁵⁷ On this point, and to foreshadow our discussion of the Civil Rights Movement, McAdam and Su write, “[S]tudies of the civil rights movement suggest that it is not disruption per se, but disruption characterized by violence directed against the movement that is especially productive of favorable government response.”⁵⁸

Sociological research and historical examples also indicate that disruption is more likely to be successful when the movement mobilizes broad support and sympathy from the general public and when it is perceived to maintain a “commitment to democratic practices and the general politics of persuasion.”⁵⁹ Thus, as historian Nelson Lichtenstein recounts, successful U.S. reform movements “from the crusade against slavery onward” have used disruption and protest while also defining

52. A second-order question, to our knowledge as yet unaddressed in the literature, is when legislative concessions take the form of organizing-enabling law and when they take other forms, for example, laws that aim to more directly address substantive needs of the social movement involved. Of course, the demands of the social movement will have a major influence: When a movement demands organizing-enabling law, it is much more likely to secure it than when it demands other concessions. But a full exploration of this important question is beyond the scope here.

53. See Doug McAdam & Yang Su, *The War at Home: Antiwar Protests and Congressional Voting, 1965 to 1973*, 67 *Am. Socio. Rev.* 696, 700 (2002).

54. See *id.* at 706–07.

55. See *id.* at 701.

56. See *id.* at 703–04.

57. See *id.* at 702.

58. *Id.* (citing Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970* (1982)); McAdam, *Tactical Innovation*, *supra* note 41, at 735. Why? Plausibly because violence directed against protesters shifts public opinion in the protesters’ direction. See *id.* at 703.

59. McAdam & Su, *supra* note 53 at 718 (emphasis omitted). Thus McAdam and Su write, “To be maximally effective, movements must be disruptive/threatening, while nonetheless appearing to conform to a democratic politics of persuasion.” *Id.* (emphasis omitted).

“themselves as champions of a moral and patriotic nationalism, which they counterpoised to the parochial and selfish elites who stood athwart their vision of a virtuous society.”⁶⁰

Finally, scholarship in these fields suggests that disruption will more likely succeed when it occurs in the context of divided—or unstable—social and political opposition.⁶¹ For example, and as the next section details, the strike wave of 1934 succeeded in forcing Congress to enact the NLRA in 1935, but relevant to that success was the fact that business was partly divided on the statute. As Professor Colin Gordon explains, “By 1935, many employers saw federal labor law as a partial and necessary solution to market instability, the persistence of the Depression, and the failure of [the National Recovery Act].”⁶² Gordon thus concludes, “[H]ad business opposition [to the NLRA] been as heartfelt and uniform as some of the act’s more vocal detractors claimed, there is little likelihood that it would have passed.”⁶³

While persuasive historical studies support the sociological theories, empirical tests of them remain indeterminate.⁶⁴ Our point, however, is not to develop a full-fledged predictive theory of when disruption is likely to achieve a desired political impact, but rather to highlight that such politically impactful disruption is possible and is more likely to occur when certain interlocking conditions are present. These conditions may be quite rare, but they are not nonexistent, and social movements can work to bring them about—or at least can remain attuned to whether such conditions exist in order to decide whether disruption is likely to be a successful tactic. Indeed, there have been several key moments in American history in which such conditions existed and social movements secured landmark legislative victories through disruptive action.⁶⁵

60. Lichtenstein, *State of the Union*, supra note 5, at 34–35.

61. See, e.g., Piven & Cloward, *Poor People’s Movements*, supra note 17, at 28–29 (stressing the relevance of “electoral instability” to the success of disruption).

62. Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920–1935*, at 204 (1994); see also Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* 331–33 (1991) (describing business support for the Wagner Act).

63. Gordon, supra note 62, at 205. International dynamics have also proved relevant in certain settings. For example, early successes of the Civil Rights Movement may have been in part facilitated by the politics of the Cold War, when “U.S. democracy was on trial[] and southern white supremacy was its greatest vulnerability.” Klarman, supra note 19, at 182. Similarly, the “decolonization of Africa . . . may help to explain why direct-action protest broke out in 1960 rather than a few years earlier.” *Id.* at 376.

64. See McAdam & Su, supra note 53, at 700–01, 711–15.

65. Our focus in this section is on the ability of social-movement organizations to secure federal legislative change through the exercise of disruptive power, and we save our in-depth discussion of state and local strategies for the next section. Of course, disruption can be used to secure state and local legislative change as well, a point we briefly address at the end of this Part. See *infra* section I.D.

B. *Labor Upheaval and the Passage of the NLRA*

One such moment was the massive industrial strike wave of 1934 and 1935, which helped ensure the passage of the NLRA and the granting of a federally protected right to organize unions.⁶⁶ For contemporary readers, living in an era when strikes are—at least until recently—infrequent and largely mild-mannered, it may be difficult to imagine the disruptive force of strikes like the ones that roiled American politics in 1934. But, in that year, “labor erupted,” with more than 1,800 separate strikes involving nearly 1.5 million workers.⁶⁷ And, in large part due to the response of employers and the police, the ’34 strike wave took on the character of industrial warfare, garnered broad public support, and raised fears of industrial (and political) revolution among elected officials.

Two of these strikes are illustrative of the power of disruption: the autoparts strike in Toledo, Ohio, and the longshore strike in California.⁶⁸ What came to be known as the “Battle of Toledo” centered around a strike at automobile parts manufacturer Autolite.⁶⁹ The workers, who were paid little and endured brutal working conditions, sought wage increases, seniority, and union recognition. When Autolite rejected their demands, the union called a strike,⁷⁰ which involved mass picketing that blocked entrances to the factory.⁷¹ Autolite responded violently by hiring and arming company guards. As union meetings outside the plant gates grew in size to six thousand people, the Toledo sheriff deputized company

66. The labor movement had already achieved some organizing-enabling statutory gains by this point. The Norris–LaGuardia Act, passed in 1932, denied federal courts authority to issue injunctions in most labor disputes, and the National Industrial Recovery Act of 1933 (NIRA) declared a right to organize, albeit without an enforcement mechanism (and was ultimately struck down by the Supreme Court on other grounds). See Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. Rev. 462, 468, 499–508 (2017) (discussing the history of the Norris–LaGuardia Act and how it facilitated workers’ countervailing power in the context of civil procedure); see also Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 Yale L.J. 616, 656–69 (2019) [hereinafter Andrias, *Forgotten Promise*] (discussing NIRA’s role in building countervailing power for workers, as well as its limits). Like the NLRA, these Acts followed significant labor unrest and disruption, although they were less directly responsive to a particular strike wave. See William E. Forbath, *Law and the Shaping of the American Labor Movement 61–97*, 158–166 (1991) [hereinafter Forbath, *American Labor Movement*] (detailing labor strikes and boycotts in the decades leading up to the passage of the NLG); Michael Goldfield, *The Southern Key: Class, Race, and Radicalism in the 1930s and 1940s 61–63* (2020) (describing labor militancy among coal miners in the years immediately preceding the passage of NIRA).

67. Bernstein, *supra* note 5, at 217.

68. See *id.* at 222; see also Goldfield, *Worker Insurgency*, *supra* note 19, at 1272.

69. See Bernstein, *supra* note 5, at 218–19.

70. See *id.* at 220.

71. Significantly, striking employees were aided by unemployed workers (organized through the American Workers Party), who, rather than seeking to replace the strikers, joined them on the picket lines. See *id.* at 221.

guards and arrested a union leader.⁷² Concerned about the escalating violence, Adjutant General Frank D. Henderson ordered the National Guard to the Autolite Factory. Over the course of the next days, the battle raged between thousands of strikers and their supporters and more than one thousand guardsmen. Two strike supporters were killed, while more than fifteen others were shot and injured.⁷³ The city's unions threatened a general strike, and against this background, Autolite finally settled.⁷⁴

Across the country in San Francisco, the disruption began as a conflict over the “shape-up” hiring system in the longshore industry—one in which foremen doled out work to however many workers and whichever particular workers the employers wanted on that shift.⁷⁵ When the shipowners refused the International Longshoremen's Association demand that the shape-up be replaced with a union-run hiring hall (a system in which the union plays a lead role in determining who gets hired), “longshoremen in all ports from San Diego to Puget Sound voted almost unanimously for a walkout,” and by early May “[a]lmost 2000 miles of coastline were shut tight.”⁷⁶ The situation escalated when a group of employers attempted to restart shipments from the ports by operating their own trucking company.⁷⁷ Widespread violence followed, including a day that came to be known as Bloody Thursday, when the employers' 800-member private police force confronted thousands of picketing longshoremen. The result was sixty-seven injured and two dead.⁷⁸

The California Governor responded by declaring a state of emergency in San Francisco. The labor movement called for a general strike, which virtually all unions and approximately 130,000 workers joined:⁷⁹ Restaurants closed, hot water stopped flowing in hotels, taxis disappeared from the streets, the trolleys stopped running, and shops, theaters, bars,

72. Irving Bernstein describes what followed:

From the roof and upper-story windows deputies rained tear gas bombs on the people in the streets below. . . . The crowd replied with a seven-hour barrage of stones and bricks, which were deposited in piles in the streets and then heaved through the factory windows. Fires broke out in the shipping room and the parking lot. In the latter cars were overturned, saturated with gasoline, and set on fire. During the evening strikers broke into the factory at three points, and there was a hand-to-hand fighting before they were driven out. The area for blocks around was blanketed with tear gas

Id. at 223.

73. Id. at 224; see also Tedd Long, *Battle of Chestnut Hill*, Toledo.com (May 24, 2023), <https://www.toledo.com/toledo-time-travels/on-this-day/battle-of-chestnut-hill> [<https://perma.cc/8KRP-4F46>].

74. Bernstein, *supra* note 5, at 226–29.

75. Id. at 255–56.

76. Id. at 262–63.

77. Id. at 272.

78. Id. at 276–78 (noting that strikers and supporters, facing off with police in gas masks “were fighting desperately for something that seemed to be life for them”).

79. See *id.* at 291.

and nightclubs shut down.⁸⁰ General Hugh Johnson, a member of the Roosevelt Administration, flew to California and denounced the general strike as “civil war.”⁸¹ The San Francisco Mayor deputized hundreds of additional police officers to deal with the strike, and the Governor then imposed military control on the city, deploying more than five thousand national guardsmen. The general strike lasted only three days, but it succeeded in ending the shape-up system.⁸² Reflecting on both the economic and political implications of the strike, California Senator Hiram Johnson sent a message warning Roosevelt: “Not alone is this San Francisco’s disaster but it is [the] possible ruin of the Pacific Coast.”⁸³

These strikes were illustrative of the serious labor unrest during 1934 and 1935, and there were hundreds of similar conflagrations across the country in those years.⁸⁴ As Professor Nelson Lichtenstein recounts, in cities and towns across the nation, “pitched battles in the streets put a set of fledgling unions at odds with the police, the national guard, and employer-sponsored militia,” placing “resolution of the labor question at the very center of American politics.”⁸⁵ As Professor Michael Goldfield describes it, “the labor insurgency, with its accompanying conflict and violence caused by intransigent company resistance, had reached proportions truly alarming to the economic and political elites.”⁸⁶ The political anxiety brought on by the labor disruption was voiced on the floor of Congress, with Senator Robert LaFollette describing the strike wave as threatening to lead to “open industrial warfare in the United States,” while Representative William Connery—the NLRA’s House sponsor—stated: “You have seen strikes in Toledo, you have seen Minneapolis, you have seen San Francisco, . . . [but] you have not yet seen the gates of hell opened, and that is what is going to happen from now on.”⁸⁷ Professor Mark Barenberg recounts that “Roosevelt and Wagner, in particular, were highly sensitive to the perceived threat to recovery posed by mass labor unrest.”⁸⁸

Congress responded to the unrest—and the threat of even greater disruption—by passing the NLRA, thereby granting “the strikers’ main demand—the right to organize.”⁸⁹ For labor’s allies within Congress (and in the executive branch), the disruption was an opportunity to highlight

80. See *id.* at 283, 290–91.

81. See *id.* at 292.

82. See *id.* at 297.

83. *Id.* at 287–88 (internal quotation marks omitted).

84. See *id.* at 316 (“In 1934 anybody struck.”).

85. Lichtenstein, *State of the Union*, *supra* note 5, at 32–33.

86. Goldfield, *Worker Insurgency*, *supra* note 19, at 1273.

87. *Id.* (internal quotation marks omitted) (first quoting 78 Cong. Rec. 12027 (1934) (statement of Sen. LaFollette); then quoting *id.* at 9888 (statement of Rep. Connery)).

88. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *Harv. L. Rev.* 1379, 1400 (1993).

89. Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 173.

the problem of “industrial tyranny.”⁹⁰ It enabled them “to put in place a permanent set of institutions situated within the very womb of private enterprise” so that the law would offer workers a collective voice, laying the groundwork for greater democracy and the protection of fundamental rights.⁹¹ Meanwhile, among those legislators who were less sympathetic to labor, the disruption needed to be quelled, and the legislation was seen as a necessary step to that end. As Ohio Representative Martin L. Sweeney stated during the floor debates on the NLRA, “[u]nless this Wagner-Connelly dispute bill is passed we are going to have an epidemic of strikes that has never before been witnessed in this country.”⁹² By conceding to workers a statutory right to form and join unions, Congress could help persuade the labor movement to substitute contract bargaining for mass disruption and, in turn, help ensure that the economy (and society) could operate without the disruptive effects of mass work stoppages. Hence, the “dominant political response to the increasingly powerful labor upsurge between 1933 and 1935 . . . was to support the NLRA.”⁹³

Congress therefore addressed the threat that labor disruption posed to the functioning of the economy—indeed, to the peaceful functioning of American society more generally—through legislative concessions rather than continued attempts at repression. Even more recalcitrant political leaders had decided they needed a way to convince labor to moderate its tactics while avoiding federal action that would risk further radicalizing an already militant movement and its supporters in the public at large. Accordingly, labor legislation that could channel disputes into collective bargaining, and away from the picket line and the street, met the moment.⁹⁴ Of course, the NLRA also *protected* the right to organize and to strike, thereby giving labor not only a pathway to leaving the streets and

90. Lichtenstein, *State of the Union*, supra note 5, at 32.

91. *Id.* at 32, 36; see also *id.* at 32 (attributing to President Roosevelt a commitment to industrial democracy as a means “to assist the development of an economic declaration of rights, an economic constitutional order” (internal quotation marks omitted) (quoting Sidney M. Milkis, *Franklin D. Roosevelt, the Economic Constitutional Order, and the New Politics of Presidential Leadership*, in *The New Deal and the Triumph of Liberalism* 31, 35 (Sidney M. Milkis & Jerome M. Mileur eds., 2002))); Barenberg, supra note 88, at 1389 (examining Wagner’s effort to build a more social democracy and observing that “[t]he opportunity for such a dramatic legislative initiative was generated by ‘mass politics’ in the form of popular electoral realignment, populist political organization, and mass labor unrest”); William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165, 175 (2001) (describing Wagner’s belief that the rights to strike, organize, and bargain collectively through unions were fundamental rights of national citizenship).

92. Goldfield, *Worker Insurgency*, supra note 19, at 1275 (internal quotation marks omitted) (quoting 78 Cong. Rec. 9705 (1934) (statement of Rep. Sweeney)).

93. *Id.* at 1274; see also Barenberg, supra note 88, at 1400 (discussing congressional concerns that mass work stoppages threatened economic growth).

94. Goldfield, *Worker Insurgency*, supra note 19, at 1275. Goldfield quotes historian Arthur Schlesinger for the proposition that “[i]t was now not just a matter of staving off hunger. . . . It was a matter of staving off violence, even (at least some thought) revolution.” *Id.* (alteration in original) (quoting Arthur M. Schlesinger, *The Coming of the New Deal* 3 (1958)).

coming to the bargaining table in the volatile days of 1935 but also the ability to engage in future disruptive activity when bargaining proved an insufficient mechanism to secure its demands.⁹⁵

Importantly, popular support for the labor movement at this point in the Great Depression was critical to the federal government's decision to grant concessions rather than attempt further repression. This support raised the possibility that repression would cost the Democratic Party electoral support from a wide swath of the public. As Piven and Cloward sum up the dynamics:

[W]ith the workers' movement still unabated, and with violence by employers escalating, reluctant political leaders finally chose sides and supported labor's demands. The disruptive tactics of the labor movement had left them no other choice. They could not ignore disruptions so threatening to economic recovery and to electoral stability, and they could not repress the strikers, for while a majority of the electorate did not support the strikers, a substantial proportion did, and many others would have reacted unpredictably to the serious bloodshed that repression would have necessitated. And so government conceded the strikers' main demand—the right to organize.⁹⁶

The labor movement capitalized on the new law, using it to build more power: In just six years following the enactment of the NLRA, more than six million workers organized,⁹⁷ a massive increase from the earlier period in which law punished collective action among workers.⁹⁸

C. *The Civil Rights Movement*

The labor movement is not alone in having used disruption to help bring about major federal legislation. Both the Civil Rights Act of 1964 and

95. Indeed, the incidence of strikes continued to rise across 1935, '36, and '37, often over workers' demands for the right to recognition provided in the NLRA. See, e.g., Lichtenstein, *State of the Union*, supra note 5, at 18, 48–53; Piven & Cloward, *Poor People's Movements*, supra note 17, at 133.

96. Piven & Cloward, *Poor People's Movements*, supra note 17, at 172–73 (footnote omitted). Of course, not all strikes lead to legislative gains, or even victories, for workers. For example, the strike wave of 1919, although it involved up to four million workers, was largely a failure for the labor movement, in part because the unions lacked “allies in government.” Melvyn Dubofsky, *The State and Labor in Modern America* 76–79 (1994). This fact reinforces the point we make above that the success of disruptive tactics depends on a constellation of factors. See supra section I.A.

97. Gerald Mayer, Cong. Rsch. Serv., RL32553, *Union Membership Trends in the United States* 22–23 & tbl.A1 (2004) (noting an increase in union membership from 3.5 million in 1935 to over ten million in 1941).

98. On the use of courts against labor, see generally Forbath, *American Labor Movement*, supra note 66. Ultimately, however, the passage of the Taft–Hartley Act in 1947—which significantly constrained union rights—as well as aggressive anti-union tactics by business, broader changes in the political economy, and numerous subsequent doctrinal developments narrowing labor rights brought the growth in the labor movement to an end. See Andrias & Sachs, supra note 2, at 568; Andrias, *New Labor Law*, supra note 13, at 13–36.

the Voting Rights Act of 1965 are attributable, in large measure, to the Civil Rights Movement's protest activities in Birmingham and Selma, Alabama.⁹⁹ And while not clearly organizing-enabling laws themselves, the successful use of disruption to move major federal civil rights legislation is equally instructive.¹⁰⁰

Birmingham and Selma, of course, were preceded by years of coordinated civil rights activism: By 1962, thousands of activists had participated in sit-ins across the South, with about one-in-six sit-in participants arrested for doing so.¹⁰¹ Over 50,000 people had participated in demonstrations, with more than 3,600 spending time in jail, in the single year following the initiation of the sit-in efforts.¹⁰² The freedom rides—aimed at desegregating bus terminals—also predated Birmingham and Selma. Freedom Riders, numbering approximately one thousand in total, were met by “some of the worst mob violence of the era” that “became so intense and open that Attorney General Robert Kennedy sent 400 U.S. marshals to Montgomery to maintain order.”¹⁰³

Prior to Birmingham, President John F. Kennedy and his Administration had moved cautiously on civil rights legislation. In fact, when Kennedy was elected in 1960, “he was not a civil rights enthusiast, and his victory depended on the support of southern whites.”¹⁰⁴ Accordingly, during his first two years in office, Kennedy refused to push for civil rights legislation on the ground that Congress would refuse to enact it.¹⁰⁵

99. See generally Glenn T. Eskew, *But for Birmingham: The Local and National Movements in the Civil Rights Struggle* (1997) (detailing the connection between the Birmingham civil rights movements and the subsequent Civil Rights Act); David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (1978) [hereinafter Garrow, *Protest at Selma*] (arguing that protest in Selma was critical to the passage of the Voting Rights Act); Klarman, *supra* note 19 (describing how televised brutality against civil rights activists motivated the passage of the Acts); Diane McWhorter, *Carry Me Home: Birmingham, Alabama: The Climactic Battle of the Civil Rights Revolution* (2001) (describing how the civil rights struggle in Birmingham motivated the passage of the Civil Rights Act of 1964).

