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I. INTRODUCTION

Over the past fifty years, American labor unions have endured a precipitous decline. As of 2022, the total number of organized workers was just 10.1% of the entire American workforce.[1] In the private sector, this number fell to just 6.0%. This figure stands in stark contrast to the United States' apex of unionization in 1954 when 34.8% of workers belonged to a union.[2]Unorganized workers, on average, earn roughly 17% less in wages than their unionized counterparts.[3] In addition to decreased wages, non-union workers face greater uncertainty regarding benefits, working conditions, and job security.[4]

The plight of unorganized workers comes into even clearer focus when considering the nation's low-wage employees.[5] Fast-food workers comprise a sizeable number of low-wage employees in the United States.[6] As of May 2021, over three million Americans worked in the fast-food industry.[7] Despite its size, just 3.1% of fast-food workers belonged to a union, placing the fast-food industry among the least organized in the United States.[8] Part of the difficulty in organizing the fast-food industry comes from the fissured nature of the sector, meaning that a few leading firms dominate the industry without directly employing most of the workers associated with their company.[9] Instead, the leading firms transfer employment to subsidiaries who obfuscate the true nature of the

1. Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members — 2022 (2022), https://www.bls.gov/news.release/pdf/union2.**pdf [**https://perma.cc/GEM7-4KWN].

2. Drew Desilver, *American Union Membership Declines as Public Support Fluctuates*, PEW RESEARCH CENTER (Feb. 20, 2014) https://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/ [https://perma.cc/HU9Q-BQ87].

3. Press Release, *supra* note 1.

4. Megan M. Reynolds & David Brady, *Bringing You More Than the Weekend: Union Membership and Self-Rated Health in the United States*, 22 SOC. FORCES 1023, 1024 (2012).

5. MARTHA ROSS & NICOLE BATEMAN, BROOKINGS INST., MEET THE LOW-WAGE WORKFORCE 7 (2019), https://www.brookings.edu/wp-content/uploads/2019/11/201911_Brookings-Metro_low-wage-workforce_Ross-Bateman.pdf [https://perma.cc/9WVD-89TG]. "Low-wage" workers are generally defined as workers who earn less than 2/3 of the median wage, subject to geographic variations. *Id.*

6. Press Release, *supra* note 1.

7. *Id.* at 8-9 tbl.3.

8. *Id.*

9. David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. RELS. REV. 33, 33-34 (2011).

employment dynamic.[10] This obfuscation fundamentally alters traditional employee-employer relations found in most other industries.[11] The franchise model, which dominates the fast-food industry, provides a common example of a fissured employment relationship.[12] Large firms like McDonald's and Burger King often opt to subcontract employment in this manner for a variety of reasons, such as shifting labor costs and liability to third parties.[13] These profound changes in the form and function of low-wage employment mean that millions of the most vulnerable American workers face dangerous working conditions, reduced compensation, and insufficient benefits.

California, home to more than 500,000 fast-food workers, recognized the gravity of these changes in the fast-food industry when its legislature passed AB 257.[14] A 2021 report found that over two thirds of the families of fast-food workers in Los Angeles County relied on at least one social safety net program to supplement their wages.[15] This reliance brings about a public cost of roughly $1.2 billion each year.[16] In addition to low wages, fast-food workers also endured a shockingly high rate of injury.[17] According to one survey, 87% of fast-food workers suffered at least one on-the-job injury over the course of a year.[18] AB 257 seeks to ameliorate these maladies by ensuring broad protections for low-wage workers in California without relying on the traditional labor law framework that emerged from the 1935 National Labor Relations Act ("NLRA"). The NLRA established a system of labor relations that centered around the individual workplace. AB 257, on the other hand, attempts to address labor issues across the fast-food industry. It creates a ten-member council—comprised of workers, franchisors, franchisees, and government officials—that holds legislative authority to set standards for all California fast-food establishments.[19]

This Comment examines AB 257 and argues that it represents an important step in adjusting the American labor relations framework to

10. *Id.*

11. *Id.* at 36.

12. Chris Marr, *California Fast Food Bill Inches US Toward Bargaining by Sector*, BLOOMBERG L. (Aug. 18, 2022, 5:30 AM) https://news.bloomberglaw.com/daily-labor-report/california-fast-food-bill-inches-us-toward-bargaining-by-sector [https://perma.cc/3ZDG-JWHB**]**.

13. Weil, *supra* note 10, at 37 (outlining several reasons, both economic and practical, why firms might choose to structure their employment relations in such a manner).