100. Unlike the NLRA, the Voting Rights Act and the Civil Rights Act are not comprehensive organizing-enabling statutes by our definition. See generally Andrias & Sachs, *supra* note 2 (identifying six necessary components of organizing-enabling statutes). Yet, both statutes have some organizing-enabling or power-building components. Title VII of the Civil Rights Act, for example, reduces barriers to participation in efforts to achieve civil rights by preventing retaliation on the basis of protected characteristics, while the Voting Rights Act helps build greater political power for the social movement and thereby increases its ability to make material change in members' lives.

101. See Piven & Cloward, *Poor People's Movements*, *supra* note 17, at 224.

102. *Id.*

103. *Id.* at 229–30 (quoting Robert M. Bleiweiss, *Marching to Freedom: The Life of Martin Luther King Jr.* 84–85 (1969)).

104. Klarman, *supra* note 19, at 435.

105. See *id.* For example, at a news conference on March 8, 1961, Kennedy was asked when he intended to introduce civil rights legislation, and he replied, “When I feel that

Based on its legislative inaction, advocates called the Administration “timid and reluctant” and charged it with “dragging its feet” on civil rights;¹⁰⁶ Martin Luther King, Jr. and NAACP executive secretary Roy Wilkins accused Kennedy of “vacillation, equivocation, and retreat.”¹⁰⁷

Even in 1963, Kennedy’s assessment was that a strong civil rights bill was not politically achievable, and he declined to devote political capital to one.¹⁰⁸ Unable to pass legislation, movement actors responded to Administration and Congressional inaction by “provok[ing] mass civil disorder” through nonviolent mass protest.¹⁰⁹ James Farmer, cofounder of the Congress of Racial Equality (CORE), explained the movement’s legislative strategy as follows: “We put on pressure and create a crisis, . . . and then they react.”¹¹⁰ Thus, in 1962 the Southern Christian Leadership Conference (SCLC), led by King, decided to join the Alabama Christian Movement for Human Rights (ACMHR), led by Reverend Fred Shuttlesworth, in a direct action campaign in Birmingham.¹¹¹ Dubbed by the SCLC as “Project C,” for “confrontation,” the Birmingham campaign featured many of the tested tactics of the movement: sit-ins at lunch counters at downtown stores, picket lines outside those same stores encouraging consumer boycotts, and kneel-ins at segregated churches.¹¹² Those tactics, combined with marches and street demonstrations—and the police violence that resulted—ultimately forced Congress to act on civil rights legislation.

there is a necessity for a Congressional action, with a chance of getting that Congressional action, then I will recommend it to the Congress.” See News Conference 6, March 8, 1961, John F. Kennedy Presidential Lib. & Museum, <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-press-conferences/news-conference-6> [<https://perma.cc/DFZ9-VCX2>] (last visited Feb. 5, 2024). For a time, the Administration attempted to channel the Civil Rights Movement’s own activism away from desegregation of public accommodations and toward voter registration, on the ground that voting was less likely to “incite” opposition from white southerners. Piven & Cloward, *Poor People’s Movements*, supra note 17, at 231 (quoting Arthur M. Schlesinger, *A Thousand Days* 935 (1965)); see also Klarman, supra note 19, at 435–36 (noting how the Kennedy Administration diverted civil rights attention to voter registration).

106. Klarman, supra note 19, at 435 (internal quotation marks omitted).

107. Theodore C. Sorensen, *Kennedy* 476 (1965).

108. For example, Joseph Rauh, Jr., a civil rights lawyer who was instrumental to the Civil Rights Act’s eventual passage, attributes Kennedy’s failure to advance a CRA-like bill in 1963 to “wise political calculation.” See Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964*, at 6 (1990). Robert Loevy explains that Kennedy “was bowing to the generally accepted view that a strong civil rights bill, one that would end racial segregation and racial oppression in the United States, was simply not politically achievable, no matter how much a president might throw his political will and his political strength into the battle.” *Id.* at 6–7.

109. Piven & Cloward, *Poor People’s Movements*, supra note 17, at 235.

110. *Id.*

111. See Lee E. Bains, Jr., *Birmingham 1963: Confrontation Over Civil Rights*, in *Birmingham, Alabama 1956–1963: The Black Struggle for Civil Rights* 151, 175 (David J. Garrow ed., 1989).

112. See *id.* at 175, 177–78.

The SCLC had chosen Birmingham in large part because of “the strength of its local movement.”¹¹³ But Birmingham was also home to the notoriously violent police commissioner Bull Connor, whose presence would ultimately ensure confrontation.¹¹⁴ Connor lived up to his reputation, deploying vicious tactics—“made-to-order legal violence”¹¹⁵—to suppress the movement, including the use of high-pressure fire hoses and German shepherds to disperse and brutalize marchers.¹¹⁶ And, then, there were bombings. King’s brother’s house was hit, as was the motel where the SCLC had set up its temporary headquarters.¹¹⁷ The result was civil unrest in the city:¹¹⁸ As Glenn Eskew concludes, “[c]ivil order [had] collapsed in Birmingham.”¹¹⁹

By early April, the movement was anticipating—even attempting to prompt—such responses to their activism. As Klarman writes, “[t]he strategy worked brilliantly”¹²⁰:

Television and newspaper coverage featured images of police dogs attacking unresisting demonstrators, including one that President Kennedy reported made him “sick.” Congressmen condemned the “shocking episodes of police brutality.” Newspaper editorials called the violence “a national disgrace.” Citizens voiced their “sense of unutterable outrage and shame” and demanded that politicians take “action to immediately put to an end the barbarism and savagery in Birmingham.” Within ten weeks, spin-off demonstrations spread to more than 100 cities as Birmingham “detonated a revolution.”¹²¹

As King, Shuttlesworth, and Farmer predicted, the crisis created by the SCLC/ACMHR activism in Birmingham had a profound effect on the Kennedy Administration’s political calculus and on the underlying political math around civil rights legislation in the U.S. Congress. Klarman

113. Eskew, *supra* note 99, at 4.

114. See Klarman, *supra* note 19, at 434.

115. Eskew, *supra* note 99, at 4.

116. See, e.g., *id.* at 268. On May 2, 1963, for example, SCLC organizers allowed schoolchildren to march in the protests. “Silently filing out of Sixteenth Street Baptist Church in rows of two, the serious youngsters burst into cheerful song once placed under arrest.” *Id.* at 4. Bull Connor was “[f]lustered” by the children’s participation, and so on May 3 he “fortified his defenses.” *Id.* at 5. Then:

As the singing students stepped out of the sanctuary on Sixteenth Street and crossed the expanse of the park, Connor’s slickered-down firemen, standing tall in their black boots, loosed their swivel-mounted pressure hoses on the youngsters. . . . Snapping at the end of their leashes, the German shepherds lunged at their [B]lack victims, burying their snarling teeth in the stomachs of bystanders too slow to get out of the way.

Id. at 5–6.

117. See *id.* at 300.

118. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 243.

119. Eskew, *supra* note 99, at 3.

120. Klarman, *supra* note 19, at 434.

121. *Id.* (quoting a range of primary and secondary sources).

thus concludes that “Birmingham changed everything.”¹²² Opinion polls tracked the enormous impact that the Birmingham campaign had on Americans’ views of civil rights: The number of respondents who viewed civil rights to be the nation’s most urgent issue rose from four percent prior to Birmingham to fifty-two percent following the events there.¹²³ Press coverage of the civil unrest in the city, and particularly television coverage of police brutality inflicted on the movement’s peaceful demonstrators, “dramatically altered northern opinion on race and enabled the passage of the 1964 Civil Rights Act.”¹²⁴

Kennedy, along with his senior civil rights advisors, confirmed the impact that Birmingham had on the passage of the landmark civil rights bill. Burke Marshall, the Attorney General’s special assistant on Civil Rights, told the *New York Times* it was Birmingham that made it clear “the president had to act.”¹²⁵ Kennedy himself “identified Birmingham as the turning point”:¹²⁶ As he put it during a closed-door meeting, “[b]ut for Birmingham, we would not be here today.”¹²⁷

The legislative win resulting from the Birmingham campaign was followed shortly thereafter by a similarly successful effort in Selma, Alabama, which contributed to the passage of the Voting Rights Act.¹²⁸ In January 1965, King and the SCLC launched a voting rights campaign in Selma designed to “arouse the federal government by marching by the thousands.”¹²⁹ As early as February of that year, King was himself involved

122. *Id.* at 436.

123. *Id.*

124. *Id.* at 435. Disruptive pressure by the Civil Rights Movement continued through actual passage of the Act. As King stated when the bill was at risk of filibuster, “[i]f something is not done quickly, if Congress filibusters the civil rights bill . . . Negroes will have to engage in massive civil disobedience It would be a massive uprising, and all we would be able to do would be to try and channel it into nonviolent lines.” David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 298 (1986) [hereinafter Garrow, *Bearing the Cross*] (quoting Martin Luther King, Jr.).

125. Eskew, *supra* note 99, at 311 (internal quotation marks omitted).

126. *Id.* at 312. In a nationally televised address on June 11, for example, the President referred to the “rising tide of discontent that threatens public safety,” and stated that this threat “cannot be met by repressive police action . . . [or] be quieted by token moves or talk. It is time to act in the Congress.” Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 244; see also John F. Kennedy, *Televised Address to the Nation on Civil Rights* at 03:40–07:07 (June 11, 1963), <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights> (on file with the *Columbia Law Review*).

127. Eskew, *supra* note 99, at 312 (internal quotation marks omitted); see also Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* 247 (2011) (explaining that “Atlanta did not play the direct, causal role in Congress’s consideration and passage of the law that Birmingham did.”).

128. See, e.g., Garrow, *Protest at Selma*, *supra* note 99, at 1 (“The reason why the voting rights story cannot be understood without an appreciation of the dynamics of protest can be summarized in one word: Selma.”).

129. *Id.* at 39 (quoting John Herbers, *Alabama Vote Drive Opened by Dr. King*, *N.Y. Times*, Jan. 3, 1965, at 1, 20). The goal was “to appeal to the conscience of Congress.” *Id.* (quoting Martin Luther King, Jr.).

in discussions with the President and the Attorney General about the SCLC's vision for federal voting rights legislation.¹³⁰ But President Lyndon Johnson did not want to bring a voting rights bill to Congress in 1965. As David Garrow writes, Johnson "wanted the South to have time to 'digest' the 1964 act and feared harm to other legislation in the Senate if he moved for further civil rights legislation in 1965."¹³¹

The movement's decision to focus the 1965 voting rights effort on Selma resembled the strategic thinking behind the choice of Birmingham a few years earlier.¹³² As Birmingham's Bull Connor provided the demonstrators with the confrontation they sought there, Selma's Sheriff Jim Clark played that role for the new campaign. Clark thus "could be counted on to provide vivid proof of the violent sentiments that formed white supremacy's core."¹³³ Through the early months of 1965, thousands of Black residents marched on the courthouse to demand the right to register, and Clark's force responded with brutality.¹³⁴ During the first four days of February alone, more than three thousand demonstrators were arrested,¹³⁵ including hundreds of schoolchildren.¹³⁶ Police jailed thousands of marchers and brutalized many others. This police violence was captured by national media, including an Alabama state trooper's February 17 murder of activist Jimmie Lee Jackson during a peaceful nighttime march to the courthouse in a nearby town.¹³⁷

The campaign in Selma culminated in the planned march to Montgomery. On the afternoon of Sunday, March 7, approximately six hundred participants left Brown's Chapel African Methodist Episcopal Church prepared for police violence—they had been trained in protecting themselves from physical assault, and they were accompanied by four ambulances staffed with a dedicated medical team.¹³⁸ As the marchers walked toward the Edmund Pettus Bridge, they encountered forty of Sheriff Clark's "irregular possemen"; on the bridge were fifty Alabama state troopers and several dozen of Clark's force, including fifteen on horses.¹³⁹

130. See *id.* at 56–57.

131. *Id.* at 36.

132. See, e.g., Klarman, *supra* note 19, at 440.

133. *Id.* (quoting J. Mills Thornton, *Municipal Politics and the Course of the Movement* 60, *in* *New Directions in Civil Rights Studies* (Armstead L. Robinson & Patricia Sullivan eds., 1991)).

134. On January 19, for example, "the SCLC obtained the response from the sheriff that it had sought." Garrow, *Protest at Selma*, *supra* note 99, at 43. This response was to an incident in which a local movement leader, Amelia Boynton, was "grabbed by the back of her collar and pushed . . . roughly for half a block into a patrol car," an incident that was captured in the pages of the *New York Times* and *Washington Post*. *Id.* (internal quotation marks omitted) (quoting the *New York Times*).

135. See Piven & Cloward, *Poor People's Movements*, *supra* note 17, at 249.

136. See Garrow, *Protest at Selma*, *supra* note 99, at 48.

137. See *id.* at 43–61.

138. *Id.* at 73.

139. *Id.*

Major John Cloud of the Alabama state police ordered the marchers to halt. When Hosea Williams, who, along with John Lewis of the Student Nonviolent Coordinating Committee (SNCC), was leading the march, asked if she could have a word with the police, Cloud responded, “There is no word to be had. . . . You have two minutes to turn around and go back to your church.”¹⁴⁰ One minute later Cloud ordered his troopers to advance.

Violence and chaos ensued, with troopers knocking marchers to the ground as they wielded nightsticks and shot tear gas.¹⁴¹ Following the melee on the bridge, Clark’s “possemen” pursued the retreating marchers into downtown Selma “using both nightsticks and whips.”¹⁴² Tear gas was fired into a Black church. Dozens of marchers were treated at the hospital for injuries including fractured ribs and wrists, head wounds—including the one suffered by John Lewis—and broken teeth.¹⁴³

That night, ABC News interrupted its airing of *Judgment at Nuremberg* to show a report on the bridge assault.¹⁴⁴ The next morning, the *Washington Post* ran a large headline that read “Troopers Rout Selma Marchers,” under which the paper printed a “three-column photo showing the gas-masked state troopers dragging off an injured marcher.”¹⁴⁵ The *Times* had similar coverage.¹⁴⁶ The public reaction was intense:

Most of the nation was repulsed by the “ghastly scenes” from Selma that they watched on television. . . . Over the following week, huge sympathy demonstrations took place across the

140. *Id.* at 74 (internal quotation marks omitted).

141. The violence was documented by Roy Reed for the *New York Times*:

The troopers rushed forward, their blue uniforms and white helmets lowering into a flying wedge as they moved. The wedge moved with such force that it seemed almost to pass over the waiting column [of marchers] instead of through it. The first 10 or 20 [Black marchers] were swept to the ground screaming, arms and legs flying, and packs and bags went skittering across the grassy divider strip and on to the pavement on both sides. Those still on their feet retreated. The troopers continued pushing, using both the force of their bodies and the prodding of their nightsticks. . . . Suddenly there was a report like a gunshot and a gray cloud spewed over the troopers and the [Black marchers]. “Tear gas!” someone yelled. The cloud began covering the highway. Newsmen, who were confined by four troopers to a corner 100 yards away, began to lose sight of the action. But before the cloud finally hid it all, there were several seconds of unobstructed view. Fifteen or twenty night sticks could be seen through the gas, flailing at the heads of the marchers.

Roy Reed, Alabama Police Use Gas and Clubs to Rout [Black Marchers], *N.Y. Times*, Mar. 8, 1965, at 1, 20.

142. Garrow, Protest at Selma, *supra* note 99, at 75–76.

143. See *id.* at 76. Two white participants from the North were killed in the “events surrounding Selma”—one was a Unitarian minister; the other a mother who left behind five children. Klarman, *supra* note 19, at 440.

144. See Garrow, Protest at Selma, *supra* note 99, at 78.

145. *Id.*

146. See *id.* at 78–79.

country. Hundreds of clergymen from around the nation flocked to Selma to show their solidarity with King and his comrades. Citizens demanded remedial action from their congressmen¹⁴⁷

And indeed, the reaction from Congress and from the Johnson Administration was similar and came swiftly. On the Monday following the bridge march, Senator Jacob Javits of New York called the police action an “exercise in terror,”¹⁴⁸ while Senator Walter Mondale of Minnesota said that “Sunday’s outrage in Selma, Alabama, makes passage of legislation to guarantee Southern [Black people] the right to vote an absolute imperative for Congress this year.”¹⁴⁹ On Tuesday, on the floors of Congress, forty-three representatives and seven senators “condemn[ed] Sunday’s attack and call[ed] for voting rights legislation.”¹⁵⁰ Johnson was also convinced that a voting rights law was now not only possible, but necessary: “[H]aving seen the film of Sunday’s attack, Johnson [wrote], he knew also that he must move ‘at once.’”¹⁵¹ And on Tuesday, two days after the bridge assault, the Johnson Administration announced that it was preparing the Voting Rights Act, a bill that was introduced the following week.¹⁵² Acting with “extraordinary dispatch,” Congress passed the law and Johnson signed it on August 6th.¹⁵³ As Klarman summarizes the developments: “Prior to Selma, administration officials had been divided over whether to pursue voting rights legislation in the near term, but national revulsion at the brutalization of peaceful protestors prompted immediate action.”¹⁵⁴

In sum, as these descriptive accounts reveal, under certain circumstances, disruptive action by social movements can induce an otherwise resistant federal government to act. The content of the government’s concessions will depend, of course, on the social movement’s demands. Those demands need not always include—indeed, have not always included—organizing-enabling legislation. But if a social movement that engages in successful disruptive action demands organizing-enabling legislation, and the government concedes it, the chicken-and-egg dilemma can be resolved: The movement translates its disruptive capacity into institutional political power and thereby is able to secure legislation that, absent the disruption, would have been out of reach.

147. Klarman, *supra* note 19, at 440 (quoting *The Central Points*, *Time*, Mar. 19, 1965, at 23–26, <https://content.time.com/time/subscriber/article/0,33009,833543-1,00.html> [<https://perma.cc/VV76-WQTF>]).

148. Garrow, *Protest at Selma*, *supra* note 99, at 81 (quoting 111 Cong. Rec. 4311, 4335 & 4350–52 (1965)).

149. *Id.* at 81–82 (internal quotation marks omitted) (quoting 111 Cong. Rec. 4311, 4335 & 4350–52 (1965)).

150. *Id.* at 88.

151. *Id.* at 89 (quoting President Johnson).

152. See *id.* at 89–90, 110.

153. Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 251.

154. Klarman, *supra* note 99, at 441.

D. *Local Disruption, Local Action*

Although our discussion in this Part has focused on disruption that prompts federal legislative action, more localized disruptive tactics can move state and local governments to act.¹⁵⁵ Sometimes the disruption is aimed at securing organizing-enabling law, other times at other types of policy. But in either case, the point is the same: Movement actors translate disruptive capacity into political power that they deploy to secure government concessions.

In the tenant context, for example, a wave of rent strikes in the early 1960s in New York—in which hundreds of tenant associations collectively withheld rent payments from landlords—led to the enactment of the Rent Strike Law.¹⁵⁶ The law “granted organized tenants representing at least one-third of apartments in a building the power to petition a court to appoint an independent receiver . . . to manage their buildings when the owner had permitted” serious enough conditions to persist in the building.¹⁵⁷

The disruptive tactic of squatting—the “unauthorized, illegal occupation of a residence”—has also succeeded in prompting local governmental response, albeit not legislative change, in the housing context.¹⁵⁸ In New York in the 1980s, the Association of Community Organizations for Reform Now (ACORN) led an organized squatting campaign in Brooklyn’s East New York neighborhood.¹⁵⁹ The group took “possession of twenty-five vacant, [c]ity-owned buildings.”¹⁶⁰ The city, “[u]ndoubtedly concerned about the precedent which would be set if a massive, well-publicized squatting effort were allowed to continue unimpeded,” initially responded by arresting eighteen squatters.¹⁶¹ But eventually the city was forced to negotiate and ultimately agreed to turn over ownership of fifty-eight buildings (with 180 units of housing) and to provide approximately three million dollars in funds for building rehabilitation to the Mutual Housing Association of New York, an organization created by ACORN and the squatters.¹⁶²

The 2018 teacher strikes in Republican-dominated states provide another example of state-level disruption that resulted in legislative

155. State and local legislation—as an approach to resolving the chicken-and-egg dilemma—is discussed at length in Part II.

156. See Baltz, *supra* note 3, at 2–3; see also Note, Rent Strike Legislation—New York’s Solution to Landlord–Tenant Conflicts, 40 *St. John’s L. Rev.* 253, 265 (1966) (noting that legislation was “[p]rompted by the recent New York rent strikes”).

157. Baltz, *supra* note 3, at 3.

158. See Eric Hirsch & Peter Wood, Squatting in New York City: Justification and Strategy, 16 *N.Y.U. Rev. L. & Soc. Change* 605, 605–06 (1987) (describing how a squatting effort in Brooklyn led to a legal homesteading program).

159. *Id.* at 606, 612.

160. *Id.* at 613–14.

161. *Id.* at 614.

162. See *id.* at 614–15; see also Julie Gilgoff, Land Redistribution in the Aftermath of the COVID-19 Pandemic, 67 *Wayne L. Rev.* 211, 246–47 (2022) (discussing recent use of squatting by tenant movements in Philadelphia, Los Angeles, and Oakland).

improvements. The so-named “Red for Ed” strikes began in West Virginia, when educators and staff in all fifty-five counties walked off the job to protest low wages and high healthcare costs.¹⁶³ Inspired by the activism in West Virginia, teachers in Kentucky, Oklahoma, Arizona, Colorado, and North Carolina also struck in the following months.¹⁶⁴ By late April, the strikes closed schools serving over a million students,¹⁶⁵ and state legislatures were forced to respond: West Virginia teachers received a five percent raise;¹⁶⁶ the threat of a strike produced an increase of \$51 million in school funding in Oklahoma;¹⁶⁷ and in Arizona, where legislators had previously committed to a one percent maximum raise, the legislature promised to raise teacher pay an average of twenty percent over three years.¹⁶⁸ This disruption echoed an earlier wave of strikes among teachers and other public sector workers in the 1960s and ’70s that resulted in numerous states enacting laws allowing public sector workers to organize unions and engage in collective bargaining.¹⁶⁹

In another recent example, the 2020 mass protests and organizing efforts by the Movement for Black Lives in response to police killings of George Floyd and other Black Americans led legislatures in states and cities

163. See Jess Bidgood, *West Virginia Raises Teachers’ Pay to End Statewide Strike*, N.Y. Times (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html> (on file with the *Columbia Law Review*).

164. Moriah Balingit, *First, It Was West Virginia. Then, Kentucky and Oklahoma. Now, Arizona and Colorado Teachers Prepare to Walk Out.*, Wash. Post (Apr. 26, 2018), <https://www.washingtonpost.com/news/education/wp/2018/04/26/first-it-was-west-virginia-then-kentucky-and-oklahoma-now-arizona-and-colorado-teachers-prepare-to-walk-out/> (on file with the *Columbia Law Review*); Seth Cline, *North Carolina Teachers Walk Out*, U.S. News & World Rep. (May 16, 2018), <https://www.usnews.com/news/education-news/articles/2018-05-16/north-carolina-teachers-walk-out-for-better-pay-higher-spending> [<https://perma.cc/BHH9-UWKV>].

165. Balingit, *supra* note 164.

166. *Id.*

167. *Id.*

168. Eric Blanc, *The Red for Ed Movement, Two Years In*, New Lab. Forum (Oct. 3, 2020), <https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/> [<https://perma.cc/4HBM-HNA3>]; *Three Years After Red for Ed: Successes, Shortcomings, and What Comes Next?*, ABC15 Ariz. (Apr. 26, 2021), <https://www.abc15.com/news/state/three-years-after-red-for-ed-successes-shortcomings-and-what-comes-next> [<https://perma.cc/4AN3-GFQE>] (last updated May 6, 2021) (reporting that the pay raise is stretched over three years); see also Leo Casey, *The Teacher Insurgency: A Strategic and Organizing Perspective* 6 (2020) (describing how teacher strikes focused “on the needs of teachers and education workers, as important as they were, but also on the chronic underfunding of the public schools and the fiscal policies that provided tax cuts to corporations and the wealthy while starving schools and other public services”).

169. See Joe Burns, *Strike Back: Using the Militant Tactics of Labor’s Past to Reignite Public Sector Unionism Today* 12–37 (2014) (describing how strikes by public sector unions transformed law on public sector collective bargaining during the 1960s and ’70s).

across the country to enact police reform legislation.¹⁷⁰ While the lasting impact of these reform measures may be in doubt,¹⁷¹ it is clear that the legislatures responded in part to the disruptive power of the Movement for Black Lives, and the widespread support the movement garnered, at least for a period.¹⁷²

E. *Legal Protection for (or Limits on) Disruption?*

A set of important questions remains: If disruption can provide social-movement organizations with a mechanism for achieving legislative wins, what role does law play in such disruption? Do social-movement organizations need law to enable their disruptive activity? Can social-movement organizations use disruption where law prohibits such activity? To what extent does law limit the ability to engage in disruption? There are, in simplified terms, three different postures the law can take with respect to disruptive action: First, it can proscribe the disruptive activity and subject participants and their organizations to state sanction for engaging in the disruption; second, it can neither proscribe nor protect the disruptive activity, thereby removing state sanction as a risk but leaving participants vulnerable to retaliation by private actors (including private retaliation that relies on state support);¹⁷³ third, it can offer affirmative protection for the activity, proscribing both state sanctions and private retaliation for participation.

170. See Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reforms Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. Times (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> (on file with the *Columbia Law Review*) (last updated Oct. 10, 2021) (noting how “state and city lawmakers across the country have seized on a push for reform prompted by outrage at the killing of George Floyd”); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 407–10, 415–16 (2018) (describing the Movement for Black Lives’s vision and its impact); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 Yale L.J. 778, 810–13 (2021) (describing experiments in collective action against the carceral state).

171. See, e.g., Benjamin Schneider, *Is San Francisco Re-Funding the Police?*, SFWeekly (June 16, 2021), https://www.sfweekly.com/archives/is-san-francisco-re-funding-the-police/article_f7f50019-0eaf-51b0-bc84-585a8889e77a.html [<https://perma.cc/23N5-95WM>]; Stephanie Sierra, Lindsey Feingold & John Kelly, *Despite Calls to Defund the Police, Oakland’s PD Budget Increased Nearly 18% Since 2019, I-Team Found*, ABC7 News (Oct. 11, 2022), <https://abc7news.com/defund-police-oakland-crime-shooting/12311750/> [<https://perma.cc/V2G8-C54F>].

172. See, e.g., Eder et al., *supra* note 170. Although beyond the scope of this Essay, it is worth noting that there are numerous examples from other countries of mass disruption leading to legal change, including organizing-enabling change. In particular, strikes and mass protest by the labor movement and other social movements have proven pivotal to democratic reform and even regime change. See Kate Andrias, *Labour and Democracy*, in *Law of Work Handbook* (Guy Davidov, Brian Langille & Gillian Lester eds., Oxford U. Press) (forthcoming 2024).

173. The divide between state sanction and private sanction is blurry. If a private actor is permitted to retaliate—for example, through economic coercion, private violence, or by taking advantage of a private right of action in court—the state is implicated. It either fails to prohibit such retaliation or actively facilitates it; for example, by making the justice system

Extant law provides examples of each of these postures. First and most obviously, if disruption involves the destruction of property or physical violence, the activity will be subject to criminal prohibition and sanction. Indeed, even nonviolent disruptive tactics can violate the criminal law: Much of what the civil rights demonstrators did, for example, was deemed to be in violation of criminal statutes of one kind or another—such as trespassing, disorderly conduct, or parading without a permit—and, as noted in the descriptions above, thousands were arrested and jailed for their participation.¹⁷⁴

Certain forms of labor strikes are treated with the second posture, being neither legally prohibited nor legally protected. Thus, for example, if workers strike “intermittently”—striking, returning to work after a short

available to the private actor through laws of trespass, tort, and others. This tension mirrors the broader incoherence in the state action doctrine. For classic critiques of the state action doctrine and the private/public distinction, beginning with the legal realists, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 161–95 (2008); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 22 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 471 (1923); Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 *Colum. L. Rev.* 149, 197–98 (1935); Cass R. Sunstein, *The Partial Constitution* 71–72 (1993); Cass R. Sunstein, *State Action Is Always Present*, 3 *Chi. J. Int’l L.* 465, 467 (2002).

174. See, e.g., Bains, *supra* note 111, at 177–78 (describing how protesters engaging in sit-ins were arrested for trespassing); Garrow, *Bearing the Cross*, *supra* note 124, at 184, 240–41 (describing how demonstrators were arrested for violating judicial orders and injunctions, as well as for disorderly conduct); Garrow, *Protest at Selma*, *supra* note 99, at 47–48 (describing how marchers were arrested for violating the city’s parade ordinance). The contemporary disruptive strategy of blocking traffic—employed by the labor movement, the Movement for Black Lives, and other organizations—is similarly in violation of law. See, e.g., Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, *Wash. Post* (July 13, 2016), <https://www.washingtonpost.com/news/work/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/> (on file with the *Columbia Law Review*); Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, *N.Y. Times* (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> (on file with the *Columbia Law Review*) (last updated June 23, 2023); Arit John, *Fast-Food Protesters Arrested in Pursuit of \$15 Minimum Wage*, *The Atlantic* (Sept. 4, 2014), <https://www.theatlantic.com/national/archive/2014/09/fast-food-protesters-arrested-in-pursuit-of-15-minimum-wage/379605/> (on file with the *Columbia Law Review*); Sam Levin, *Over 120 Arrested at North Dakota Pipeline Protests, Including Journalists*, *The Guardian* (Oct. 25, 2016), <https://www.theguardian.com/us-news/2016/oct/25/north-dakota-oil-pipeline-protest-arrests-journalists-filmmakers> [<https://perma.cc/9R4M-3KVU>]; Vimal Patel, *Climate Activists, Including Scientists, Are Arrested in Protests at Private Airports*, *N.Y. Times* (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/us/private-jets-climate-protests-airport.html> (on file with the *Columbia Law Review*); Sonja Sharp, *UC Academic Workers Block Westwood Intersection to Protest Pay, Policies*, *L.A. Times* (Apr. 26, 2022), <https://www.latimes.com/california/story/2022-04-26/uc-academic-workers-block-westwood-intersection-to-protest-pay-policies> (on file with the *Columbia Law Review*); WBZ-News Staff, *15 Arrested as Protesters Attempt to Block Boston Traffic During Rush Hour Commute*, *CBS News* (Sept. 21, 2022), <https://www.cbsnews.com/boston/news/boston-protest-traffic-wednesday-extinction-rebellion-somerville-massachusetts/> [<https://perma.cc/PDZ7-K3U8>].

time, and then striking again—they have violated no legal prohibition and thus are not vulnerable to state sanction but can nonetheless be fired by their employers for the strike.¹⁷⁵ Or, in an example that highlights the tension in the putatively neutral category: If a lawful strike causes financial harm to an employer, the union can, in certain narrow circumstances, be sued under tort law.¹⁷⁶ Rent strikes are typically treated similarly: Tenants who withhold rent are not in violation of any criminal law but nonetheless generally lack protection from evictions and other civil actions by their landlords.¹⁷⁷ So, in practice, putative neutrality in the law can still leave social movement members vulnerable to sanction.

Finally, other forms of labor strikes are treated by law's third posture: They enjoy formal affirmative legal protection, meaning that workers engaged in this kind of strike should be subject neither to state sanction nor to discharge or suit by their employers.¹⁷⁸ Similarly, a few jurisdictions affirmatively protect rent strikes, prohibiting retaliation against tenants who engage in such strikes, if they do so consistent with legal guidelines.¹⁷⁹ Meanwhile, the First Amendment provides affirmative protection from state sanction to some forms of peaceful protest. The Supreme Court has held, for example, that peaceful civil rights boycotts are protected by the First Amendment¹⁸⁰ and that the First Amendment prohibits government from criminalizing peaceful, noncoercive labor picketing.¹⁸¹

Perhaps the most important observation about legal regulation of disruptive activity is that the particular legal treatment of disruption does not

175. See, e.g., *Walmart Stores, Inc.*, 368 N.L.R.B. 24, slip op. at 1 (July 25, 2019) (finding intermittent strikes to be unprotected).

176. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1415 (2023) (allowing state tort action to proceed because strike was, in the Court's view, not arguably protected by the NLRA due to foreseeable property damage).

177. In addition to eviction, landlords may have access to other civil actions against tenants who engage in rent strikes. See, e.g., *Delano Vill. Cos. v. Orridge*, 553 N.Y.S.2d 938, 940 (N.Y. Sup. Ct. 1990) (discussing four causes of action under state tort and antidiscrimination law against tenants who coordinated a rent strike).

178. See 29 U.S.C. § 157 (2018) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . ."); *Nat'l Lab. Rels. Bd. v. Wash. Aluminum Co.*, 370 U.S. 9, 12–13, 18 (1962) (upholding determination that employer violated the NLRA by discharging workers who walked off the job in protest of working conditions). Notably, however, the Supreme Court has also interpreted the NLRA to limit protections for the right to strike, including by allowing employers to permanently replace—even though they may not discharge—economic strikers. See *Nat'l Lab. Rels. Bd. v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

179. See Baltz, *supra* note 3, at 3–4 (describing the history of the New York Rent Strike Law and recommending reforms).

180. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

181. *Thornhill v. Alabama*, 310 U.S. 88, 104–05 (1940) (holding that peaceful labor picketing could not be criminalized). But see *Int'l Bhd. of Teamsters, Loc. 695 v. Vogt, Inc.*, 354 U.S. 284, 294 (1957) (upholding against constitutional challenge prohibitions on secondary labor picketing on ground that such picketing constitutes coercive economic activity).

have a determinant impact on the viability of disruption. In other words, social-movement organizations may engage in successful disruptive activity however law regulates disruption. Thus, for example, social-movement organizations may engage in disruption despite the fact that such activity is unlawful, with participants willing to bear the consequences of the state sanctions deployed in response to the disruptive action. Going further, as was the case with certain of the Civil Rights Movement's tactics, organizations may elect disruptive activities to elicit repressive responses from the state, including from the police; that is, movements may choose certain disruptive tactics precisely *because those tactics are proscribed by law*.¹⁸² This aspect of the disruption approach is, as we will explain, unlike either of the other two approaches to the chicken-and-egg dilemma: The viability of shifting jurisdictions or shifting branches of government requires that the relevant legal regime—preemption or administrative law—permit social-movement organizations to pursue the approach.¹⁸³ By contrast, the very nature of disruption implies a willingness to challenge the law, to offer a different vision of what the law should be, or to appeal to a higher understanding of what the law is.¹⁸⁴

More often than not, however, the legal proscription of disruptive activity, or the vulnerability of participants to private retaliation, tends to impede participation. Conversely, legal protection for disruptive activity can facilitate it.¹⁸⁵ For example, when employers began widespread use of permanent replacements for striking workers—a form of employer retaliation permitted by the Supreme Court's interpretation of the federal right to strike¹⁸⁶—participation in strikes fell dramatically.¹⁸⁷ And when sit-down

182. These two categories encompass disruption that takes the form of civil disobedience. For a brief, excellent primer, see Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. Pitt. L. Rev. 723, 733–39 (1991) (describing several reasons why civil disobedience and breaking the law can be advantageous to a social movement); see also Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 3–70 (1970) (discussing the origins, existence, and limitations of the obligation to break the law to advance group aims).

183. See *infra* sections II.B, III.B. But see Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1749 (2005) (arguing that “[d]issenting by deciding . . . should be understood as an alternative strategy for institutionalizing channels for dissent within the democratic process”).

184. See Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 Nw. U. L. Rev. 985, 1019–22 (2024) [hereinafter Andrias, *Constitutional Clash*] (describing labor's alternative vision for the law of strikes instantiated through on-the-ground action).

185. See, e.g., Andrias & Sachs, *supra* note 2, at 627–31 (noting that protest is more likely to be effective when “[p]rotesters are able to protect themselves from reprisal” and discussing how law can facilitate such conditions).

186. See *Nat'l Lab. Rels. Bd. v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938) (declaring in dicta that striking workers could be permanently replaced).

187. See, e.g., Peter Cramton & Joseph Tracy, *The Use of Replacement Workers in Union Contract Negotiations: The U.S. Experience, 1980–1989*, 16 J. Lab. Econ. 667, 670 fig.1, 694–95 (1998) (observing that the incidence of strikes fell fifty percent during the 1980s and finding that a higher risk of replacement results in lower strike incidence).

strikes were ruled illegal by the Supreme Court in the 1930s, workers ultimately abandoned that tactic, despite its extraordinary success.¹⁸⁸ Although we lack similar data on the point, it is likely that tenants are dissuaded from engaging in rent strikes when they face the prospect of getting evicted in retaliation for such strikes.¹⁸⁹

What would a legal regime designed to protect disruptive concerted action look like? Sketching—and defending—such a regime is beyond this Essay’s scope,¹⁹⁰ but a few initial observations are in order. In the tenant context, protection for disruption—for example, an affirmative right to engage in rent strikes—would require substantial new law in most jurisdictions.¹⁹¹ In the labor context, it would require substantial broadening of existing protections. For example, current labor law only protects workers’ right to engage in full work stoppages at their own workplaces.¹⁹² Broader protection for disruption could involve extending the strike right to secondary boycotts and sympathy or solidarity strikes across multiple domains, prohibiting permanent replacements of strikers, and permitting nontraditional strikes short of full or indefinite stoppages.¹⁹³ In addition, protests and strikes that target the political process might also be protected. Under current doctrine, the NLRA protects workers’ concerted activity that occurs through political channels only if it relates to employment issues.¹⁹⁴ But the NLRB has opined that employers can terminate or discipline workers if they strike for an exclusively political cause—that is, if the target of their strike is the government rather than the employer.¹⁹⁵ The theory is that political strikes are not core to collective bargaining. Yet, failing to protect such political strikes may leave workers vulnerable to

188. The famous sit-down strikes in Flint, Michigan, were remarkably successful, but the strikers were ultimately held to be in violation of trespass laws. See *Nat’l Lab. Rels. Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939). The workers, however, had a different vision of their legal rights, claiming that they rightfully occupied the factories in self-defense of their right to organize under the NLRA. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 *Law & Hist.* 45, 47–48 (2006) (detailing workers’ vision of the law); see also Sidney Fine, *Sit-Down: The General Motors Strike of 1936–1937*, at 176 (1969) (describing the success of sit-down strikes which openly flouted trespass laws).

189. Cf. Hogue & Way, *supra* note 3, at 407–12 (describing threats faced by tenants).

190. For a related discussion about how law can facilitate effective protest, see generally Andrias & Sachs, *supra* note 2, at 629–31.

191. See Gowing, *supra* note 3, at 891–94 (discussing law of rent strikes).

192. See, e.g., 29 U.S.C. § 158(b)(4) (2018) (prohibiting strikes against a secondary employer); *Walmart Stores, Inc.*, 368 N.L.R.B. 24, slip op. at 3 (July 25, 2019) (deeming repeated, short strikes unprotected).

193. See Andrias & Sachs, *supra* note 2, at 629–31. As we acknowledge, limits ought to exist on the right to engage in disruptive protest—including by requiring that protests be peaceful, eschewing both destruction of property and violence against individuals.

194. See *Eastex, Inc. v. Nat’l Lab. Rels. Bd.*, 437 U.S. 556, 569–70, n.20 (1978).

195. Memorandum from Ronald Meisburg, Gen. Couns., NLRB, to All Regional Dirs., Officers-in-Charge, and Resident Officers 3, 6–7 (July 22, 2008) (on file with the *Columbia Law Review*).

economic retaliation when they engage in a form of disruption that is most likely to result in organizing-enabling laws.¹⁹⁶

II. STATE AND LOCAL LAW

Disruption in the form of strikes, protest, and civil disobedience is not the only way out of the chicken-and-egg dilemma. If a social-movement organization lacks the political power to secure organizing-enabling legislation from the federal government either through ordinary legislative channels or through disruptive activity, the organization might redirect its legislative efforts to a state or local jurisdiction where the political conditions allow it to win a substantively similar or analogous statute. Unlike with the disruption approach, where the organization's federal legislative goal remains unchanged but its approach to securing that goal expands, here the target of the organization's legislative efforts shifts. The strategy, at bottom, is to shift from a legislative target that is not attainable to one that is. It is to take advantage of the fact that, as this Part explains, it is often "easier to pass new state laws than new federal laws."¹⁹⁷ Successes can then potentially be exported to other jurisdictions or to the national level. Of course, as this Part also details, this strategy has limits, in part due to preemption and home rule doctrines. Moreover, this strategy is not necessarily separate and apart from disruption; rather, disruption can be an effective tool for achieving legislative change at the state and local level, as well as at the federal level.

A. *Partisan Federalism: Legislating Without Gridlock*

The federalism literature is replete with instances of political actors unable to move an agenda at the federal level but successful in doing so in states or cities. To take one example from the specific context of organizing-enabling legislation, the labor movement has attempted unsuccessfully for decades to secure a national ban on so-called captive audience meetings—anti-union meetings that employers force their employees to attend.¹⁹⁸ The PRO Act is just the most recent iteration of this failed federal effort.¹⁹⁹ So, unions have taken the campaign to the states and are winning at that jurisdictional level: Captive audience bans

196. For a defense of political strikes on democracy grounds, see Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 *Va. L. Rev.* 685, 687–89 (1985).

197. Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951.

198. See, e.g., Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, *N.Y. Times* (July 16, 2009), <https://www.nytimes.com/2009/07/17/business/17union.html> (on file with the *Columbia Law Review*) (reporting on an attempt to ban captive audience meetings in 2009 that ultimately failed to be enacted); Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *How the PRO Act Restores Workers' Right to Unionize*, *Econ. Pol'y Inst.* (Feb. 4, 2021), <https://www.epi.org/publication/pro-act-problem-solution-chart/> [<https://perma.cc/TP6E-BD89>] (noting that the currently-stalled PRO Act would ban captive audience meetings).

199. See McNicholas et al., *supra* note 198.

have recently been enacted in Connecticut and Minnesota,²⁰⁰ and another bill is about to become law in New York.²⁰¹

Examples abound outside the organizing-enabling context as well. For instance, in the early 2000s environmentalists and the Democratic Party sought to address climate change by, among other tactics, enacting federal legislation to regulate emissions. When the legislative drive stalled in Congress, the campaign moved to the states, and California, Hawaii, and New Jersey “passed laws to reduce greenhouse gas emissions, succeeding where their national counterparts failed.”²⁰² Other legislative campaigns that succeeded at the state and local level having not initially prevailed in Congress include guarantees of marriage equality, cannabis legalization, nonpartisan redistricting commissions, and, on the other side of the political spectrum, restrictive voter ID laws and restrictive abortion laws.²⁰³

Why, in general terms, is it often easier for social-movement organizations to achieve their political goals in states and cities than in Congress? Why is it often easier to pass new state laws and local ordinances than to enact new federal legislation? Two factors reinforce one another: one, the prevalence of unified party control of all the branches of state and local governments combined with, two, the reduced prominence of the filibuster—a minority-empowering legislative tool—in states and cities. In short, where a single party has majority control of government and is unencumbered by filibuster-like rules, social-movement organizations aligned with that party have greatly improved prospects of enacting legislation, including organizing-enabling legislation.²⁰⁴

200. See Conn. Gen. Stat. Ann. § 31-51q (West 2023); Minn. Stat. Ann. § 181.531 (2023).

201. See Chris Marr, New York Ban on ‘Captive Audience’ Meetings Sent to Gov. Hochul, Bloomberg L. (June 11, 2023), <https://news.bloomberglaw.com/daily-labor-report/new-york-ban-on-captive-audience-meetings-sent-to-gov-hochul> (on file with the *Columbia Law Review*). Like all state and local legislation that facilitates labor organizing, these laws face preemption challenges of the sort we discuss below. See *infra* section II.B.1. As of this writing, the captive audience laws have not been invalidated on preemption grounds. Even if they are, the state enactments can play an expressive role relevant to ultimate legal change at the federal level. See *infra* note 287 and accompanying text.

202. Bulman-Pozen, *Partisan Federalism*, *supra* note 24, at 1101–02 (citation omitted).

203. *Id.* at 1103–04, 1129, 1135–36. For more detailed examination of the dynamics of particular campaigns, see, e.g., Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America* (2015) (voting); William N. Eskridge Jr. & Christopher R. Riano, *Marriage Equality: From Outlaws to In-Laws* (2020) (marriage equality); Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* (2020) (abortion).

204. See, e.g., Steven Greenhouse, *Minnesota’s Democratic Trifecta Pays Benefits for Workers*, Century Found. (June 8, 2023), <https://tcf.org/content/commentary/minnesotas-democratic-trifecta-pays-benefits-for-workers/> [<https://perma.cc/HR5F-AFW2>]. As we discuss below, in certain states, the ballot initiative process makes available another mechanism for enacting legislation (or even amending the state constitution) at the state level which is unavailable at the federal level. See *infra* notes 218–221 and accompanying text.

Start with unified party control. As of January 2024, the governments of forty states—that is, *eighty percent* of all the states in the nation—were controlled by a single political party. In these forty states, either the Democratic or Republican Party had majority control over both branches of the state legislature and the governorship.²⁰⁵ Sixteen such “trifecta” states were Democratic, while twenty-three were Republican.²⁰⁶ As a result of what political scientists term “geographic partisan sorting,” this binary division of state government power into firmly Democratic or firmly Republican hands is at the highest level since the Civil War.²⁰⁷

The situation in cities is even starker. City governments are generally divided between a mayor and a unicameral legislative body (usually a city council). Taking the twenty largest cities in the United States, all but two for which members’ partisan affiliations are identifiable are currently governed by a unified party—the same party controls the mayor’s office and a majority of the seats in the city council.²⁰⁸ Again, geographic political sorting explains the phenomenon: As high as partisan sorting across states

205. See State Partisan Composition, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/about-state-legislatures/state-partisan-composition> [<https://perma.cc/CUU5-FL92>] (last updated Nov. 28, 2023).

206. The Democrat-controlled states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington. See *id.* The Republican-controlled states are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Utah. In Alaska, seventeen of the twenty members of the state senate have formed a bipartisan coalition. See Yereth Rosen, In New Bipartisan Alaska Senate Majority of 17, Members Vow Compromise and Consensus, Alaska Pub. Media (Nov. 29, 2022), <https://alaskapublic.org/2022/11/29/in-new-bipartisan-alaska-senate-majority-of-17-members-vow-compromise-and-consensus/> [<https://perma.cc/QBB6-KZU3>]. Nebraska is unicameral and its members are elected on a nonpartisan basis, but it is well-recognized that the GOP controls the legislature. See, e.g., Paul Hammel, Republicans May Have Gained a Filibuster-Proof Majority in Nebraska Legislature, Neb. Exam’r (Nov. 9, 2022), <https://nebraskaexaminer.com/2022/11/09/republicans-appear-to-have-gained-a-filibuster-proof-majority-in-nebraska-legislature/> [<https://perma.cc/ZFG3-UB9E>].

207. See Ethan Kaplan, Jörg L. Spenkunch & Rebecca Sullivan, Partisan Spatial Sorting in the United States: A Theoretical and Empirical Overview, 211 J. Pub. Econ. 1, 9 (2022).

208. In horse-racing terms, not a trifecta but an exacta. See Types of Horse Racing Bets, TVG, <https://www.tvg.com/promos/horse-racing-betting-guide/wagering-types> [<https://perma.cc/2J9Z-GUGM>] (last visited Mar. 1, 2024). One recent exception is Jacksonville, the eleventh largest city, which has a Republican city council but last year elected a Democratic mayor. See Matt Dixon, Florida Democrats Flip the Jacksonville Mayor’s Office in a Major Upset, NBC News (May 16, 2023), <https://www.nbcnews.com/politics/elections/democrat-donna-deegan-flips-jacksonville-mayors-office-major-upset-rcna84791> [<https://perma.cc/SL54-FV8Q>] (last updated May 17, 2023). San Antonio, the seventh largest city, has an Independent mayor and a nonpartisan city council with majority-Democratic members. Dallas, the ninth largest city, has a nonpartisan city council with majority-Democratic members and a mayor who recently switched his party affiliation from Democratic to Republican. Fort Worth, the thirteenth largest city, has a nonpartisan city council with members whose political affiliations are not readily publicized. See the chart in Appendix 1.

has become, sorting across counties and precincts within states is even higher and is currently at its peak level in United States history.²⁰⁹

By definition, unified party control of states and cities gives the majority party significant control over the lawmaking process in the jurisdiction. And the lack, at the state and city level, of the principal minority-empowering legislative tool available at the federal level—the filibuster—deepens this control. The filibuster, of course, functions to protect minority power by allowing the minority party in the U.S. Senate to insist that legislation be passed only if it secures supermajority support; it allows a minority of forty-one Senators to block legislation from passing the Senate.²¹⁰ If states and cities also had filibuster-type supermajority rules, the fact that one party had majority-control over the legislature (and control of the executive branch) would not give that party practical control over the lawmaking processes of the state or the city—unless the party had *supermajority* control in the relevant legislative chamber. But the vast majority of states and cities do not have filibuster-like processes, and even those that do lack a historical practice of requiring supermajority support for legislative enactments. In 2021, only seven states—Delaware, Hawaii, Idaho, Maine, Maryland, Utah, and Vermont—had legislative procedures equivalent to the U.S. Senate filibuster.²¹¹

States and cities are thus sites of unified party control unencumbered by the minority-empowering rules of the filibuster. This is in contrast to the situation in the United States Congress, where divided government is far more often the norm. For example, the federal government has been under trifecta political control for only sixteen of the last fifty years.²¹² But

209. See Kaplan et al., *supra* note 207, at 2, 7 (“Geographic sorting within states is currently at a historic high. . . . [T]he rise in state-level partisan sorting is not nearly as sharp as the increase in sorting across counties within the same state.” (footnote omitted)); see also Greg Martin & Steven Webster, *The Real Culprit Behind Geographic Polarization*, *The Atlantic* (Nov. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/why-are-americans-so-geographically-polarized/575881/> (on file with the *Columbia Law Review*) (analyzing the reasons behind geographic partisan sorting).

210. See *About Filibusters and Cloture*, U.S. Senate, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> [<https://perma.cc/6VKC-YBRP>] (last visited Jan. 16, 2024).

211. See *Is Your State as Gridlocked as the U.S. Senate?*, RepresentUs, <https://represent.us/state-filibuster-rules/> [<https://perma.cc/4PBG-MYBB>] (last updated Sept. 8, 2021). Counting states with filibuster-like procedural rules turns out to be tricky. One study, which counted any state without time limits on debate, put the number at fifteen. That same study found ten state legislative bodies with “no measures to limit debate on the floor” and seventeen states with supermajority requirements to cut off debate. See Meghan Reilly, *States Limiting Legislative Debate*, *Off. Legis. Rsch. Rsch. Rep.*, (July 8, 2009), <https://www.cga.ct.gov/2009/rpt/2009-R-0249.htm> [<https://perma.cc/MY3X-APWC>].

212. See *Party Government Since 1857*, U.S. House of Representatives: History, Art & Archives, <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/> [<https://perma.cc/G3A4-VNFK>] (last visited Jan. 16, 2024) (reporting unified party control of all three branches of federal government for the full terms of the 95th, 96th, 103rd, 108th, 109th, 111th, 115th, and 117th Congresses in the period of 1973 to 2023).

even in moments of unified party control of the federal government, the filibuster rule means that *majority* control is not enough—a supermajority in the Senate is required to ensure party control of the federal lawmaking process.²¹³ And here, the situation is more extreme: For only *two* of the last fifty years (1977–1979), plus a brief but significant part of 2009, has the Senate been controlled by a supermajority of the party that also holds the House and the Presidency.²¹⁴

Therefore, for a social-movement organization stymied at the federal level, state and local political conditions are potentially more hospitable. Where the legislative goals of the organization are aligned with the political orientation of the majority party, the ability to enact legislation is greatly enhanced by unified party control in a filibuster-free context; it is indeed easier to “pass new state laws than new federal laws.”²¹⁵ Of course, a social-movement organization can hope to move a political agenda only in a state or locality with the right valence of unified party control. And for social-movement organizations of poor and working-class people hoping to enact organizing-enabling legislation, that is likely to mean unified Democratic party control.²¹⁶ Today, this means that in seventeen states and

213. See About Filibusters and Cloture, *supra* note 210 (explaining that the Senate practice of unlimited debate can prevent or delay lawmaking absent sufficient support for a cloture vote).

214. Compare *supra* note 212 (noting Congresses in times of trifecta political control), with Party Division, U.S. Senate, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/KX73-H84E>] (last visited Jan. 16, 2024). From 1973 to 2023, a period of unified party control of the Presidency and both chambers of Congress aligned with a sufficient majority in the Senate to invoke cloture to end the filibuster for a full Congressional term only during the 95th Congress, which met from 1977 to 1979. See *id.* In addition, during the unified party control of government that occurred with the 111th Congress from 2009 to 2011, Democrats achieved a filibuster-proof majority in the Senate for a brief period of time when Senator Arlen Specter became a Democrat in 2009. This switch gave the Democratic caucus sixty votes. Later that year, however, Democratic Senator Ted Kennedy died and his permanent replacement, Senator Scott Brown, was a Republican. See When Obama Had “Total Control of Congress”, *Akron Beacon J.* (Sept. 9, 2012), <https://www.beaconjournal.com/story/news/2012/09/09/when-obama-had-total-control/985146007/> [<https://perma.cc/KMN3-R4RM>].

215. See Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951.

216. See *Greenhouse*, *supra* note 204. It is important to note that not all Democrats are supportive of legislation that enables poor and working people to build power, particularly given the influence of corporate money within both political parties. Recent examples exist of organizing-enhancing legislation failing even under unified Democratic control. See, e.g., Shawn Hubler, *Newsom Vetoes Bill Allowing Workers to Collect Unemployment Pay While Striking*, *N.Y. Times* (Sept. 30, 2023), <https://www.nytimes.com/2023/09/30/us/newsom-veto-unemployment-pay-strikes.html> (on file with the *Columbia Law Review*) (last updated Oct. 2, 2023); see *supra* note 206 and accompanying text. Accordingly, we do not mean to suggest that organizing-enabling legislation necessarily will get enacted in trifecta states and cities, but to argue the more modest point that the political conditions we discuss can make enactment of organizing-enabling legislation more likely. Indeed, even in jurisdictions dominated by Democrats, poor and working-class social-movement organizations have had to engage the electoral process and back candidates sympathetic to

fifteen of the largest twenty cities in the country, such organizations have far better prospects for securing organizing-enabling legislation than they do in Congress.²¹⁷

And there is yet another reason why it can be easier to achieve reforms at the state level: Many state constitutions provide for mechanisms of direct democracy that are lacking at the federal level. Ballot initiatives are available in about half the states and in many localities, allowing voters to enact new statutes or amend the state constitution by majority popular vote.²¹⁸ In addition, every state provides for the legislative referendum, which allows and sometimes requires “the legislature (or sometimes another government actor) to place a measure on the ballot for popular approval by a majority of voters.”²¹⁹ Movements of poor and working-class people have sometimes been able to use the ballot initiative process to advance their goals, bypassing intransigent or gridlocked legislatures. Take the fact that every ballot initiative that proposed a minimum-wage increase since 2008 has been successful, including in Republican-dominated states where legislative reform has failed.²²⁰ Social-movement organizations have also occasionally used the initiative process to enshrine organizing rights. For example, worker movements in Illinois recently won a state constitutional amendment affirming that “[e]mployees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work.”²²¹

their goals in primaries and through fusion ballot strategies. See, e.g., Juan Perez Jr. & Shia Kapos, ‘A Dangerous Force’: Chicago Mayor’s Race Tests Teachers Union Clout, *Politico* (Apr. 3, 2023), <https://www.politico.com/news/2023/04/03/teachers-union-chicago-mayor-runoff-00090022> [<https://perma.cc/ZTV8-MDL8>] (“Even in a Democratic stronghold awash with labor shops, the [Chicago Teachers Union] has spent more than a decade cultivating a distinct and influential brand of street-fighting, social justice-driven unionism that addresses more than classroom size and teacher pay.”).

217. This does not necessarily mean a permanent gulf between red and blue states. A political approach targeted at Democrat-controlled states or cities holds the most immediate promise for residents of those states and cities. But the dynamic version of the state and local approach, which we describe below, offers a means to translate this promise to other states and cities and, ultimately, to federal policy as well. See *infra* section II.D.

218. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *Mich. L. Rev.* 859, 876–77 (2021) [hereinafter *Bulman-Pozen & Seifter, Democracy Principle*]; John G. Matsusaka, *Direct Democracy Works*, 19 *J. Econ. Persps.* 185, 185–86 (2005). Almost all the states that have ballot initiatives also provide for the popular referendum, “which allows the people to reject laws or constitutional amendments passed by the state legislature.” *Bulman-Pozen & Seifter, Democracy Principle, supra*, at 877.

219. *Bulman-Pozen & Seifter, Democracy Principle, supra* note 218, at 877.

220. Kate Andrias, *The Perils and Promise of Direct Democracy: Labour Ballot Initiatives in the United States*, 34 *King’s L.J.* 260, 272 (2023) [hereinafter *Andrias, Direct Democracy*].

221. S.J. Res. Const. Amend. 11, 102d Gen. Assemb., Reg. Sess. (Ill. 2021) (enacted). Of course, organizing-enhancing reforms are not always achievable through direct democracy.

B. *Preemption: Limits on State and Local Capacity*

The possibility of enacting organizing-enabling legislation in a statehouse or city council depends first and foremost on these political dynamics. But it also depends on a set of legal rules, primarily preemption—both federal and state—and “home rule” powers. With respect to preemption, the rules differ according to the substantive area of law in play. Rather than reviewing preemption regimes in all the contexts in which movements might seek organizing-enabling legislation, we use labor and landlord–tenant law as illustrative examples. We then turn to discuss home rule.

1. *Labor Law: Federal Preemption and Its Exceptions.* — Federal labor law contains one of, if not the, “most expansive preemption regimes in American law.”²²² An interlocking set of doctrines dictates that states and cities may not regulate conduct that is either arguably protected or prohibited by the NLRA,²²³ nor may they intervene in conduct that—while neither protected nor prohibited by the federal statute—was left by Congress to “the free play of contending economic forces.”²²⁴ States and cities are also prohibited from supplementing the remedies available under federal law, even for violations of that federal law.²²⁵ As Professor Cynthia Estlund summarizes, “labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.”²²⁶ The upshot for present purposes is that state or local legislation aimed at enabling *labor* organizing is very likely to be constrained—if not rendered legally impermissible—by labor preemption law.²²⁷

There are, however, several important caveats to this general conclusion. First, federal law only preempts state and local regulations that

Research suggests that ballot initiative campaigns can be difficult to win when wealthy corporate interests are united on one side of a ballot measure, when a measure is complicated and difficult to decipher, and when business interests have particular control over communication or have the ability to exercise coercive economic pressure over voters. Conversely, ballot initiatives are more successful when they are clearly written and involve salient issues, unquestionably offer benefits to large numbers of voters, and are supported by well-organized groups. Andrias, *Direct Democracy*, supra note 220, at 283–84.

222. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 Harv. L. Rev. 1153, 1154–55 (2011) [hereinafter Sachs, *Despite Preemption*].

223. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959).

224. *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 149–50 (1976) (quoting Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 Colum. L. Rev. 469, 478 (1972)).

225. *Wis. Dep’t of Indus., Lab. & Hum. Rels. v. Gould, Inc.*, 475 U.S. 282, 287 (1986).

226. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1571 (2002).

227. Because of this strong preemption doctrine, the labor movement’s efforts to enact and enforce organizing-enhancing legislation at the state level have often failed. See, e.g., *Gould*, 475 U.S. at 287 (striking down a Wisconsin statute that imposed penalties on firms that violated the NLRA).

cover workers who are “employees” within the meaning of the NLRA;²²⁸ if a group of workers is excluded from NLRA coverage, states and cities can enable their organizing efforts with little risk of being preempted by the federal statute.²²⁹ And while most workers are covered by the NLRA, many are not. For example, domestic workers and agricultural workers are explicitly carved out from the NLRA’s reach, leaving states and cities free to enact legislation that enables their organizing.²³⁰ Other groups of workers, including so-called gig workers who provide app-based driving and delivery services, are currently considered outside the NLRA’s definition of “employee,”²³¹ thus granting states and cities the opportunity to legislate on their behalf, albeit with attention to antitrust law and its preemptive force.²³²

Another exception provides that when a state or local government acts as a market participant rather than as a regulator—for example, through contracting or procurement—its actions are not subject to preemption review.²³³ Under this “proprietary exception” to labor preemption constraints, states and cities can enable organizing on certain public construction projects,²³⁴ among those employed on government

228. The NLRA only protects “employees.” *Nat’l Lab. Rels. Bd. v. United Ins. Co. of Am.*, 390 U.S. 254, 255 (1968). If workers fall outside the NLRA’s definition of an employee, then the law does not apply, so neither of the two NLRA preemption scenarios are implicated. See, e.g., *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 790–95 (9th Cir. 2018) (“The Chamber has not made any showing or set forth any evidence showing that the for-hire drivers covered by the Ordinance are arguably employees subject to the NLRA. We thus hold that the Ordinance is not preempted . . .”).

229. With respect to workers not covered by the NLRA, states could preempt local regulatory efforts. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1115–16 (2007) (providing an overview of how state law can preempt local laws).

230. See 29 U.S.C. § 152(3) (2018) (providing that the term “employee” does not include “any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home”). On the racist roots of these exclusions, see Ira Katznelson, *When Affirmative Action Was White* 54–79 (2005).