14. CAL. LAB. CODE §§ 1470-1473 (Deering 2023).

15. UC BERKELEY LAB. CTR. ET AL., THE FAST FOOD INDUSTRY AND COVID-19 IN LOS ANGELES, 2 (Mar. 2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/03/The-Fast-Food-Industry-and-COVID-19-in-Los-Angeles.pdf [https://perma.cc/9YB9-4KUJ].

16. *Id.* at 2.

17. *Id.* at 3.

18. *Id.*

19. Marr, *supra* note 13.

meet the needs of the modern economy. Section II traces the history of sectoral labor law[20] in the United States and examines the ways in which several brief experiments with setting sector-wide standards for wages, hours, and working conditions diverged from the traditional labor law framework erected by the NLRA. Part A of Section II examines several instances of sectoral or quasi-sectoral bargaining that have occurred in the United States since World War II. Part B discusses the sectoral approach adopted by California's AB 257 (hereinafter, "AB 257") and describes the ways in which the bill moves away from the traditional, private model of industrial relations. Section III argues that while the regulatory approach adopted by AB 257 provides necessary relief to low-wage workers in a highly fissured industry, modifications to the law could provide even stronger protections. Part A of Section III examines possible challenges to AB 257 due to federal labor law preemption and explains how the Bill would survive such challenges. Finally, Part B assesses the Bill's future and argues for a vigorous enforcement of AB 257 due to the legislature's clear intent to address an urgent situation in California. Further, this Section advocates the passage of similar legislation across the United States.

II. BACKGROUND

For most of its recent history, American labor law has relied on a localized, enterprise-based system of organization. The changes brought about by the passage of the 1935 NLRA solidified worksite-level bargaining with an individual employer as the norm for union activity in the United States.[21] This focus on shop-level bargaining rather than broader, political reforms developed into a ubiquitous tenant of American labor organizing.[22] Despite this general underpinning, various social phenomena and circumstances prompted forays into more expansive models of labor law. Throughout the nineteenth, twentieth, and twenty-first centuries, American legislatures, workers, and courts established broad standards for wages and working conditions through several methods.

In 1933, Congress passed the National Industrial Relations Act

20. Sectoral labor law refers to a system of labor relations that addresses the employer-employee relationship at an industry-wide level rather than at the individual workplace.

21. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 14 (2016).

22. William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1112 (1989). Forbath asserts that a voluntarist ideology "teaches that workers should pursue improvements in their living and working conditions through collective bargaining and concerted action in the private sphere." *Id.* Rather than focus on broad social legislation to improve conditions, this mindset adopts a laissez-faire approach in the hopes of winning individual victories at specific worksites.

("NIRA"),[23] which established procedures whereby workers, business associations, and consumers could propose "codes of fair competition" for specific industries.[24] These codes could include industry-wide minimum standards for wages and working conditions.[25] The NIRA inaugurated a "tripartite" model of political economy similar to those that emerged in many European states during the aftermath of World War II.[26] These systems of industrial relations centered around "a strong state, a business community firmly rooted in a single country, and a well-organized working class."[27] Rather than addressing wage and hour concerns via sporadic legislative action, the NIRA employed a novel administrative apparatus that facilitated sector-wide cooperation. The NIRA created a tripartite system which sparked a brief experiment with social democratic labor law that "invited trade associations and union leaders to establish wages and other working conditions jointly with the government."[28]

However, this experiment proved itself short-lived. The Supreme Court struck down the industry code provisions of the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*.[29] The Court held that Congress may not "abdicate or transfer to others the essential legislative functions" vested to it by the Constitution.[30] In the Court's eyes, the industry codes—as products of extra-legislative councils representing businesses, workers, and consumers—constituted illicit legislative edicts. In arriving at this view, the *Schechter* Court employed the nondelegation doctrine which proscribes Congress from delegating its legislative powers unless it provides an "intelligible principle" to which the body receiving the power is "directed to conform."[31] The Court used the nondelegation doctrine sparingly during the New Deal Era and it has rarely been used since.[32] Nevertheless, the nondelegation doctrine sounded a death knell for the brief era of sectoral cooperation under the NIRA.

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23. National Industrial Recovery Act (NIRA) of 1933, Pub. L. No. 67, 48 Stat. 195. The NIRA was invalidated by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

24. *Id.*

25. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 621 (2019).

26. Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY 95, 95 (Richard P. Applebaum & Nelson Lichtenstein eds., 2016).

27. *Id.*

28. Andrias, *supra* note 22, at 15.

29. 295 U.S. 495 (1935).

30. *Id.* at 529.

31. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

32. D. A. Candeub, *Preference and Administrative Law*, 72 ADMIN. L. REV. 607, 630 ("The New Deal Court, relying on the doctrine, only overturned statutes in two cases: *Schechter Poultry Corp. v. United States* [294 U.S. 495] and *Panama Refining Co. v. Ryan* [293 U.S. 388 (1935)].").

Out of the ashes of the NIRA, the Franklin D. Roosevelt administration constructed the framework for modern American labor law. Incensed by the Court's decision in *Schechter*, President Roosevelt called a press conference on May 31, 1935—four days after the opinion's publication.[33] In front of the gathered media, President Roosevelt asserted that the implications of the *Schechter* decision were "much more important than almost certainly any decision of [his] lifetime . . . , more important than any decision probably since the Dred Scott case."[34] The following month, President Roosevelt implored Congress to stay over the summer to pass remedial legislation.[35]

Perhaps the most important bill to come from Congress' emergency session was the NLRA, sponsored by Senator Robert F. Wagner.[36] The NLRA, also known as the Wagner Act, offered a compromise between the sweeping reforms demanded by organized labor on the one hand and capital's resistance to government intervention in the labor market on the other. In this sense, the NLRA provided a relatively conservative option by which labor unrest might be quelled without engaging in the large-scale intervention of the NIRA.[37] Leon Keyserling, a Senate staffer who authored portions of the NLRA, claimed that "[t]he twofold purpose of the NLRA was (1) to advance social justice and (2) to channel protest and defuse potential rebellion."[38] Chastened by the Supreme Court's evisceration of the NIRA in *Schechter* and *Panama Refining Co.*, the New Deal Congress adopted a new tack to enacting labor reforms necessary for industrial relief.

One of the most vital reforms carried out by the NLRA comes from Section 7(a), which grants workers a statutory right to form a union at their workplace.[39] Section 7(a) states in no uncertain terms that:

> 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 or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in

33. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR 1929-1945, at 273 (1999).

34. Franklin D. Roosevelt, President of the United States, Press Conference (May 31, 1935), https://www.presidency.ucsb.edu/node/208710 [https://perma.cc/2FKB-USB6].

35. KENNEDY, *supra* note 34, at 273.

36. *Id.*

37. Theodore J. St. Antoine, *How the Wagner Act Came to Be: A Prospectus*, 96 MICH. L. REV. 2201, 2205 (1998).

38. *Id.*

39. 29 U.S.C. § 157 (2022).

a labor organization as a condition of employment . . . .[40]

The NLRA sought to achieve its goals by creating "a permanent set of institutions within the very womb of private enterprise, which offered workers a voice, and sometimes a club, with which to resolve their grievances."[41] Rather than the sectoral, tripartite approach promised by the NIRA, the NLRA implemented a private, enterprise-based system of labor organizing. In true New Deal fashion, however, the NLRA also created a bureaucratic arm of the government to adjudicate alleged violations of the Act's provisions—the National Labor Relations Board ("NLRB").[42] Despite the NLRB's national scope, the NLRA narrowed the battlefield of labor action to individual worksites.

Although the NLRA brought relatively "conservative" changes to the system of industrial relations—at least when compared with the NIRA—the new reforms faced massive resistance from the courts and, eventually, the post-World War II Congress.[43] Shortly after the NLRA went into effect, the Supreme Court began to restrict the Act's scope and curb the NLRB's ability to vigorously enforce its provisions.[44] In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court found that a California telegraph company did not run afoul of the NLRA when it fired several unionized employees who had engaged in a brief strike.[45] The Court held that it was "not an unfair labor practice . . . to reinstate only so many of the strikers as there were vacant places to be filled."[46] In effect, this ruling allowed a private employer to hire permanent replacements for union members exercising the right to strike guaranteed by Section 7(a) of the NLRA. The *Mackay Radio* ruling came as part of a string of pre-World War II cases in which the Supreme Court interpreted the NLRA according to a formalist contractualism that empowered management and legitimized the "inequalities of bargaining power arising from unequal social distribution of property ownership."[47]

In the period after World War II, the United States experienced a

40. *Id.*

41. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 36 (2002).

42. National Labor Relations Act § 3(a), 49 Stat. 445 (1935) (codified as amended at 29 U.S.C. § 153) ("There is hereby created a board to be known as the 'National Labor Relations Board,' which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate.").

43. Andrias, *supra* note 22, at 17.

44. *Id.*

45. 304 U.S. 333, 345-46 (1935) ("[I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them.").

46. *Id.* at 346.

47. Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 304 (1978).

massive strike wave.[48] At its height in January of 1946, the movement involved nearly two million striking workers spread across various essential industries such as steel, mining, and the railways.[49] This display of labor militarism frightened many Americans and mobilized conservative interests against a labor movement that it viewed as out of control. Following a Republican sweep of Congress in the 1946 midterms—the first of its kind since the 1930s—anti-union interests sought to scale back New Deal legislation which they viewed as the primary cause of labor unrest.[50] In 1947, Senator Robert Taft introduced the Labor Management and Relations Act ("LMRA"), better known as the Taft-Hartley Act.[51] The LMRA further cemented the NLRA's commitment to private bargaining at individual worksites while simultaneously stripping many of the bargaining tools in labor's arsenal.[52] Indeed, the LMRA "codified the Supreme Court's prior decisions allowing employers to campaign against unions as long as they did not engage in threats of reprisals or promises of benefits."[53] Many in the labor movement recognized the profound impact the LMRA would have on union organizing within the private enterprise framework established by the NLRA. John L. Lewis, president of the United Mine Workers, even went so far as to label the LMRA as "the first ugly, savage thrust of fascism in America."[54]

A. American Experiments with Quasi-Sectoral Bargaining

The private, enterprise-based system of collective bargaining that emerged from the legislative combination of the NLRA and the LMRA provides the framework for modern labor organization in the United States. This system adopts a localized, shop-based approach to bargaining and eschews the setting of expansive statutory minimum standards for wages, hours, and working conditions.[55] However, the NLRA scheme does not expressly forbid broad collective bargaining agreements that cover large swaths of a particular sector. On several occasions, American

48. U.S. DEP'T OF LAB., BUREAU OF LAB. STATS., BULL. NO. 918, WORK STOPPAGES CAUSED BY LABOR-MANAGEMENT DISPUTES IN 1946 1 (May 1947) https://www.bls.gov/wsp/publications/annual-summaries/pdf/work-stoppages-1946.pdf [https://perma.cc/NUT2-NKDL] ("Approximately 4.6 million workers were directly involved in the stoppages which began in 1946—a larger number than in any previous year on record.").

49. *Id.* at 10.

50. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974, at 51 (1996).

51. *Id.*

52. Andrias, *supra* note 22, at 18.

53. *Id.* at 18-19.

54. LICHTENSTEIN, *supra* note 42, at 115.

55. *Id.*

workers have enjoyed quasi-sectoral bargaining agreements which effectively set industry wide standards.

1. Railway Labor Act

The Railway Labor Act of 1926 ("RLA") provides one such example of a quasi-sectoral agreement which provided workers in a specific industry with a method to settle labor disputes outside the NLRA framework. The RLA predates the NLRA by nearly 10 years and continues to serve as the authoritative labor law for rail industries and—after a 1936 amendment—airline industries.[56] The authors of the RLA recognized that the rail industry constituted a uniquely vital sector of the American economy. Indeed, during the late nineteenth century in the United States, there were several railway strikes that exerted tremendous stress on both the national economy and spirit.[57]

With these strikes in mind, Congress set about constructing a labor relations framework that could prevent similar disputes in the rail industry. The RLA itself lists the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein" as the first of its intended purposes.[58] One way in which the RLA sought to realize this purpose came with the creation of a thirty-four-member Adjustment Board.[59] This Board—comprised of seventeen representatives selected by carriers, railroad companies, and railroad operators and another seventeen selected by labor organizations—holds the authority to hear and adjudicate unresolved labor disputes across the rail industry.[60] If employers and employees cannot settle a dispute amongst themselves, the RLA entitles them to a hearing before the Adjustment Board. Subsequently, the Adjustment Board can issue a ruling with which the losing party is obliged to comply within thirty days.[61] In the event that the losing party fails to comply, however, the victorious party can file a civil lawsuit in which the findings and ruling of the Adjustment Board is "*prima facie* evidence of the facts therein stated, and . . . the petitioner . . . shall not be liable for costs."[62] These provisions gave considerable

56. Pub. L. No. 74-487, 49 Stat. 1189.

57. Mark A. Schuler, *The Railway Labor Act of 1926 and Modern-Day Airline Labor Strife: Progress Toward Labor Peace Begins With Overruling* Williams v. Jacksonville Terminal Co., 21 SEATTLE U. L. REV. 189, 191 (1997) ("violent labor conflicts were especially notable in the history of the railroad industry during the late nineteenth century and continuing through the beginning of the twentieth century").

58. 45 U.S.C. § 151a(1) (2022).

59. *Id.* § 153(a).

60. *Id.*

61. *Id.*

62. Harry H. Byrer, *The Railway Labor Act and the National Labor Relations Act—A Comparison,*

power to the Adjustment Board and disincentivized non-compliance with its rulings.