231. See *Atlanta Opera, Inc.*, 372 N.L.R.B. 95, slip op. at 2 (June 13, 2023) (noting that the NLRA “excludes independent contractors from statutory coverage”). The NLRB recently changed its test for employee status, which might result in at least some gig workers being properly classified as employees. See *id.* at 12.

232. To survive, state law providing collective action rights to nonstatutory employees who are classified as independent contractors must fall within either antitrust law’s labor exemption or its state action exemption. See *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022) (holding that the labor exemption encompasses concerted action by independent contractors that relates to an employer–employee relationship); *Chamber of Com.*, 890 F.3d at 782, 787 (striking down Seattle ordinance providing collective bargaining rights to rideshare drivers for failing to fall within the state action exemption).

233. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246–48 (1959).

234. See, e.g., *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1016 (9th Cir. 2010) (finding a labor agreement for a municipality’s construction projects that provided collective bargaining protections not preempted by the NLRA).

contracts or in government-supervised programs,²³⁵ or by those working for recipients of certain types of public financing.²³⁶

A third exception allows states and localities to pass employment laws of general applicability even when those laws have an effect on bargaining.²³⁷ For example, state and local laws can raise the floor above which collective bargaining occurs and can guarantee some of the goods that workers would otherwise achieve through bargaining, such as higher wages, benefits, or protections against unjust discipline.²³⁸ Moreover, these laws can be designed to give workers greater collective voice in the conditions of their industries. That is, states can create administrative worker boards or industry committees that provide worker organizations and business groups a formal role in setting wages and working conditions, including on an industry-by-industry basis, subject to government approval.²³⁹

Beyond these exceptions to labor law preemption, there are other potential avenues for state and local interventions to enable labor organizing. One involves labor organizations leveraging their existing political influence to secure state and local government action in areas of law that are unrelated to worker organizing, and thus invisible to preemption review, but that matter greatly to employers.²⁴⁰ These state and local government actions are then exchanged for “private contractual

235. See, e.g., *Airline Serv. Providers Ass’n v. L.A. World Airports*, 873 F.3d 1074, 1077, 1085–86 (9th Cir. 2017) (finding the preemption provisions of the NLRA inapplicable and thus concluding that the City was acting as a market participant).

236. See, e.g., *Hotel Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 217–18 (3d Cir. 2004) (finding a city ordinance requiring contractors and employers of hospitality employees to sign no-strike agreements that was “specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property” not preempted).

237. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749, 753–55 (1985).

238. See *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85–86 (2d Cir. 2015) (holding that a New York law setting minimum wages for home care aides was not preempted by the NLRA); see also *Rest. L. Ctr. v. City of New York*, 90 F.4th 101, 106 (2d Cir. 2024); *Rest. L. Ctr. v. City of New York*, 585 F. Supp. 3d 366, 377 (S.D.N.Y. 2022) (holding that New York City’s just-cause ordinance was not preempted by the NLRA).

239. See David Madland, *Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States* 21–22 (2021) (describing the operation of workers’ boards, with examples from several states); Andrias, *The Forgotten Promise*, *supra* note 66 at 702–03 (listing several examples of state-level worker boards); Andrias, *New Labor Law*, *supra* note 13, at 64–66 (discussing the New York Wage Board); see also *infra* notes 274–277 and accompanying text for discussion of recent successes of this reform.

240. One of us has previously described this exception to preemption as “tripartite labor lawmaking.” Sachs, *Despite Preemption*, *supra* note 222, at 1157, which is distinct from the tripartism involved when governments, labor, and employers negotiate substantive labor standards through, for example, wage boards. See generally Andrias, *Forgotten Promise*, *supra* note 66 (describing the use of tripartite industry committees during the early years of the Fair Labor Standards Act through which unions and businesses helped set minimum wages on an industry-by-industry basis); Andrias, *New Labor Law*, *supra* note 13 (discussing recent efforts by the labor movement to set wages and working conditions on a sectoral basis using tripartite administrative structures such as wage boards).

agreements through which unions and employers bind themselves to new rules for organizing and bargaining.”²⁴¹ Another approach, untested as of this writing, would involve the NLRB ceding jurisdiction over a particular industry (or industries) to a state whose laws promise to enable organizing in a manner that the Board predicts will eliminate labor disputes in the industry.²⁴²

While the federal government preempts much state labor legislation, states, in turn, can preempt local labor and employment legislation. This has become increasingly common in recent years, with conservative state legislatures seeking to limit the ability of liberal cities to protect workers’ rights and other civil rights.²⁴³ In 2016, for example, after an organizing campaign by low-wage workers, the city of Birmingham increased its minimum wage to \$10.10 per hour. The state of Alabama responded by prohibiting localities from raising the minimum wage higher than the federal minimum of \$7.25.²⁴⁴ More recently, the State of Texas enacted a bill that strips cities of the ability to set standards for local workplaces (and to ensure civil rights or improve their environments).²⁴⁵

2. *Landlord–Tenant Law: State Discretion and State Preemption.* — The preemption rules governing organizing-enabling legislation in the tenant

241. Sachs, *Despite Preemption*, supra note 222, at 1155. In one example, the City of New Haven, the Yale–New Haven Hospital, and the New Haven hospital workers’ union engaged in three-way negotiations over the construction of a cancer facility. The union wanted new rules for organizing. The hospital needed zoning and development permits from the City. Following a series of meetings mediated by the New Haven mayor, a package deal was reached: The City issued the permits in exchange for the hospital’s agreement to reorder contractually the rules of organizing. *Id.* at 1156.

242. See 29 U.S.C. § 164(c)(1)–(2) (2018); Benjamin Sachs, *Unpreemption: The NLRB’s Untapped Power to Authorize State Experimentation*, OnLabor (Jan. 11, 2022), <https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation/> [<https://perma.cc/S9P2-5H4N>] (last updated Dec. 24, 2022) (describing how the NLRB could cede jurisdiction to states and thereby enable states to avoid preemption).

243. More often than not, the state legislatures depriving local communities of democratic power have been majority white and the local communities have been majority Black and Brown. Observers have argued that the preemption efforts are often “rooted in racism and designed to uphold white supremacy.” See Hunter Blair, David Cooper, Julia Wolf, & Jaimie Worker, *Econ. Pol’y Inst.*, *Preempting Progress 2* (2020), <https://files.epi.org/pdf/206974.pdf> [<https://perma.cc/NH6X-KQ6K>].

244. See *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1288 (11th Cir. 2018) (describing the effects of the Minimum Wage Act which rendered the Ordinance raising Birmingham’s minimum wage void).

245. H.B. 2127, 88th Leg., Reg. Sess. (Tex. 2023). For detailed analysis of how conservative state legislatures are depriving liberal cities of authority to protect workers’ rights and other civil rights see, e.g., Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities’ Principles of Home Rule for the 21st Century*, 100 N.C. L. Rev. 1385, 1389–90, 1415–16 (2022); Miriam Seifter, *Counter-majoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1750–51 (2021); see also Jacob M. Grumbach, *Laboratories Against Democracy 97–122* (2022) (describing how national groups are using state authority to suppress the vote and erode democracy).

context are distinct from the regime that governs labor law. Unlike in the labor context, there is very little federal preemption of state landlord-tenant law. Indeed, the Supreme Court has recently termed landlord-tenant relationships the “particular domain of state law”²⁴⁶ and declared that states “have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.”²⁴⁷ Unlike the labor context, moreover, federal law does not provide a comprehensive regulatory regime for private rental housing.²⁴⁸ Where there is federal regulation, courts have generally construed the federal statutes as providing a floor for tenants’ rights, holding that state laws offering fewer such rights are preempted while state laws providing greater tenant protections—including, presumably, tenant organizing protections—can coexist with the federal statutory regimes.²⁴⁹

There is an important limitation here: These general principles govern the private rental market but not necessarily federally funded public housing or housing rented with federal housing assistance.²⁵⁰ For renters in public housing or who rent with assistance from the Section 8 program, the ability of states to legislate is constrained by the dictates of the relevant federal programs. Thus, for example, if the federal program requires eviction for certain tenant conduct, states are likely unable to offer just-cause eviction protections that prohibit eviction for the federally required reason.²⁵¹ Nonetheless, even here, state law will be preempted only if it *conflicts* with some provision of federal law,²⁵² allowing far greater

246. Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (citing *Lindsey v. Normet*, 405 U.S. 56, 68–69 (1972)).

247. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (citations omitted); see also Robert Van Someren Greve, Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD’s One-Strike Rule, 25 *Geo. J. on Poverty L. & Pol’y* 135, 158 (2017) (“Landlord-tenant relations are traditionally within the scope of the States’ police powers, and thus, the States ‘have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.’” (quoting *Loretto*, 458 U.S. at 440)).

248. See Megan E. Hatch, Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches, 27 *Hous. Pol’y Debate* 98, 100 (2017) (providing an overview of the two major pieces of legislation in this area, one of which covers housing discrimination (the Federal Fair Housing Act of 1968) and the other of which is no longer in force (the 2009 Protecting Tenants at Foreclosure Act)).

249. See, e.g., *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 164–65 (6th Cir. 2014) (holding the 2009 Protecting Tenants at Foreclosure Act preempted state laws that are less protective of tenants’ rights but did not preempt more protective state laws); *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc) (allowing state and federal claims of housing discrimination).

250. See Van Someren Greve, *supra* note 247, at 157 (describing HUD’s “One-Strike Rule” and its restrictive impact on state policies).

251. *Id.* at 160.

252. *Id.* at 159–66. These sections describe state laws that can protect federal housing tenants from evictions without directly conflicting with federal public housing regulations.

room for state laws facilitating organizing of public housing tenants than is available for state laws facilitating organizing in the labor context. And states are nearly unconstrained by preemption in their capacity to enact organizing-enabling legislation for tenants in the private rental market.²⁵³

Preemption has a much greater bite in state invalidation of local landlord–tenant law.²⁵⁴ Such preemption is a creature of state law and accordingly varies across states. Nonetheless, “[s]tate preemption of local housing policy is common,” with rent control and inclusionary zoning being common targets for such preemptive state rules.²⁵⁵ As Professor Jamila Michener shows, for example, thirty states “limit localities’ ability to enact rent control” while approximately nine prohibit localities from pursuing zoning policies meant to ensure access to affordable housing.²⁵⁶ Recently, some states have preempted—or their courts have found to be preempted—a broader swath of local tenant-protective ordinances. For example, in July 2021, Albany, New York, enacted a good-cause eviction law, prohibiting landlords from evicting tenants except for certain statutorily specified reasons and also prohibiting landlords from justifying evictions on failure-to-pay grounds if the rent increased by more than five percent.²⁵⁷ In March 2023, however, the appellate division in New York found that the good-cause eviction protection conflicted with landlords’

As Robert Van Someren Greve observes, courts have upheld these state laws against preemption challenges in at least some cases. See, e.g., *Chateau Foghorn v. Hosford*, 168 A.3d 824, 857 (Md. 2017) (concluding that a state law that vests courts with equitable discretion to prevent eviction for insubstantial infractions is not preempted by federal law because it does not conflict with federal regulations governing evictions from federally subsidized housing); *Hous. Auth. of Covington v. Turner*, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009) (holding that a state law granting tenants a right to cure their eviction is not preempted by federal law on the same grounds). But see *Bos. Hous. Auth. v. Garcia*, 871 N.E.2d 1073, 1079–80 (Mass. 2007) (holding that federal law preempts state good-cause protections for tenants subject to federal housing eviction regulations that directly conflict with the protections).

253. Although certain forms of collective action among private actors in housing markets might raise antitrust concerns absent state legislation, states are permitted to enact policies that allow for putative anticompetitive conduct. See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (elaborating upon the “state action” exception to antitrust law). To fall within this exception, “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion) (Brennan, J.)). Thus, state legislation, including legislation that allows tenants and landlords to negotiate rents, should not pose antitrust problems if the policy is clearly articulated and permits state supervision.

254. See Jamila Michener, *Entrenching Inequity, Eroding Democracy: State Preemption of Local Housing Policy*, 48 *J. Health Pol., Pol’y & L.* 157, 161–62 (2023) [hereinafter Michener, *Entrenching Inequity*].

255. *Id.* at 164; see also Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 *Colum. L. Rev.* 215, 252 (2021) (“[A]t least twenty-nine states preempt rent control ordinances.”).

256. See Michener, *Entrenching Inequity*, *supra* note 254, at 165 fig.1, 166, 167 fig.2.

257. *Pusatere v. City of Albany*, 185 N.Y.S.3d 350, 352–53 (N.Y. App. Div. 2023).

state law right to evict tenants “at will,” and was thus preempted.²⁵⁸ Florida’s state legislature recently passed a statute that broadly “ban[s] local governments from passing or retaining renter protections not currently afforded to Floridians under state law.”²⁵⁹

With Republican-controlled states increasingly wielding broad preemption powers to frustrate Democrat-controlled cities’ policies, other states may soon follow Florida’s lead.²⁶⁰ And although these preemptive state laws do not mention organizing rights explicitly, many would reach locally enacted protections for tenant organizing. Indeed, in *Constructing Countervailing Power*, we listed good-cause eviction protection as one component of a hypothetical tenant organizing law—the very protection now preempted by New York state law and clearly by a Florida-type statute too.²⁶¹ And, to the extent that state law does not currently preempt local organizing-enabling legislation, state legislatures have the power and discretion to amend state law to do so.

3. *Local Legislation and the Constraints of Home Rule.* — As noted above, before localities can legislate at all—in the labor, landlord–tenant, or any other context—they must possess adequate “home rule” power to do so. This is the case because “[l]ocal power in the United States is derived from state law [and] [u]nless states authorize their local governments to do something, they have no power to do it.”²⁶² The vast majority of states (all but two) have enacted home-rule provisions—either by statute or through constitutional amendments—that grant most local governments in the state (including the larger cities) authority to enact some range of local legislation.²⁶³ But there is great variation among the states when it comes to the extent of local authority granted by the relevant home-rule provision. As then-Professor David Barron and Professor Gerald Frug

258. *Id.* at 353.

259. McKenna Schueler, *New Tenant Protections in Orange County Could Be Threatened, Under Florida Housing Proposal*, *Orlando Wkly.* (Mar. 20, 2023), <https://www.orlandoweekly.com/news/new-tenant-protections-in-orange-county-could-be-threatened-under-florida-housing-proposal-33799460> [<https://perma.cc/M9JZ-YYP6>]. While Florida’s law sweeps unusually broadly, approximately two-thirds of all states (both Republican- and Democrat-controlled) preempt at least certain kinds of housing laws that municipalities may wish to pass. See *State Preemption of Local Equitable Housing Policies*, *Loc. Sols. Support Ctr.*, <https://www.supportdemocracy.org/equitablehousing/#table> [<https://perma.cc/XNW8-PQWF>] (last visited Jan. 17, 2024).

260. See Joshua Fechter, Erin Douglas & Alex Nguyen, *Texas House Approves Sweeping Limits on Local Regulations in GOP’s Latest Jab at Blue Cities*, *Tex. Trib.* (Apr. 18, 2023), <https://www.texastribune.org/2023/04/18/texas-house-local-control/> [<https://perma.cc/ZAF9-ZEQG>] (last updated Apr. 19, 2023); Monica Potts, *Red States Are Fighting Their Blue Cities, FiveThirtyEight* (Mar. 13, 2023), <https://fivethirtyeight.com/features/how-red-states-are-fighting-their-blue-cities/> [<https://perma.cc/T8QS-J8MG>].

261. See Andrias & Sachs, *supra* note 2, at 592.

262. Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* 2 (2008); see also David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2257, 2276 (2005).

263. See Frug & Barron, *supra* note 262, at 33.

explain, many home-rule provisions “expressly confine the power to initiate legislation to matters of ‘local’ concern,” a restriction that has led courts to void city ordinances regarding discrimination in housing and employment (on the ground that these issues are matters of superlocal concern).²⁶⁴ Such “local concern” limitations have also led courts to construe city power narrowly in order to avoid any conflict with state statutes on similar subject matters—a move that also explains judicial invalidation of city measures in the housing and employment spheres.²⁶⁵ Other home-rule provisions prohibit local legislation on “private or civil affairs,”²⁶⁶ a category that has “always been somewhat of a mystery,” but that again has provided courts “a way to restrain local efforts to undertake a wide range of actions that might mitigate the social impacts of private development, ranging from rent control to living wage ordinances.”²⁶⁷ Home-rule provisions also often limit localities’ ability to tax, a limitation with wide-ranging implications for city power.²⁶⁸

Given the great variation in home-rule power across states, and the concomitant variation in judicial construction of that power, it is difficult to predict with certainty which cities possess adequate authority to enact which varieties of organizing-enabling legislation. What we can say with certainty is that adequate home-rule power is a prerequisite to local organizing-enabling legislation and that some cities have the authority to enact a wide range of organizing-enabling law, some have the authority to enact a narrower range, and some probably lack the authority to enact any at all. At one end of the spectrum are cities like Seattle, which has the home-rule authority to pass a comprehensive union-organizing regime for gig drivers not classified as employees under federal labor law.²⁶⁹ At another end of the spectrum are cities like Boston, barred even from enacting rent control and minimum wage laws.²⁷⁰ Looking at the nation’s

264. See *id.* at 61.

265. See *id.*

266. *Id.* (internal quotation marks omitted).

267. *Id.*

268. See *id.*

269. That ordinance was eventually invalidated by the Ninth Circuit on other grounds in *Chamber of Com. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018). The Washington state legislature enacted four statutes that addressed municipal regulation of the for-hire transportation industry. See *id.* at 783. One declared “the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.” *Id.* (quoting Wash. Rev. Code Ann. § 46.72.001 (West 2018)). The second enumerated examples of cities’ regulatory power, including the power to “license, control, and regulate all for hire *vehicles* operating within their respective jurisdictions.” *Id.* at 784 (quoting Wash. Rev. Code Ann. § 46.72.160). The remaining two statutes addressed similar concerns and applied specifically to the taxi industry. See Wash. Rev. Code Ann. §§ 81.72.200, 210.

270. See, e.g., David J. Barron, Gerald E. Frug & Rick T. Su, *Dispelling the Myth of Home Rule: Local Power in Greater Boston 7–8* (2004); Letter from Nancy E. Glowa, Cambridge

cities as a whole, labor attorney Darin Dalmat conducted an extensive study of local power to pass living-wage laws, which, while themselves not organizing-enabling laws, operate directly on the employment sphere and likely implicate a similar analysis of the “local” and “private” affairs questions. Dalmat concludes that home-rule authority is broad enough to permit for citywide minimum wage ordinances in about half the states, while such ordinances are likely impermissible in one-fourth of the states and of questionable legal status in the remaining fourth.²⁷¹

C. *Successes at the State and Local Level*

Notwithstanding the preemption challenges and home-rule constraints, both the labor movement and the tenants’ rights movement have had significant successes in enacting power-building laws at the state and local level in recent years.

For example, much of the labor movement recognizes that sectoral bargaining—combined with worksite bargaining—is necessary in today’s economy to give workers real power over their wages, benefits, and working conditions. Yet, achieving a system of sectoral or broader-based bargaining at the federal level is politically infeasible. One of the key insights of the Fight for \$15 campaign, led by the Service Employees International Union (SEIU), was that advances can be made toward sectoral bargaining at the state level: States can structure their employment laws in ways that allow worker organizations and employers to participate in administrative processes—in “worker boards” or “industry committees”—to set wages, benefits, and working conditions for their own industries.²⁷² Thus, although states and localities are preempted from creating full-fledged sectoral bargaining, they can still enable sectoral standard setting. Moreover, workers can use such boards as a focal point for their organizing.²⁷³ To that end, the Fight for \$15 recently helped pass a new statute in California that raises wages for all fast-food workers, while also establishing a state-appointed council to set, on an ongoing

City Solicitor, to Richard C. Rossi, Cambridge City Manager (Sept. 28, 2015) (on file with the *Columbia Law Review*). See generally *Bannerman v. City of Fall River*, 561 N.E.2d 793, 796 (Mass. 1984) (holding invalid a city ordinance converting rental apartments into condominiums because the city had no “independent power” to pass such an ordinance); *Bloom v. City of Worcester*, 293 N.E.2d 268, 274–75 (Mass. 1973) (discussing state law that almost entirely bars municipalities from enacting law governing civil relationships).

271. See Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 *Colum. J.L. & Soc. Probs.* 93, 95 (2005).

272. See generally Andrias, *New Labor Law*, *supra* note 13 (detailing the Fight for \$15’s use of state wage boards and other state and local legislation as a means of moving toward sectoral bargaining).