While the RLA did not erect a framework for setting industry-wide standards per se, it did create one of the first legislative experiments with labor-management power sharing and cooperation. The power afforded to the Adjustment Board by the RLA allows workers and management to fundamentally shape labor policy in the rail sector through authoritative rulings on worksite disputes.

2. The Treaty of Detroit

One of the best examples of this quasi-sectoral bargaining under American labor law is the "Treaty of Detroit" —the 1950 collective bargaining agreements between the United Autoworkers ("UAW") and the leading automobile manufacturers of the time.[63] The early 1950s saw the zenith of private-sector union membership in the United States.[64] In 1950, the year the Treaty of Detroit went into full effect, 34.6% of all private sector wage and salary workers enjoyed union membership.[65] In addition to a robust labor movement, the particular economic conditions of the auto industry in the early 1950s made expansive bargaining agreements feasible. During this period, the "Big Three" auto manufacturers—GM, Ford, and Chrysler—employed most automobile workers.[66] UAW President Walter Reuther recognized that the limited number of employers in the sector handed organized labor a powerful bargaining tool.[67] By threatening to strike any one of the Big Three who did not reciprocate the terms of a collective bargaining agreement reached with any of the others, the UAW could guarantee industry-wide benefits, wages, and conditions. Indeed, when the UAW finalized a revolutionary bargaining agreement with GM in 1950, Chrysler and Ford quickly agreed to identical terms at their plants.[68] Reuther hailed the three contracts which comprised the Treaty as "the most significant development in labor relations since the mass production industries were organized."[69]

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44 W. VA. L. REV. 1, 9 (1937) (however, in certain circumstances, the petitioner may still incur some costs, despite the fact that they prevailed before the Adjustment Board).

63. NELSON LICHTENSTEIN, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT 280 (1995).

64. Barry T. Hirsch, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, 22 J. ECON. PERSPS. 135, 176 (2008).

65. *Id.* The percent of wage and salary workers who are members of a union—union density—peaked at 34.8% in 1954. The following years, however, saw a precipitous decline in union density, which fell to just 6% of all private-sector workers in 2022. Press Release, *supra* note 1, at 1.

66. LICHTENSTEIN, *supra* note 64, at 280.

67. *Id.*

68. *Id.*

69. *Id.*

The benefits of this quasi-sectoral agreement reached both union and non-union workers alike. By 1958, wages in the auto industry had nearly doubled.[70] In turn, auto workers enjoyed widespread property ownership. Labor historian John Barnard notes that "Detroit and Flint, the two major centers of manufacturing and assembly, had the highest proportion of owner-occupied homes of any American cities of their size."[71] Although the Treaty of Detroit took place firmly within the confines of the private-bargaining framework of the NLRA, the discrete material conditions of post-World War II Detroit allowed the UAW to set sectoral standards that would otherwise be infeasible.[72]

3. New York State Wage Boards

A particularly apt example of quasi-sectoral bargaining comes from New York's Minimum Wage Act, which allows for the creation of wage boards to recommend minimum wages for specific occupations.[73] This law hands the state's executive branch a powerful tool with which it may bring labor, employers, and the public together to investigate the wages and working conditions of a specific occupation. If, at any time, the labor commissioner is "of the opinion that any substantial number of persons employed in any occupation . . . are receiving wages insufficient . . . to protect their health, he shall appoint a wage board to inquire into and report and recommend adequate minimum wages and regulations for employees in such occupation."[74] The law stipulates that the wage board shall contain an equal number of representatives nominated by employer and employee interest groups.[75] The board, in turn, holds the authority to conduct hearings, gather data, and produce a report containing its recommendations as to minimum wages for workers of the occupation at issue.[76] Once the wage board compiles its report, the labor commissioner wields the authority to approve or dismiss its recommendations.[77] However, the law clearly asserts that "any minimum wage order and regulation issued by the commissioner pursuant to this article shall . . . be final."[78] Accordingly, the recommendations emanating from the wage

70. JOHN BARNARD, WALTER REUTHER AND THE RISE OF THE AUTO WORKERS 154 (1983).

71. *Id.*

72. Barry Eidlin, *The House That Reuther Built*, JACOBIN (Jun. 8, 2016) https://jacobin.com/2016/06/uaw-academic-workers-colleges-union-walter-reuther-treaty-detroit/ [https://perma.cc/X3CF-26ET].

73. N.Y. LAB. LAW § 650 (McKinney 2022).

74. *Id.* § 653(1).

75. *Id.* § 655.

76. *Id.*

77. *Id.*

78. *Id.* § 657.

board do not require legislative ratification before obtaining the force of law.

In 2016, Governor Andrew Cuomo called for the convention of a wage board under New York's Minimum Wage Act.[79] The Governor's decision came in response to the "Fight for $15" movement's organizing activity in New York's fast-food industry.[80] In April 2015, Fight for $15, with the backing of the Service Employees International Union ("SEIU"), organized nearly 60,000 American fast-food workers as they engaged in walk-outs across the United States.[81] This mass action, which involved mostly non-union, low-wage workers, pressured Governor Cuomo to invoke New York's Minimum Wage Act and convene a wage board.[82] The fast-food wage board subsequently recommended that "the minimum wage be raised to $15 for fast food employees in fast food establishments."[83]

While New York's wage boards provide a relatively unique approach to setting industry-wide labor standards, several legal scholars have pointed out ways in which this approach flounders.[84] One major problem with the wage boards—at least as constituted in New York—arises from their lack of executive power.[85] Another difficulty with the wage boards stems from their inadequacy as bargaining forums. Despite all the procedures and investigations that take place on wage boards, labor and management do not actually produce binding agreements that resolve their differences.[86] The New York wage boards only recommend action in a manner that leaves the ultimate authority to implement minimum wage in the hands of the executive, via their appointed labor comm-

79. Steven Greenhouse, *Fight for $15: The Strategist Going to War to Make McDonald's Pay*, THE GUARDIAN (Aug. 30, 2015, 10:42 AM), https://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions [https://perma.cc/6NRB-E2HP].

80. *Id.* The Fight for $15 movement organizes across multiple industries with the aim of establishing a national $15 dollar minimum wage.

81. Steven Greenhouse & Jana Kasperkevic, *Fight for $15 Swells Into Largest Protest by Low Wage Workers in US History*, THE GUARDIAN (Apr. 15, 2015, 5:40 PM), https://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston [https://perma.cc/UWQ6-UYSD].

82. Greenhouse, *supra* note 80.

83. N.Y. STATE DEP'T OF LAB., REPORT OF THE FAST FOOD WAGE BOARD TO THE NYS COMMISSIONER OF LABOR 20 (2015), https://media.bizj.us/view/img/6606112/fast-food-wage-board-report.pdf. The report advised a graduated schedule which would phase in wage increases over a span of six years. It also recommended a different wage scale for New York City and upstate New York. *Id.* at 18.

84. *See* Andrias, *supra* note 22, at 66.

85. Cesar F. Rosado Marzan, *Can Wage Boards Revive U.S. Labor?: Marshalling Evidence From Puerto Rico*, 95 CHI.-KENT L. REV. 127, 140 (2020) ("The New York minimum wage setting system remains in the hands of the government's executive branch").

86. *Id.*; *see also* Andrias, *supra* note 22, at 66 ("To be sure, as an example of tripartism, the New York wage board is partial. There was no restaurant representation on the board; no comprehensive bargaining occurred; and the board's mandate was limited to wages.").

issioner.[87] This power distribution creates an asymmetric tripartism in which the state acts less like a referee in labor-management bargaining and more like the final arbiter of policy.

4. Seattle Domestic Worker Standards Board

Another recent example of localized sectoral bargaining comes from the Seattle City Council's passage of the Domestic Workers Ordinance.[88] The Ordinance, among other enactments, created the Domestic Workers Standards Board ("DWSB"), tasked with the provision of "a forum for hiring entities, domestic workers, worker organizations, and the public to consider, analyze, and make any recommendations to the City on the legal protections, benefits, and working conditions for domestic worker industry standards."[89]

Much like the New York wage boards, the DWSB allows workers, employers, and the public to collaborate and generate policy recommendations for the City Council.[90] Of the DWSB's thirteen members, four must come from domestic worker organizations and two representatives must be domestic workers who are not worker organization representatives.[91] In addition, four board members must be hiring entities who employ domestic workers, and two members must be individuals who employ one or more domestic workers.[92] This deadlock between employer and employee representatives is offset by a single community representative.[93] As well as policy changes, the DWSB can issue recommendations on "changes to the City's outreach and education efforts, and/or changes to the City's enforcement strategies."[94] In this sense, the DWSB holds broader authority than the New York wage boards, which are limited to policy advice.[95]

The DWSB, while an undoubtedly valuable forum for disenfranchised workers, falls victim to many of the same hitches as New York's wage boards. Much like in New York, the DWSB only holds the power to make policy recommendations which the executive may accept or reject at their

87. REPORT OF THE FAST FOOD WAGE BOARD TO THE NYS COMMISSIONER OF LABOR, *supra* note 84 at 20.

88. Paul Shukovsky, *Seattle City Council Passes Domestic Workers "Bill of Rights"*, BLOOMBERG L. (July 24, 2018, 6:06 AM), https://news.bloomberglaw.com/daily-labor-report/seattle-city-council-passes-domestic-workers-bill-of-rights [https://perma.cc/G7RF-QBK8].