273. *Id.* at 64; see also Kate Andrias, David Madland & Malkie Wall, *A How-To Guide for State and Local Workers’ Boards*, Ctr. for Am. Progress (2019), <https://www.americanprogress.org/article/guide-state-local-workers-boards/> [<https://perma.cc/EAK9-QMPR>].

basis, industry-wide minimum standards, including wages, hours, and working conditions, for fast-food workers.²⁷⁴ At SEIU’s urging, Minnesota just enacted a board for the nursing home industry.²⁷⁵ Proposed legislation in New York would create a mechanism for nail salon owners and workers to set minimum prices and minimum wages for the industry.²⁷⁶ In Illinois, proposed legislation would create a standards board for child care.²⁷⁷

Workers not covered by the NLRA have also had recent successes with organizing-enabling legislation at the state and local level. In New York, farmworkers recently won the right to unionize and bargain.²⁷⁸ And domestic workers have successfully pushed for new “Bills of Rights” and protections in numerous states and cities, including California, Connecticut, Illinois, Nevada, New York, and Seattle.²⁷⁹ These ordinances give domestic workers rights to minimum wages, rest breaks, and meal breaks.²⁸⁰ Some also create Domestic Workers Standards Boards through which domestic worker organizations, the public, and hiring entities can engage in negotiations about conditions of employment.²⁸¹ Tenant movements, too, have had success at the state and local level. Consider the experience in New York State. After decades of struggle, the tenant movement played a key role in winning the Housing Stability and Tenant Protection Act of 2019 (HSTPA),²⁸² which contains what State Senate Majority Leader Andrea Stewart-Cousins called “the strongest tenant protections in history.”²⁸³ Among other reforms, HSTPA expands rent

274. A.B. 1228, 2023 Leg., Reg. Sess. (Cal. 2023). This statute represented a compromise between the industry and the union; it followed an initial, stronger bill that the fast-food industry sought to repeal through a ballot initiative. See A.B. 257, 2021 Leg., Reg. Sess. (Cal. 2021).

275. Minnesota Nursing Home Workforce Standards Board Act, H.F. 908 § 81.212, 93d Leg., Reg. Sess. (Minn. 2023); Max Nesterak, Worker Advocates Push for Nation-Leading Labor Standards Board in Minneapolis, *Minn. Reformer* (Sept. 22, 2023), <https://minnesotareformer.com/2023/09/22/worker-advocates-push-for-nation-leading-labor-standards-boards-in-minneapolis/> [<https://perma.cc/G6UU-MXB5>].

276. See S.B. 4638, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

277. H.B. 2310 § 15, 103d Leg., Reg. Sess. (Ill. 2023).

278. See Farm Laborers Fair Labor Practices Act, N.Y. Dep’t Lab., <https://dol.ny.gov/farm-laborers-fair-labor-practices-act> [<http://perma.cc/A6KN-UW72>] (last visited Jan. 16, 2024).

279. Domestic Workers Bill of Rights, National Domestic Workers Alliance, <https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/> [<https://perma.cc/V852-EN6L>] (last visited Jan. 17, 2024) (describing the basic components of the legislation and the jurisdictions that have adopted a version of it).

280. *Id.*

281. See, e.g., Seattle, Wash., Seattle Municipal Code ch. 14.23, § 14.23.030 (2018).

282. S. 6458, 2019–2020 Reg. Sess. (N.Y. 2019).

283. Press Release, N.Y. State Legislature, Statement From Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie on Historic Affordable Housing Legislation (June 11, 2019), <https://nyassembly.gov/Press/files/20190611a.php> [<https://perma.cc/8YTX-PCSD>]; see also Celia Weaver, From Universal Rent Control to Cancel Rent: Tenant Organizing in New York State, 30 *New Lab. F.* 93, 94 (2021) (describing efforts of the New York tenant movement to win the HSTPA by forming a coalition of dozens of New York housing justice organizations across the state).

stabilization to cover the entire state of New York, bans the use of so-called “tenant blacklists” to protect tenants who enforce their rights, creates the crime of unlawful eviction, and strengthens protections against retaliatory evictions.²⁸⁴ Tenants in New York are now able to organize with far less fear of retaliation. They achieved this victory by forming the first viable statewide tenants’ rights coalition of organizing groups in New York since the 1990s and will be able to use the legislation to organize further.²⁸⁵

D. *Dynamic Federalism: From National to Local to National Again*

A final observation bears mention here. In one version of the state and local approach to resolving the chicken-and-egg dilemma, a social movement shifts its political efforts from federal legislation to state or local legislation, and there the story ends: Either the organization succeeds at the subfederal level or it fails. If successful, the organization will use the new legislation to build power in the jurisdiction where the law applies, but the effort to secure organizing-enabling legislation stops with this success.

In theory, however, there exists the possibility for another, more iterative and dynamic, version of the state and local approach. Here, again, the social-movement organization fails to secure legislation at the federal level and so shifts to state and local efforts. And, again, if the movement succeeds in passing organizing-enabling legislation in a state or a city, it uses that legislation to build power in the jurisdiction where the law was passed. But then, and this is the key difference, the social-movement organization exports power built with the organizing-enabling legislation in the original jurisdiction to other jurisdictions where it presses for additional organizing-enabling laws.²⁸⁶

This exporting of movement power from one jurisdiction to another can take multiple forms: It could consist of sending financial resources derived from increased membership levels, shifting human resources generated in one jurisdiction to another, leveraging economic or political relationships in the original jurisdiction to the new one, or simply celebrating political achievements such that they become a model for legislation elsewhere. Whatever the specifics, the basic dynamic is the same: Power built in one state or city is used to increase power in another state or locality and, ultimately, to secure new organizing-enabling legislation in the second state or city.²⁸⁷

284. S. 6458 at pt. E § 1, pt. M § 227-f, § 768, § 223-b.

285. Weaver, *supra* note 283, at 98.

286. For discussion of the dynamics of law reform in a federalist system generally, see sources cited *supra* note 27.

287. The effort can also be expressive or symbolic: sending a message about the importance of organizing rights and building support across jurisdictions, even when a local or state bill is ultimately found to be preempted. It can also be more radical, as when a

Again, in theory, this process can repeat itself, producing a virtuous circle whereby power building that begins with the enactment of organizing-enabling legislation in a single city or state can fuel such legislation, and also power building, across multiple cities and states. Ultimately, should the cycle lead to the building of sufficient power across states and cities, the social movement might amass sufficient national power such that it could enact the federal legislation that it originally lacked power to enact. So, in the end, the dynamic state and local approach to resolving the chicken-and-egg dilemma provides social-movement organizations with an iterative approach to securing not only state and local laws that enable organizing but, ultimately, enough political power to win *federal* organizing-enabling legislation.²⁸⁸

To make this approach less abstract, take labor organizing rights as the context for a hypothetical example. Imagine that the labor movement presses unsuccessfully in Congress for legislation that would establish unionization and collective bargaining rights for Uber and Lyft drivers. Lacking power to enact such a bill at the federal level, the labor movement takes the campaign to Massachusetts—a trifecta state with majority control by the Democratic party.²⁸⁹ In Massachusetts, the bill passes and eventually tens of thousands of app-based drivers become union members. The unions then take a percentage of the dues generated by this new membership and create a fund to enact similar laws in five other trifecta states; they also pay to train and send Massachusetts drivers to the other states to lead the organizing effort. When bills pass in these other states, the unions see their memberships increase commensurately, and now the labor movement is far better positioned to return to Congress and press for the federal bill.

III. JUDICIAL AND EXECUTIVE ACTION

A third way in which a social movement can mitigate the chicken-and-egg dilemma is by shifting its focus from the legislative branch to other parts of government. That is, when a social movement is unable to pass

locality engages in lawmaking that is theoretically off-limits. See Gerken, *supra* note 183, at 1749.

288. On a few historical occasions, this dynamic has occurred in the context of constitutional amendment as well. Following the Civil War, for example, the women's suffrage movement failed to win coverage for women in the Fifteenth Amendment, fought state-by-state for fifty years winning suffrage at the state level, and finally built enough political power that Congress passed the Nineteenth Amendment in 1919. See Carrie Chapman Catt & Nettie Rogers Shuler, *Woman Suffrage and Politics: The Inner Story of the Suffrage Movement* 107 (1923).

289. See Susannah Sudborough, 500+ Rideshare Drivers to Caravan Across Boston to Push for Union Rights, *Boston.com* (July 10, 2023), <https://www.boston.com/news/local-news/2023/07/10/uber-lyft-drivers-union-rally-caravan-state-house/> [<https://perma.cc/JH3B-8WDU>] (describing efforts by rideshare drivers to win collective bargaining rights).

organizing-enabling legislation, it can turn to the other branches of government for reforms that make organizing easier. Both the judicial and the executive branches (at the federal and state levels) are potential targets, although the executive branch tends to offer more promise. And while executive branch action is more easily reversed and often more legally constrained than legislation, it can provide the groundwork for fundamental legislative reform.

A. *The Judiciary*

The judiciary is one available resource, particularly in states where the state constitution protects labor rights or social and economic rights and where the political economy and judicial selection system has produced a progressive judiciary.²⁹⁰ For example, the New York Appellate Division recently ruled that exclusion of farm workers from a state statute that protects workers' rights to organize and collectively bargain violated the state constitution.²⁹¹ And in an example outside the context of organizing-enabling law, but which suggests the capacity of courts to redistribute power and resources, in 1975 the New Jersey Supreme Court famously held that municipalities and state agencies dealing with land use have an affirmative obligation to promote low- and moderate-income housing.²⁹²

For a number of reasons, however, the judiciary is unlikely to be the most productive avenue for achieving organizing-enabling legal change, particularly of the kind that facilitates pro-labor or poor people's organizing.²⁹³ One problem is the scope of the reforms needed. As we have

290. See generally Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (2013) (detailing protection of social and economic rights in state constitutions); Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 218, at 872–83 (“The vast majority of states provide either for the election of judges in the first instance or for retention elections following appointment.”); Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 *Colum. L. Rev.* 1855 (2023) (highlighting distinctive features of state constitutions, including emphasis on democratic and positive rights).

291. See *Hernandez v. State*, 173 A.D.3d 105, 114–15 (N.Y. App. Div. 2019).

292. See *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 336 A.2d 713, 731–32 (N.J. 1975); see also James E. Ryan, *Schools, Race, and Money*, 109 *Yale L.J.* 249, 267–68 (1999) (describing recalcitrance of state legislatures in response to redistributive judicial decisions by state courts in school finance litigation).

293. See Kate Andrias, *Building Labor's Constitution*, 94 *Tex. L. Rev.* 1591, 1609–15 (2016) (describing courts' historic hostility to labor rights and examining the tension between judicial supremacy and the labor movement's democratic commitments). Indeed, during the early twentieth century and again in recent years, the right turned to the judiciary to *undermine* countervailing social movements—that is, to enact an anti-organizing agenda. For example, between the 1880s and the 1930s, corporations and their allies challenged hundreds of democratically enacted and broadly popular laws aimed at raising labor standards and enabling workers to organize unions; courts struck down more than 200 such federal, state, and local laws. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 *N.Y.U. L. Rev.* 1383, 1393 (2001); William

previously argued, an organizing-enabling legal regime should explicitly grant collective rights; provide organizations with access to a reliable source of financial resources; guarantee free spaces for organizing; remove barriers to participation, including by preventing retaliation; permit organizations to make material change in members' lives, for example, through bargaining rights at multiple levels; and allow for contestation and disruption.²⁹⁴ Accomplishing such comprehensive change likely requires legislation; it is highly unlikely that any judicial decision could by itself produce such a regime, although it may be able to advance some elements of it. Thus, after the state court opined on the need for labor rights for farmworkers in the recent New York farmworker case, the New York legislature followed up with a statute creating a system for organizing and collective bargaining among agricultural workers.²⁹⁵ Conversely, a court decision may run into serious opposition from state legislatures, limiting its effects. The 1975 New Jersey decision required an additional nine years of litigation before the state legislature adopted a housing plan that courts deemed facially constitutional.²⁹⁶

Another problem with focusing on the judiciary as a source for organizing-enabling legal change is that the judicial system tends to be structurally biased against such change. Federal judges in particular are often drawn from the elite, and thus many are sympathetic to business interests.²⁹⁷ Even many judges appointed by Democratic Presidents have tended to be committed to existing structures and incremental reform and to be wary of change that redistributes power.²⁹⁸ Moreover, the kinds of legal rights that are required to facilitate organizing among working-class

E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1109, 1185–95, 1237 (1989). More recently, the right has turned to the courts, and to the Supreme Court in particular, to oppose democratically enacted laws that protect the political process and that are broadly popular. The Court has struck down campaign finance laws and key portions of the Voting Rights Act, giving “a green light to Republican legislatures seeking to suppress minority votes for electoral gain.” Terri Jennings Peretti, *Partisan Supremacy: How the GOP Enlisted Courts to Rig America’s Election Rules* 63 (2020).

294. See Andrias & Sachs, *supra* note 2, at 586–631.

295. *Farm Laborers Fair Labor Practices Act*, N.Y. Dep’t of Lab., <https://dol.ny.gov/farm-laborers-fair-labor-practices-act> [<http://perma.cc/A6KN-UW72>] (last visited Jan. 17, 2024).

296. See *Hills Dev. Co. v. Twp. of Bernards*, 510 A.2d 621, 634 (N.J. 1986).

297. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515 *passim* (2010).

298. See Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 *Ind. L.J.* 5, 10 (2018) (“[F]or several decades, even the Court’s more liberal members have offered only tepid opposition to economically regressive constitutional interpretations, sometimes helping shape them.”); Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 9–10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29788, 2022), <https://www.nber.org/papers/w29788> [<http://perma.cc/S4CZ-GAK8/>] (noting that a law and economics program funded substantially by “pro-business foundations and corporations” was popular among federal judges appointed by both Democratic and Republican Presidents).

people are unlikely to be found in the common law tradition and therefore are less judicially discoverable, particularly in a legal climate in which originalism and textualism dominate.²⁹⁹

B. *The Executive*

The executive branch provides an alternate and often more promising forum. Working-class social movements have, on numerous occasions, been able to garner support and achieve executive-led reform, be it from the mayor, governor, or President, and from administrative agencies, even when the movements lack sufficient support from the legislature. In most instances, these victories come in the form of substantive policy gains sought by the social movements. But in others, as we will detail, movements have secured organizing-enabling policies from the executive branch.

The viability of the executive branch approach as a means to escape the chicken-and-egg dilemma depends both on the executive's support for the social movements' goals, and on the capacity of administrative action to facilitate organizing. As noted above, establishing a comprehensive legal framework for organizing likely requires legislation; as with a judicial decision, it is highly unlikely that any administrative action could, by itself, produce such a regime. Executives, after all, execute the law; they do not create it. Moreover, developing Supreme Court jurisprudence threatens to undermine the ability of agencies to regulate in the public interest, including their ability to protect the right to organize.³⁰⁰ Nonetheless, for now, executive action—including rulemakings, adjudications, enforcement actions, guidance, executive orders, appointments, procurement-related action, and the use of the “bully pulpit,” whether at the federal, state, or local level—can perform some key organizing-enabling functions that can set the groundwork for future federal legislative reform. Notably, executive branch strategies can be used in conjunction with federalism and disruption strategies. Indeed, some of the most promising executive branch actions involve federal officials working with state actors to achieve goals neither could achieve alone, through waivers, grants, rulemaking, and

299. Indeed, given the current makeup of the federal courts generally and the Supreme Court in particular, pro-organizing legislative reforms may face constitutional challenge. See Andrias, *Constitutional Clash*, *supra* note 184, at 1072–73 (noting that in recent years, the Supreme Court has “claimed more and more power for itself” and “refus[ed] to defer to agencies’ interpretation of statutes” on labor issues). With related concerns in mind, scholars have suggested reforms such as stripping some jurisdiction from the Supreme Court and imposing term limits on Justices. See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *Calif. L. Rev.* 1703, 1706 (2021) (urging reforms to limit the power of the Court); Presidential Comm’n on the Sup. Ct. of the U.S., *Final Report 20–21* (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/F6RS-85ML>] (discussing a range of possible reforms, including term limits and proposals to reduce the power of the Court).

300. See Andrias, *Constitutional Clash*, *supra* note 184, at 1057–64 (describing the range of efforts by business to curtail powers of the administrative state and the Supreme Court’s increasing embrace of this agenda).

enforcement.³⁰¹ And, as with legislation, such executive action sometimes comes about only after disruptive activity.

1. *The Executive Toolkit*. — To understand how the executive can further organizing-enhancing reforms, it is important first to appreciate the range of available executive tools and the strengths and weaknesses of each. Under the Administrative Procedure Act (APA), federal administrative agencies typically have a choice of how to pursue their policy goals, as long as they are exercising delegated power.³⁰² The agency’s options include: issuing a legislative rule, bringing or deciding a case, or announcing its interpretation of the statute or some guidance regarding its implementation.³⁰³ An agency might choose to rely on one or all of those policymaking tools in the course of implementing its statutory mandate.³⁰⁴ Under long-settled administrative law doctrine, the agency will not be required to explain to a court why it chose one instrument or the other.³⁰⁵

The choice among these instruments matters because each brings with it a different process, legal effect, and degree of judicial review.³⁰⁶ For example, a federal agency that engages in legislative rulemaking must typically follow “notice-and-comment” procedures: informing the public of its proposal, soliciting feedback on the proposal, and responding in writing to objections.³⁰⁷ This approach has the advantage of producing a policy that is prospectively binding on both the issuing agency and the regulated public, much like a statute. In addition, although the Supreme Court has recently curtailed the extent of deference it will exercise and appears poised to cut back further, legislative rules are still entitled to some judicial deference.³⁰⁸

301. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 *Tex. L. Rev.* 265, 298 (2019) (describing the mutually beneficial relationship between state actors and presidential administrations); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 *Va. L. Rev.* 953, 955 (2016) (referencing healthcare, marijuana, and climate change as three policy areas where federal and state enforcement intersect).

302. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. Chi. L. Rev.* 1383, 1386–87 (2004).

303. *Id.* at 1386.

304. *Id.* at 1383.

305. See *Sec. Exch. Comm’n v. Chenery (Chenery II)*, 332 U.S. 194, 203 (1947).

306. See Magill, *supra* note 302, at 1383–84.

307. See 5 U.S.C. § 553 (2018) (stating the requirements for notice and comment rulemaking).

308. Nearly 40 years ago, in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984), the Supreme Court held that courts should defer to a federal agency’s interpretation of an ambiguous statute as long as that interpretation is reasonable. But the Court has recently cut back on deference even in the context of legislative rules and threatens to do so again in upcoming cases. See *Sackett v. Env’t Prot. Agency*, 143 S. Ct. 1322, 1348 (2023) (rejecting the EPA’s authority to regulate under the Clean Water Act through aggressive statutory interpretation); *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2608–09 (2022) (holding that when a case presents a major question with “economic and political significance” the agency must point to “clear congressional authorization” for the authority it claims); *Petition for Writ of Certiorari at i–ii, Loper Bright Enters. v.*

But they are expensive and time consuming, often taking more than three years to complete.³⁰⁹

By contrast, interpretive rules, guidance documents, or policy statements are cheap and efficient for an administrative agency to pursue but lack the force of law and receive less deference from courts.³¹⁰ Enforcement actions fall somewhere in between: An enforcement action is less procedurally intensive than a legislative rule and it is binding, but only on an individual, although often with some precedential force. Meanwhile, agencies can also use enforcement policy and discretion, including nonenforcement or aggressive enforcement, to pursue particular goals.³¹¹

While the above policy tools are available to federal administrative agencies, Presidents can influence administrative agencies' use of such tools. Presidents frequently issue executive orders or presidential memoranda, directing their agencies to pursue particular regulatory actions, policies, or enforcement priorities.³¹² They also exercise the appointment power to choose administrative officials who will pursue particular policy goals.³¹³ More controversially, they sometimes use the

Raimondo, No. 22-451 (U.S. filed Nov. 10, 2022), 2022 WL 19770137 (presenting the question of whether the Court should overrule *Chevron* or “clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency”).

309. Gov't Accountability Off., Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 17 (2009), <https://www.gao.gov/assets/gao-09-205.pdf> [<https://perma.cc/PWH7-92RH>]; Richard J. Pierce, Jr., Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis, 80 Geo. Wash. L. Rev. 1493, 1493 (2012) (finding that it takes an extended period of time and a significant commitment of agency resources to use the notice and comment process to issue a rule).

310. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 103 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)); cf. Connor N. Raso, Note, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 Yale L.J. 782, 787 (2010) (finding that agencies do not try to bypass rulemaking constraints through the guidance process).