89. SEATTLE, WASH., MUN. CODE § 14.23.030(A) (2018).

90. *Id.*

91. *Id.* § 14.23.030(B)(1).

92. *Id.* § 14.23.030(B)(2).

93. *Id.* § 14.23.030(B)(3).

94. *Id.* § 14.23.030(G).

95. *See* N.Y. LAB. LAW § 653 (McKinney 2022).

discretion.[96] Unlike in New York, however, the Seattle City Council must give at least some deference to the DWSB and its recommendations when making policy decisions that affect domestic workers.[97] This gives the DWSB slightly more legal cachet than New York's wage boards, but still falls markedly short of real executive power.

B. California's AB 257: The Fast-Food Accountability and Standards Recovery Act

In recent years, labor scholars and trade unionists have advocated for a more sectoral approach as a potential catalyst for a reinvigorated labor movement in the United States.[98] The SEIU urged candidates running for public office in 2020 to support laws that "bring employers, workers, and government together at industry-wide bargaining tables to negotiate wages, benefits, and working conditions."[99] Even mainstream, national candidates such as Senator Bernie Sanders have promoted sectoral bargaining as an alternative to more traditional methods of organizing.[100] Faced with the obstacles to union organizing that arise in highly fissured sectors of the economy, some state legislatures have embraced these calls for a more sectoral approach.

California's recently enacted AB 257 presents an innovative model for adjusting the collective bargaining process to better meet the needs of modern workers in the American economy. The Bill moves away from the traditional, private model of collective bargaining through the creation of "a council that sets workplace standards covering the state's fast food industry, including wages, working hours, health and safety, training, and other workplace conditions."[101] Even though AB 257 moves away from the usual American methods of collective bargaining and union activity, the Bill gained the support of many leading trade unionists.[102] The

96. *Id.* § 653(G).

97. *Id.* § 653(H).

98. Andrias, *supra* note 22, at 78 ("[T]raditional NLRA collective bargaining is profoundly mismatched with the contemporary economy in which employers are fissured and work is increasingly global, contingent, shared, and automated.").

99. Nicole Berner & Dora Chen, *SEIU Conditions 2020 Presidential Endorsement on Demand for "Unions for All"*, ON LAB. (Aug. 21, 2019), https://onlabor.org/seiu-conditions-2020-presidential-endorsement-on-demand-for-unions-for-all [https://perma.cc/DE9W-2BFN] (listing the New York wage boards as an example).

100. *The Workplace Democracy Plan*, FRIENDS OF BERNIE SANDERS, https://berniesanders.com/issues/workplace-democracy [https://perma.cc/T2JD-SBNS] (last visited Apr. 10, 2023). The platform, authored by 2020 presidential hopeful Bernie Sanders, recommends "a sectoral collective bargaining system that will work to set wages, benefits, and hours across entire industries, not just employer-by-employer." *Id.*

101. Marr, *supra* note 13.

102. Eleven highly influential union leaders urged Governor Gavin Newsom to pass AB 257, citing

California legislature identified the fast-food industry as a sector which "has been rife with abuse, low pay, few benefits, and minimal job security."[103] These pervasive ills pose a distinct threat to California, which is home to more than 500,000 fast-food workers.[104] This workforce outnumbers that of any other state.[105]

AB 257 creates a ten-member Fast-Food Council within the California Department of Industrial Relations.[106] The Bill establishes goals of "sectorwide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of living to, fast food restaurant workers."[107] Much like the New York wage boards and Seattle DWSB, the Fast-Food Council is evenly divided between employer and employee representatives with an additional two seats occupied by government officials.[108] One distinctive aspect of the Council, however, lies in the force of its regulations. Unlike most wage and standard boards in the United States, the Council maintains the authority to establish standards and regulations that bear the authority of law.[109] In fact, AB 257 gives the Council's promulgations such weight that "to the extent there is a conflict between standards, rules, or regulations issued by the council and the rules or regulations issued by another state agency, the standards, rules, or regulations issued by the council shall apply" in the fast-food sector.[110]