311. See Kate Andrias, The President's Enforcement Power, 88 NYU. L. Rev. 1031, 1035 (2013) (describing how Presidents have played a role in enforcement policy and urging reform); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 674 (2014) (describing Presidents' decisions to decline to enforce federal law and arguing that constitutional authority for enforcement discretion is limited and defeasible); Daniel T. Deacon, Note, Deregulation Through Nonenforcement, 85 NYU. L. Rev. 795, 807–15 (2010) (examining modes of deregulation through nonenforcement under the second Bush Administration).

312. Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2277–84 (2001); Kathryn A. Watts, Controlling Presidential Control, 114 Mich. L. Rev. 683, 699–700 (2016); see also Cristina M. Rodríguez, The Supreme Court, 2020 Term—Foreword: Regime Change, 135 Harv. L. Rev. 1, 7 (2021) (arguing that “[s]hifts in legal argument should not be met with skepticism, and they often should be credited as legitimate reinterpretations of law that, in turn, will help give rise to a new political regime”).

313. Christina M. Kinane, Control Without Confirmation: The Politics of Vacancies in Presidential Appointments, 115 Am. Pol. Sci. Rev. 599, 599 (2021); Nina A. Mendleson, The

power not to act. They leave key positions empty,³¹⁴ or they choose not to defend statutes with which they disagree.³¹⁵ In addition, executives can use the bully pulpit to influence behavior by both agency officials and private actors.³¹⁶ Finally, they have significant authority in their capacity as “employer-in-chief” to use procurement policy to affect other goals.³¹⁷

Most state systems offer a similarly flexible range of administrative tools, with governors wielding significant executive power, often more than Presidents, that is subject to fewer checks.³¹⁸ Most state judiciaries also defer to administrative agencies’ reasonable interpretations of their governing statutes.³¹⁹ Moreover, states elect a variety of executives beyond their governors, including attorneys general, secretaries of state, treasurers, auditors, controllers, and superintendents.³²⁰ These democratically accountable officials all may have capacity to make policy changes that can enhance organizing. State attorneys general, for example, have the ability to issue positions clarifying state law; they can target enforcement of the

Permissibility of Acting Officials: May the President Work Around Senate Confirmation?, 72 *Admin. L. Rev.* 533, 541 (2020); Anne Joseph O’Connell, *Actings*, 120 *Colum. L. Rev.* 613, 617–23 (2020) (chronicling President Trump’s use of appointed acting officials to pursue policy preferences).

314. See Kinane, *supra* note 313, at 599–600.

315. Aziz Z. Huq, *Enforcing (But Not Defending) “Unconstitutional” Laws*, 98 *Va. L. Rev.* 1001, 1005 (2012) (asking when an executive should decline to defend in court a federal law it has determined to be unconstitutional, yet still enforce that same statute against third parties and concluding that the President is on weaker ground when the rights of individual third parties are in play); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 *Duke L.J.* 1183, 1235 (2012) (describing examples of nondefense and concluding that the question of the executive branch’s responsibility to enforce and defend statutes is not governed by a legal rule derivable from the Constitution itself, but “is instead a matter of judgment, informed by a welter of historical and institutional concerns”); cf. Katherine Shaw, *Constitutional Nondefense in the States*, 114 *Colum. L. Rev.* 213, 214–17 (2014) (examining how states have engaged in executive nondefense).

316. Kagan, *supra* note 312, at 2301; Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 *Tex. L. Rev.* 71, 84–85 (2017).

317. See Kagan, *supra* note 312, at 2292; David Madland & Karla Walter, *Uncle Sam’s Purchasing Power: How to Leverage Government Spending to Promote Good Jobs*, 31 *Berkeley J. Emp. & Lab. L.* 425, 435–36 (2010).

318. Miriam Seifter, *Gubernatorial Administration*, 131 *Harv. L. Rev.* 483, 499–500 (2017).

319. While deference remains the norm at the state level, due to a concerted campaign by right-wing legal organizations, some state courts have recently cut back on their deference doctrines. See Daniel Dew, *Opinion, 11 States Have Ended Judicial Deference to Executive Agencies—More Should Follow Their Lead*, *The Hill* (Jan. 17, 2023), <https://thehill.com/opinion/judiciary/3809650-11-states-have-ended-judicial-deference-to-executive-agencies-more-should-follow-their-lead/> (on file with the *Columbia Law Review*).

320. Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 218, at 872; see also Miriam Seifter, *Understanding State Agency Independence*, 117 *Mich. L. Rev.* 1537, 1552 (2019) (“Forty-three states popularly elect an attorney general; thirty-seven elect a secretary of state, thirty-four elect a treasurer, twenty-four elect an auditor, and twenty-two elect a superintendent of public instruction or members of a board of education.” (footnotes omitted)).

law against entities that violate rights and repress organizing; and they wield a bully pulpit.³²¹

Interest groups are able to alter public policy outcomes through engagement with all of these executive actors and administrative processes.³²² Although corporations and elites typically dominate administrative governance, when working-class and poor people are well organized, the balance can shift.³²³ In particular, there have been several key moments in American history when working and poor people's social movements secured critical policy victories through the executive branch. Although not always organizing-enabling victories, and although executive victories can be rescinded by subsequent administrations, they often become sticky by shaping public debate, creating endowment effects, and helping build support for legislative change.

2. *Successes in the Executive Branch(es)*. — Consider the Civil Rights Movement. In the late 1950s and early 1960s, amid the context of growing mass protests but still lacking the power to pass federal civil rights legislation, civil rights leaders successfully pressed first President Dwight Eisenhower, then Kennedy, and then Johnson to act.³²⁴ Eisenhower oversaw the desegregation of schools and places of public accommodation in the District of Columbia; created a committee to promote equal employment opportunities within the federal government; pursued the desegregation of the armed forces; and, most famously, dispatched federal troops to Little Rock in September 1957 in the face of Arkansas' defiance of a federal court's school integration order—all actions taken using executive power and without enacting new legislation.³²⁵

321. Bulman-Pozen & Seifter, *Democracy Principle*, supra note 218, at 915–16.

322. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 *J. Pub. Admin. Rsch. & Theory* 103, 105 (2006).

323. Gilens, supra note 1, at 157–85 (“[U]nions would appear to be among the most promising interest group bases for strengthening the policy influence of America’s poor and middle class.”); Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 565 (2012) (explaining how unions and other organizations on the left “mobilize working-class citizens to levels above what they could have achieved based on their individual resources and motivation”).

324. Harold Fleming points out that when asked on the campaign trail about civil rights legislation, then-candidate Kennedy responded first by emphasizing executive branch action. See Harold C. Fleming, *The Federal Executive and Civil Rights 1961–1965*, *Dædalus*, Fall 1965, at 921, 921–22. Indeed, even before these high-profile wins, threats of disruption brought about executive action in the realm of civil rights. In the summer of 1941, for example, labor leader A. Philip Randolph threatened a march on Washington to protest discrimination against African Americans in employment; President Roosevelt responded with an executive order creating the Fair Employment Practices Committee (FEPC), an agency intended to help African Americans and other minorities obtain jobs in defense industries during World War II. William P. Jones, *The March on Washington: Jobs, Freedom, and the Forgotten History of Civil Rights* 35–39 (2013).

325. Fleming, supra note 324, at 924–25.

Subsequently, Kennedy and then Johnson designated high-level officials in the White House with responsibility for the advancement of civil rights and created interagency civil rights committees composed of senior departmental staff members.³²⁶ In the years leading to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, they also used executive orders and enforcement policy to pursue civil rights policies that were not yet winnable through legislation. For example, Kennedy issued an executive order banning discrimination in federally aided housing and directed his Attorney General, Robert Kennedy, to use the Civil Rights Division of the DOJ to aggressively enforce previously neglected voting rights laws.³²⁷ Kennedy also used procurement power, issuing an executive order mandating nondiscrimination in employment among contractors, which Johnson later strengthened.³²⁸ Nearly all of these policies ultimately were codified in the Civil Rights Acts of 1964 and 1968.³²⁹

A more recent example emerges from the area of immigration. Unable to garner sufficient legislative support to pass comprehensive immigration reform, young immigrant rights activists—termed “Dreamers”—persuaded the Obama Administration to create a policy of “deferred action” to enable undocumented immigrants brought to the United States as children to remain in the United States.³³⁰ Deferred Action for Childhood Arrivals (DACA), announced in 2012, shielded from removal hundreds of thousands of young undocumented immigrants.³³¹ President Trump subsequently attempted to rescind the program, but the

326. *Id.* at 926–28.

327. *Id.* at 928, 931. Still, the Kennedy Administration’s fair housing policies were criticized for not being as extensive as presidential authority might have allowed. Additionally, Kennedy nominated several segregationist judges to the federal bench in southern district courts effectively hampering the efforts of civil rights litigants and the DOJ. *Id.* at 930–31.

328. Exec. Order No. 11,246, 3 C.F.R. 167–77 (1965 Supp.); Exec. Order No. 10,925, 3 C.F.R. 86–91 (1961 Supp.).

329. See 42 U.S.C. §§ 2000e to 2000e–17 (2018) (prohibiting discrimination in employment); *Id.* §§ 3601–3619 (prohibiting discrimination in housing).

330. Julia Preston & John H. Cushman Jr., Obama to Permit Young Migrants to Remain in U.S., *N.Y. Times* (June 15, 2012), <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> (on file with the *Columbia Law Review*); see also Cristina M. Rodríguez, Reading *Regents* and the Political Significance of Law, 2021 *Sup. Ct. Rev.* 1, 5, 16 (describing how recipients of deferred action benefits relied on them and the transformative nature that these benefits have on immigrant lives); Miriam Jordan, Worried and Frustrated, ‘Dreamers’ Say They Won’t Give Up, *N.Y. Times* (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/dreamers-daca-trump.html> (on file with the *Columbia Law Review*); Julia Preston, How the Dreamers Learned to Play Politics, *Politico* (Sept. 9, 2017), <https://www.politico.com/magazine/story/2017/09/09/dreamers-daca-learned-to-play-politics-215588/> [<https://perma.cc/H4FY-QPUG>].

331. See Memorandum from Janet Napolitano, Sec’y, DHS, to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/FAG7-4U7Q>].

Supreme Court held that, although the new Administration had the legal right to do so, it failed to follow proper procedures.³³² To date, although legislative reform has not yet been achieved, the DACA administrative policies continue to benefit many individuals.³³³ They have also had a lasting impact on the political debate over the status of the Dreamers. Polls show that over seventy percent of voters support the Dream Act, which would codify the executive branch policy.³³⁴

Examples exist at the state level as well. For instance, in response to pressure from worker movements, a number of state attorneys general (AGs) are focusing on protecting workers. As of 2020, eight state AGs (in California, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Pennsylvania) and the District of Columbia had a unit or bureau specifically focused on workers' rights, often contributing their enforcement resources during organizing campaigns.³³⁵

Occasionally, social movements have been able to obtain not only public policy victories but also executive action victories that are organizing-enhancing. Perhaps the most significant example is currently underway at the NLRB. In Congress, unions have urged enactment of the PRO Act, which would amend the NLRA.³³⁶ The bill is supported by President Joseph Biden and has passed the House of Representatives,

332. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2021). Subsequent attempts by the Trump Administration to rescind the program similarly failed, and DACA remains in effect. In contrast, *Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)* was deemed unlawful by the Fifth Circuit. *Texas v. United States*, 809 F.3d 134, 181–82 (5th Cir. 2015), *aff'd* by an equally divided court, *United States v. Texas*, 599 U.S. 670 (2023) (concluding that DAPA was “manifestly contrary to the INA” because it “would make 4.3 million otherwise removable” noncitizens eligible to apply for work authorization and receive other benefits).

333. The Biden Administration has sought to fortify the DACA program through a Presidential Memorandum and then notice and comment. See *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, 86 Fed. Reg. 7053, 7053 (Jan. 20, 2021).

334. Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, Pew Rsch. Ctr. (June 17, 2020), <https://www.pewresearch.org/short-reads/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-us-illegally-as-children/> [https://perma.cc/V9QY-P2YY]; see also Suhan Kacholia, *A Majority of Voters Support Continuing DACA Program*, Data for Progress (Oct. 25, 2022), <https://www.dataforprogress.org/blog/2022/10/25/a-majority-of-voters-support-continuing-daca-program> [https://perma.cc/MJ8N-DEF9]. The key point again is that this form of executive action provides a way for social-movement organizations to secure policy victories that cannot yet be obtained legislatively. It is also worth noting that, although this particular policy does not represent a comprehensive organizing-enabling regime, it does help prevent retaliation against social-movement members for their immigrant rights organizing activity, while also providing a sense of collective power and identity among the social-movement members.

335. Terri Gerstein, *Workers' Rights Protection and Enforcement by State Attorneys General*, Econ. Pol'y Inst. (Aug. 27, 2020), <https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/> [https://perma.cc/JGP3-7VUX].

336. *Protecting the Right to Organize Act of 2021*, H.R. 842, 117th Cong. (2021).

though not the Senate.³³⁷ The PRO Act would expand the coverage of the NLRA by changing the definition of “employee” so that fewer workers are excluded as putative independent contractors.³³⁸ It would also change the definition of “employer” to allow workers to bargain with the entity that exercises power over their terms and conditions of employment.³³⁹ In addition, the bill would vastly strengthen workers’ rights to organize, picket, strike, and ultimately to reach collective bargaining agreements.³⁴⁰ For example, the PRO Act would prohibit “captive audience” meetings during which employers require employees to listen to anti-union messages as a condition of employment,³⁴¹ amend the election process by requiring swifter elections and allowing mail ballots and other forms of nonworksite voting,³⁴² enable first contract mediation and arbitration,³⁴³ allow secondary boycotts,³⁴⁴ prohibit employers’ use of permanent replacements and lock outs,³⁴⁵ and allow workers to engage in intermittent strikes.³⁴⁶ In addition, the PRO Act would increase penalties, provide for swifter remedies, and create a private right of action so workers can go directly to court when employers violate the law.³⁴⁷

There is virtually no chance the PRO Act will be enacted in the next couple of years.³⁴⁸ However, significant innovation is occurring at the administrative level to achieve many of the same policy outcomes. Under new leadership appointed by President Biden, the NLRB has been interpreting the existing statute, consistent with its original statutory purpose, in ways that make it easier for workers to organize, bargain, and strike. In a series of memoranda, the General Counsel of the NLRB has announced her intention to “vigorously protect the rights of workers to freely associate and act collectively to improve their wages and working conditions.”³⁴⁹ She has issued a roadmap outlining doctrines the agency

337. DiVito, *supra* note 20.

338. H.R. 842 § 101(b).

339. *Id.* § 101(a).

340. *Id.* § 104.

341. *Id.*

342. *Id.* § 105.

343. *Id.* § 104.

344. Why the US PRO Act Matters for the Right to Unionize: Questions and Answers, Hum. Rts. Watch (Apr. 29, 2021), <https://www.hrw.org/news/2021/04/29/why-us-pro-act-matters-right-unionize-questions-and-answers> [<https://perma.cc/Z899-7ATQ>].

345. H.R. 842 § 104.

346. *Id.* § 110.

347. *Id.* § 109(a)(2).

348. See DiVito, *supra* note 20 (“The PRO Act passed the House and was endorsed by President Biden, but failed to earn a Senate vote after Republicans threatened to filibuster.”).

349. Press Release, NLRB, General Counsel Jennifer Abruzzo Releases Memorandum Presenting Issue Priorities (Aug. 12, 2021), <https://www.nlr.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue> [<https://perma.cc/7W37-XQZ2>].

will reconsider. It includes reconsidering a host of rules that limit workers' organizing rights, including: the permissibility of captive audience meetings,³⁵⁰ the legality of employer handbook rules that may chill organizing activity,³⁵¹ the permissibility of confidentiality provisions,³⁵² whether employees can use email systems for organizing activity,³⁵³ the standard of proof for terminating workers for engaging in expressive union activity,³⁵⁴ rights of off-duty employees and union organizers to access employer property to engage in union activity,³⁵⁵ and whether majority support for unionization can be demonstrated through signing of cards instead of through an election.³⁵⁶ Also up for reconsideration are various doctrines that limit workers' right to engage in concerted action, including intermittent or short strikes and collective protest of sexual harassment and unsafe working conditions.³⁵⁷ In addition, the agency has announced that it is returning to a prior, more expansive, standard for who qualifies as an employee (versus an independent contractor),³⁵⁸ and it has adopted a new, more expansive, standard for who qualifies as a joint employer.³⁵⁹ Finally, it is seeking swifter remedies and stronger penalties, within statutory limits.³⁶⁰

Because the NLRA is a comprehensive statutory framework, it provides the authority for the NLRB to advance these organizing rights, even without a new statute. Yet, executive action to advance organizing rights is possible outside of this context as well. Chief executives *can* use, and have effectively used, the bully pulpit to support labor organizing. Famously, President Franklin Roosevelt urged workers to join unions in the aftermath of the passage of the NLRA, contributing to a rapid rise in

350. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on the Right to Refrain From Captive Audience and Other Mandatory Meetings to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 1 (Apr. 7, 2022) (on file with the *Columbia Law Review*).

351. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Mandatory Submissions to Advice to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 2 (Aug. 12, 2021) (on file with the *Columbia Law Review*) [hereinafter Abruzzo, Mandatory Submissions to Advice].

352. *Id.*

353. *Id.* at 3.

354. *Id.*

355. *Id.* at 4.

356. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Guidance in Response to Inquiries About the Board's Decision in *Cemex Construction Materials Pacific, LLC* to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 4–5 (Nov. 2, 2023) (on file with the *Columbia Law Review*).

357. Abruzzo, Mandatory Submissions to Advice, *supra* note 351, at 7–8.

358. *Atlanta Opera, Inc.*, 372 N.L.R.B. 95, slip op. at 2 (June 13, 2023).

359. Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 73,956 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

360. See Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Seeking Full Remedies to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 1 (Sept. 8, 2021) (on file with the *Columbia Law Review*).

unionization rights.³⁶¹ More recently, President Biden has repeatedly extolled the virtues of unions and emphasized their importance in the economy.³⁶² In 2023, he became the first sitting U.S. President to walk a picket line.³⁶³

President Biden also convened a White House task force to consider tools that executive agencies could use “in order to reduce barriers to worker organizing and position the federal government as a model employer.”³⁶⁴ As a result of Task Force recommendations, it has become easier for federal government employees to organize, with several agencies having granted union organizers more access to federal property.³⁶⁵ According to the Administration, as a result of these actions, the number of federal government employees in a union has increased by nearly twenty percent.³⁶⁶

In addition, federal procurement policy has changed to benefit unionized companies who are responsible employers; here, the goal is to ensure strong, high-quality labor standards and efficiency in contracting. To that end, “agencies have included requirements or preferences to encourage registered apprenticeships, project labor agreements, and other measures in investments as diverse as battery materials,

361. Nelson Lichtenstein, *Workers’ Rights Are Civil Rights*, Working USA, Mar.–Apr. 1999, at 57, 59 (describing the United Mine Workers’ massive campaign to unionize the coal mines and the exhortation that “[t]he President wants you to join a union.” (internal quotation marks omitted) (quoting John L. Lewis)).

362. See Joseph Biden, President of the U.S., *State of the Union Address* (Feb. 7, 2023), in 169 Cong. Rec. S245, S260 (daily ed. Feb. 7, 2023) (“I’m so sick and tired of companies breaking the law by preventing workers from organizing. Pass the PRO Act—because workers have a right to form a union.”); Matt Viser & Tyler Pager, Biden, in Speech to Congress, Offers Sweeping Agenda and Touts Democracy, Wash. Post (Apr. 29, 2021), https://www.washingtonpost.com/politics/biden-speech-congress/2021/04/28/f33615aca7a2-11eb-bca5-048b2759a489_story.html (on file with the *Columbia Law Review*).

363. See Katie Rogers & Erica L. Green, Biden Joins Autoworkers on Picket Line in Michigan, N.Y. Times (Sept. 26, 2023), <https://www.nytimes.com/2023/09/26/us/politics/biden-uaw-strike-picket-michigan.html> (on file with the *Columbia Law Review*).

364. Press Release, The White House Task Force on Worker Organizing and Empowerment, *Update on Implementation of Approved Actions* (Mar. 17, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions/> [<https://perma.cc/Q3T8-K858>] [hereinafter Task Force on Worker Organizing].

365. *Id.*; White House Task Force on Worker Organizing and Empowerment, *Progress to Date as of March 20, 2023*, at 33 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/WH-Task-Force-on-Worker-Organizing-and-Empowerment_3.17-Implementation-Update_Final.pdf [<https://perma.cc/8733-GCPR>] [hereinafter *Implementation Update*] (describing how the Office of Personnel Management will remove unnecessary barriers and obstacles impeding unions from increasing bargaining units for the more than 300,000 federal workers eligible to organize but not in a bargaining unit).

366. Task Force on Worker Organizing, *supra* note 364.

manufacturing, broadband installation, mega-infrastructure projects, and clean buses.”³⁶⁷ Finally, the DOL will lead a coordinated initiative across the government to increase workers’ awareness of their collective bargaining rights.³⁶⁸

Executive action to advance organizing rights is possible in areas other than labor as well, often at the state level. Recently, tenant organizers have engaged state administrative agencies to act in ways that strengthen tenant organizing. Often, this takes the form of using administrative levers to obtain greater protections against eviction or rent raises, which creates space for organizing by reducing the risk of retaliation.³⁶⁹ For example, in New York, tenant groups have pressed the rent stabilization board for lower rent increases and stronger protections against eviction.³⁷⁰ They then are able to use these policies to signal the power of their organization, which helps to recruit new members to the movement and to assure tenants they face little risk of retaliation if they become involved.

At the federal level, tenant groups have pressed President Biden to issue an executive order to require federal agencies “to identify avenues for protecting tenants in federally-assisted housing and in the private rental market against unreasonable rent hikes, wrongful and unjustified evictions, denial of a lease renewal, and retaliation for organizing.”³⁷¹ They also have urged the President to “[c]onvene a cabinet-level interagency task force charged with identifying avenues for longer-term, cross-agency collaboration to regulate rents and secure other tenants’ rights, including adequate legal representation in eviction proceedings, enforceable affordability and quality housing standards, and freedom from discrimination” and that he “[p]rovide a formal avenue for federal agencies to consult with tenant stakeholders, including tenants themselves, as part of a White House Tenant Council, launching with a White House summit on rent inflation and tenant protections this fall.”³⁷² Biden responded in January 2023 by announcing a series of agency actions that will ensure greater protections for renters. This includes a “Blueprint

367. *Id.*

368. Implementation Update, *supra* note 365, at 7 (explaining how the NLRA rights notice required under Executive Order 13,496 has been refreshed and distributed to agencies); see also Exec. Order No. 13,496, 74 Fed. Reg. 6107 (Jan. 30, 2009).

369. See Andrias & Sachs, *supra* note 2, at 560, 620–22 (arguing that “the law must protect all those involved in organizing efforts from retaliation”); Richard H. Caulfield, Tenant Unions: Growth of a Vehicle for Change in Low-Income Housing, 3 U.C. Davis L. Rev. 1, 17 (1971) (noting the trend of states enacting statutes prohibiting retaliatory evictions).

370. Linda Schmidt, Low-Income Tenants Rally Against Rent Increases at NYC Rent Board Hearing, Fox5 (June 5, 2023), <https://www.fox5ny.com/news/low-income-tenants-rally-against-rent-increases-at-nyc-rent-board-hearing> [<https://perma.cc/7HQ9-X6CB>].

371. People’s Action, Federal Actions to Regulate Rents 2 (2022), https://peoplesaction.org/wp-content/uploads/2022/08/Federal-Actions-to-Regulate-Rents_V3a.pdf [<https://perma.cc/S4ZA-4QEM>].

372. *Id.*

for a Renters Bill of Rights,” that “lays out a set of principles to drive action by the federal government, state and local partners, and the private sector to strengthen tenant protections and encourage rental affordability.”³⁷³ It also includes numerous actions by agencies, such as a notice of proposed rulemaking from HUD that would require public housing authorities and owners of project-based rental assistance properties to provide at least thirty days’ advanced notice before terminating a lease due to nonpayment of rent.³⁷⁴ Once implemented, these reforms should enhance the capacity for collective action among tenants by safeguarding them against eviction and other forms of retaliation for organizing.

A second way in which administrative power has been used to support tenant organizing is through the use of enforcement discretion. Tenant groups draw attention to the misdeeds of particular landlords through protests, press coverage, social media, or by petitioning government officials. Enforcers alerted to the violations then pursue those landlords, providing a victory for the organizing efforts.³⁷⁵ The tenant organizations can use these victories to draw more participants into their movements.³⁷⁶ For example, in Minneapolis, Isuroon, a local grassroots organization advocating for Somali women, advocated on behalf of a collection of more than thirty tenants who were unfairly facing eviction.³⁷⁷ Their combined efforts gained the attention of the Minnesota Attorney General, who launched an investigation into whether the landlords violated state landlord–tenant and race discrimination laws.³⁷⁸

Finally, tenants have worked to persuade agencies to engage tenant organizations in the process of administration. Such approaches not only strengthen housing law implementation, they also give tenant groups

373. Press Release, Fact Sheet, White House, Biden–Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability (Jan. 25, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/> [https://perma.cc/7NZ6-WGCG].

374. *Id.*

375. See Veronica Rose, HPD Releases Request for Proposals to Find Tenant Organizing Groups for Partners in Preservation Program, CityLand (Mar. 29, 2023), <https://www.citylandnyc.org/hpd-releases-request-for-proposals-to-find-tenant-organizing-groups-for-partners-in-preservation-program/> [https://perma.cc/MQU4-EX4W] (describing how a Department of Housing, Preservation, and Development Partners in Preservation pilot program led to the creation of seventy-two new tenant associations).

376. See Andrias & Sachs, *supra* note 2, at 623 (describing how material victories aid organizing).

377. Katie Wermus, Minneapolis Landlord Under Investigation for Possibly Overcharging Tenants, Filing Unlawful Evictions, Fox9 (Apr. 26, 2023), <https://www.fox9.com/news/minneapolis-landlord-under-investigation-for-possibly-overcharging-tenants-filing-unlawful-evictions> [https://perma.cc/RN2M-AJ9J].

378. Press Release, Keith Ellison, Attorney General Ellison Investigating Minneapolis Landlord that May Have Filed Dozens of Baseless Evictions (Apr. 25, 2023), https://www.ag.state.mn.us/Office/Communications/2023/04/25_GreenwayApartments.asp [https://perma.cc/Y4S4-PAGH].

more credibility and more capacity to organize. In New York City, for example, tenant organizations convinced the Housing Preservation Department (HPD) to create a program that brings together various city agencies, legal service providers, and tenant organizing groups to address landlord harassment of tenants in rent-regulated buildings.³⁷⁹ The original pilot program ran in just a few neighborhoods but was highly successful at reducing the problem of landlords harassing low-rent tenants to get them to move out so that a future tenant could be charged more. It also helped build organization among tenants. Through the program, tenant organizations canvassed 272 buildings, reaching over 3,000 units; organized seventy-two new tenant associations; held 117 tenant leadership workshops; and developed 356 new tenant leaders and floor captains.³⁸⁰ The city is now expanding the program through a Request for Proposals that specifically asks “community-based organizations with a rich history of organizing” to submit plans.³⁸¹ For each proposal selected, HPD will select an organization that will oversee the implementation of the program and work to organize tenants in that community.³⁸²

C. *Dynamic Government: From Executive to Legislative*

To be sure, executive strategies come with some significant weaknesses. They can be easily reversed by a subsequent executive. And at the federal level, administrative capacity to regulate in the public interest is very much under attack by the Supreme Court.³⁸³ Yet, even with negative court rulings, significant power remains lodged in the executive branch at both the federal and state levels. And despite the ability of elections to shift executive policy, executive action can also be sticky: It creates endowment effects that make subsequent executives loath to roll back popular initiatives, and, in any event, doing so takes an investment of scarce resources and careful adherence to procedure.

More important, as with state and local strategies, the executive strategy can be iterative and dynamic, affecting future legislative action.³⁸⁴ When a social-movement organization fails to secure organizing-enhancing legislation at the legislative branch and so switches to the

379. Partners in Preservation, NYC. Hous. Pres. & Dev., <https://www.nyc.gov/site/hpd/services-and-information/partners-in-preservation.page> [https://perma.cc/8WYC-J8TJ] (last visited Jan. 17, 2024).

380. *Id.*

381. *Id.*

382. *Id.*

383. See *supra* notes 300, 308, and accompanying text.

384. Consider the example of President Roosevelt’s establishment of the FEPC, which was followed, first, by New York’s strong employment discrimination law in 1945 and then by Title VII in 1964. See generally David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 *Stan. L. Rev.* 1071 (2011) (tracing the complicated path from the FEPC to Title VII).

executive branch with success, it need not rest on any executive gains. The social-movement organization can use its executive victory to build power—to increase membership and resources. It can also use the executive branch path to bring attention to its concerns and to garner public support while experimenting with different policy approaches. Once the executive affirms rights and popular support grows, the new protections may become entrenched, making it harder for legislatures to oppose those rights.³⁸⁵ The social-movement organization can thus export that new power, popular support, and lived experience to strengthen its efforts at legislative reform.

CONCLUSION

Democracy requires political equality. And political equality requires economic equality.³⁸⁶ As has become painfully clear over the last several decades, however, the United States is suffering from crisis levels of economic inequality. This economic inequality fuels political inequality, moreover, in a mutually reinforcing cycle: As wealth concentrates into the hands of a few, the wealthy convert their economic advantage into disproportionate political influence, which they then use to increase their wealth, and on and on until democracy fades into oligarchy.³⁸⁷

Breaking this cycle is thus of the utmost concern to the survival of democracy. While campaign finance restrictions, voting rights, and other traditional approaches to the problem of representational inequality are important, they have not provided complete solutions.³⁸⁸ Critical as well is

385. See E.E. Schattschneider, *Politics, Pressures and the Tariff* 288 (1935) (providing the classic analysis that “[n]ew policies create a new politics”); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400, 430–48 (2015) (showing that public policy often has the effect of mobilizing political support for that policy); Alexander Hertel-Fernandez, *How Policymakers Can Craft Measures That Endure and Build Political Power* 3 (June 2020) (unpublished manuscript), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf [<https://perma.cc/S8WF-TFCA>] (analyzing when policy interventions “have significant *political* effects as well, changing the relationship that Americans, social movements, grassroots organizations, and private-sector businesses have with government and creating new opportunities for future policymaking”).

386. In the words of philosopher Elizabeth Anderson, democracy requires “effective access to levels of functioning sufficient to stand as an equal in society.” See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 318 (1999); see also Robert A. Dahl, *Polyarchy: Participation and Opposition* 1 (1971) (“[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”).

387. See generally, e.g., Jacob S. Hacker & Paul Pierson, *Let Them Eat Tweets: How the Right Rules in an Age of Extreme Inequality* (2020); Joseph E. Stiglitz, *The Price of Inequality* (2012); Jeffrey A. Winters, *Oligarchy* (2011) (explaining that concentrated wealth is both the source of power unique to oligarchy and the ultimate political motive of all oligarchs).

388. See Andrias & Sachs, *supra* note 2, at 577–78.

the ability of the poor and working class to build organizations through which they can demand for themselves a greater voice in the economy and in politics. Among the tools that might be deployed in furtherance of this power-building effort are what we have described as organizing-enabling laws: laws that facilitate the construction of countervailing power among the poor and working class.

But organizing-enabling laws will only contribute to the project of economic and political equality if those laws get enacted, and enactment of such laws is beset by the chicken-and-egg problem described above. This Essay shows three routes to resolving this chicken-and-egg dilemma: disruption, jurisdiction switching, and branch shifting. As alluded to throughout, moreover, the three approaches need not be deployed in isolation but can be part of an integrated movement toolkit. With that toolkit, law can facilitate organizing and thereby contribute to the democratic project.

APPENDIX A

City	Population ³⁸⁹	Mayor ³⁹⁰	City Council Majority
1. New York	8,335,897	Democrat	Democrat ³⁹¹
2. Los Angeles	3,822,238	Democrat	Democrat ³⁹²
3. Chicago	2,665,039	Democrat	Democrat ³⁹³
4. Houston	2,302,878	Democrat	Democrat ³⁹⁴
5. Phoenix	1,644,409	Democrat	Democrat ³⁹⁵
6. Philadelphia	1,567,258	Democrat	Democrat ³⁹⁶

389. See City Population by Sex, City and City Type, UNdata, <https://data.un.org/Data.aspx?d=POP&f=tableCode%3A240> [https://perma.cc/2PL4-GKCM] (last updated Sept. 13, 2023).

390. List of Current Mayors of the Top 100 Cities in the United States, Ballotpedia, https://ballotpedia.org/List_of_current_mayors_of_the_top_100_cities_in_the_United_States [https://perma.cc/WKG5-7FVB] (last visited Feb. 7, 2024).

391. Council Members & Districts, N.Y. City Council, <https://council.nyc.gov/districts/> [https://perma.cc/FE8U-7Y3V] (last visited Feb. 7, 2024).

392. See Jim Newton, Commentary, Decline in Political Integrity Is at the Heart of Los Angeles City Council Scandals, Cal Matters (June 29, 2023), <https://calmatters.org/commentary/2023/06/los-angeles-city-council-scandals/> [https://perma.cc/8NHU-TXE9] (describing how the only Republican on the L.A. city council was “convicted of obstruction and sent to prison in 2021”).

393. Chicago’s city council is not a partisan body. However, the individuals serving on the council are Democrats and other progressives. See Heather Cherone, New City Council Set to Be Most Diverse as Center of Power Moves Left, WTTW (Apr. 5, 2023), <https://news.wttw.com/2023/04/05/new-city-council-set-be-more-diverse-center-power-moves-left> [https://perma.cc/EP4E-YFZT] (describing the political dynamics of the Chicago City Council).

394. Houston’s city council is not a partisan body. However, conservatives are in the minority on the city council. See Rebecca Noel, Election of GOP-Endorsed City Council Candidates in Houston Joint Runoff May Shift Power Dynamics in City Hall, Expert Says, Hous. Pub. Media (Dec. 11, 2023), <https://www.houstonpublicmedia.org/articles/news/politics/elections/2023/12/11/472086/election-of-gop-endorsed-city-council-candidates-in-houston-joint-runoff-may-shift-power-dynamics-in-city-hall-expert-says/> [https://perma.cc/V2U6-AD2U] (last updated Dec. 12, 2023).

395. Phoenix’s city council is not a partisan body. But a majority of the individuals serving on the city council are Democrats. See Taylor Seely, Who Is on the Phoenix City Council? What to Know, azcentral (Feb. 22, 2023), <https://www.azcentral.com/story/news/local/phoenix/2023/02/22/who-is-on-the-phoenix-city-council-what-to-know/69866408007/> [https://perma.cc/CWY3-MWF8] (last updated May 16, 2023).

396. See Councilmember Katherine Gilmore Richardson, At-Large, Majority Leader, City Council Phila., <https://phlcouncil.com/KatherineGilmoreRichardson/> [https://perma.cc/D66D-ZYAP] (last visited Feb. 7, 2024).

7. San Antonio	1,472,909	Independent	Democrat ³⁹⁷
8. San Diego	1,381,162	Democrat	Democrat ³⁹⁸
9. Dallas	1,299,544	Republican	Democrat ³⁹⁹
10. Austin	974,447	Democrat	Democrat ⁴⁰⁰
11. Jacksonville	971,319	Democrat	Republican ⁴⁰¹
12. San Jose	971,233	Democrat	Democrat ⁴⁰²
13. Fort Worth	956,709	Republican	Unknown ⁴⁰³
14. Columbus	907,971	Democrat	Democrat ⁴⁰⁴
15. Charlotte	897,720	Democrat	Democrat ⁴⁰⁵

397. San Antonio's city council is not a partisan body. But a majority of the individuals serving on the city council are liberal. See Andrea Drusch, What the Midterms Tell Us About the 2023 City Council Battlegrounds to Watch, *San Antonio Rep.* (Dec. 4, 2022), <https://sanantonioreport.org/new-san-antonio-city-council-maps-partisan-breakdown/> [https://perma.cc/RJC8-XA63].

398. See David Garrick, With Tuesday's Runoffs, San Diego Democrats Will Have a 9-0 City Council Majority for the First Time, *San Diego Union Trib.* (Nov. 9, 2022), <https://www.sandiegouniontribune.com/news/politics/story/2022-11-09/democrats-san-diego-city-council-9-0-majority> [https://perma.cc/HKA9-792H].

399. Dallas's city council is not a partisan body. However, it "is made up overwhelmingly of members who identify as Democrats." J. David Goodman, Dallas Mayor Switches to G.O.P. and Attacks Democratic Leaders, *N.Y. Times* (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/eric-johnson-dallas-mayor-republican.html> (on file with the *Columbia Law Review*).

400. Austin's city council is not a partisan body. But a majority of the individuals serving on the city council are Democrats. See Amy Smith, Mackenzie Kelly: A Collaborative Conservative Among Democrats, *Austin Monitor* (Dec. 22, 2021), <https://www.austinmonitor.com/stories/2021/12/mackenzie-kelly-a-collaborative-conservative-among-democrats/> [https://perma.cc/3XXK-932L] (describing the political dynamics of the Austin City Council).

401. See Claire Heddles, Meet Jacksonville's New City Council, *Jax Today* (June 22, 2023), <https://jaxtoday.org/2023/06/22/meet-jacksonvilles-new-city-council/> [https://perma.cc/7R4V-BJGG].

402. San Jose City Council, Santa Clara Cnty. Democratic Party, <https://sccdp.org/index.php/voter-resources/our-elected-officials/san-jose-city-council/> [https://perma.cc/8W8E-38AB] (last visited Feb. 7, 2024).

403. Fort Worth's city council is not a partisan body. Information about the partisan affiliations of the individual members is not readily available.

404. See Bill Bush, New Nine-Member 'Residential District' Columbus City Council Looks Much the Same as the Old One, *Columbus Dispatch* (Nov. 7, 2023), <https://www.dispatch.com/story/news/local/2023/11/07/six-democrat-incumbents-3-newcomers-win-columbus-city-council-seats/71494509007/> [https://perma.cc/JU5K-PQ5L] (last updated Nov. 9, 2023) (quoting the City Council president as saying, "Columbus voters elected nine Democrats to represent our city").

405. See 11/07/2023 Official Municipal Election Results—Mecklenburg, N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/07/2023&county_id=60&office=LOC&contest=0 [https://perma.cc/TZ58-Q8YA] (last updated Nov. 17, 2023).

16. Indianapolis	880,621	Democrat	Democrat ⁴⁰⁶
17. San Francisco	808,437	Democrat	Democrat ⁴⁰⁷
18. Seattle	749,256	Democrat	Democrat ⁴⁰⁸
19. Denver	713,252	Democrat	Democrat ⁴⁰⁹
20. Washington, DC	671,803	Democrat	Democrat ⁴¹⁰

406. See *Democrats Keep Supermajority on Indy’s City-County Council*, Indianapolis Bus. J. (Nov. 7, 2023), <https://www.ibj.com/articles/democrats-keep-supermajority-on-indys-city-county-council> [<https://perma.cc/B5K6-G29B>].

407. San Francisco’s legislative body is called the Board of Supervisors. It is not a partisan body. But the individuals who serve on the Board of Supervisors are overwhelmingly Democrats. See Nami Sumida, *We Used an Algorithm to Score S.F. Supervisors From Progressive to Moderate*, S.F. Chron. (Nov. 8, 2021), <https://www.sfchronicle.com/projects/2021/supervisor-scores/> [<https://perma.cc/TZS3-D3FL>] (noting that “the board is entirely Democratic”).

408. Seattle’s city council is not a partisan body. But an overwhelming majority of individuals who serve on the city council are Democrats. See Sarah Grace Taylor, Harrell, Nelson Celebrate as Results Suggest Moderate Seattle City Council, *Seattle Times* (Nov. 14, 2023), <https://www.seattletimes.com/seattle-news/politics/tuesday-count-keeps-seattle-council-races-close-though-few-ballots-remain/> [<https://perma.cc/NR8Y-Z6CM>] (predicting that “six moderate Democrats and two so-called progressives” will “take office in January” based on election results).

409. Denver’s city council is not a partisan body. But an overwhelming majority of the individuals who serve on the city council are Democrats. See Rebecca Tauber, *What We Know About How the Next Denver City Council Will Look and Work—And How it Could Be Different*, *Denverite* (Apr. 6, 2023), <https://denverite.com/2023/04/06/denver-election-results-denver-city-council/> [<https://perma.cc/3WRL-79H3>].

410. The District of Columbia’s city council is a partisan body. Ten members are Democrats and two are independents. See *The D.C. City Council*, Ctr. for Youth Pol. Participation (2023), <https://cyp.p.rutgers.edu/d-c/> [<https://perma.cc/8K8H-A9F6>].