Consequently, the Council's standards and regulations supersede any conflicting state regulations, at least within the fast-food sector. AB 257 does not, however, allow for the Council's authority to supersede that of a "valid collective bargaining agreement . . . [that] expressly provides for the wages, hours of work, and working conditions" of the employees involved.[111] This caveat retains the incentive for parties to engage in more

the Council's ability to "bring workers to the table" and give them "a chance to rewrite the rules so the rules keep them safe." Letter from International Presidents of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Federation of Teacher (AFT), American Federation of State County and Municipal Employees (AFSCME), Communication Workers of America (CWA), Laborers International Union of North America (LIUNA), National Education Association (NEA), Service Employees International Union (SEIU), UNITE-HERE, United Brotherhood of Carpenters, United Farm Workers (UFW), and United Food and Commercial Workers (UFCW) to Gavin Newsom, Governor of California (June 16, 2022) (on file with author).

103. CAL. LAB. CODE § 1471(b) (Deering 2023).

104. Press Release, *supra* note 1, at tbl. 5.

105. *Id.*

106. CAL. LAB. CODE § 1471(a)(1) (Deering 2023).

107. *Id.* § 1471(b).

108. *Id.*

109. *Id.* § 1471(d)(1)(a).

110. *Id.*

111. *Id.* § 1471(k)(3). This limitation on the Council applies if the collective bargaining agreement secures "a regular hourly rate of pay not less than 30 percent more than the state minimum wage[,] . . .

traditional workplace bargaining for standards and wages above the minimum floor set by the Fast-Food Council. So, although the Bill creates a distinct system of labor relations from that established by the NLRA, AB 257 does not preclude employers and employees at any given workplace from engaging in both systems simultaneously.

AB 257 also defines which establishments qualify as "fast-food" franchises subject to the regulations and standards set by the Council. Notably, the Bill limits its scope to California restaurants which are "part of a set of fast food restaurants consisting of 100 or more establishments nationally that share a common brand."[112] In addition, "fast food restaurants" as understood by the framers of the Bill, concern establishments which provide food and beverages for "immediate consumption" by "customers who order or select items and pay before eating."[113] These requirements tailor the Bill's focus to large, profitable corporations who could previously skirt many labor regulations by obfuscating their status as employers via the franchise model.[114]

III. DISCUSSION

The novel approach to labor relations established in AB 257 has engendered opposition from some of the largest players in the fast-food industry. National fast-food chains poured millions of dollars into lobbying campaigns against the Bill.[115] Just one day after Governor Gavin Newsome signed the Bill into law, opponents of AB 257 mailed a proposition for a statewide referendum to repeal the Bill to California's Attorney General.[116] This opposition is unlikely to cease merely because the Bill has taken on the force of law. Rather, AB 257 will likely face legal, as well as political, challenges from its opponents.

A. Federal Labor Law Preemption

The Supremacy Clause of the U.S. Constitution enshrines federal laws

provides equivalent or greater protection than the standards established by the council and if state law on the same issue authorizes an exception for employees covered by a collective bargaining agreement." *Id.*

112. *Id.* at Dig.

113. *Id.* § 1470(c)(1)-(2). This section also stipulates that the establishment serve "items prepared in advance, including items that may be prepared in bulk and kept hot" and that "limited or no table service" is offered. *Id.*

114. *See* Weil, *supra* note 10, at 34.

115. Errol Schweizer, *Why AB 257 Could Be Life Changing for California's Fast-Food Workers*, FORBES (Sept. 5, 2022, 8:52 AM), https://www.forbes.com/sites/errolschweizer/2022/09/05/why-ab257-could-be-life-changing-for-californias-fast-food-workers [https://perma.cc/9QXJ-ECB6].

116. Letter from Amber Evans & Steven McDermed to Rob Bonta, Atty. Gen., Cal., 1 (Sept. 6, 2022) (on file with author).

as "the supreme Law of the Land,"[117] which gives rise to the doctrine of federal preemption. Under federal preemption, "federal law operates to invalidate state and local laws and decisions that conflict with it."[118] While federal labor statutes such as the NLRA and the LMRA do not explicitly address the issue of federal preemption, the Supreme Court has held certain state regulations of labor relations preempted by these statutes.[119] Federal labor law preemption contains three basic categories: *Garmon* preemption, *Machinists* preemption, and Section 301 preemption.[120] The following three Subparts will describe each of these categories, respectively, and consider whether AB 257 is preempted by federal labor law.

1. *Garmon* Preemption

The first category of federal labor law preemption established by the Supreme Court comes from its 1959 decision *San Diego Building Trades Council v. Garmon*.[121] The *Garmon* Court recognized the "Delphic nature" of statutory implications regarding what authority federal legislation assumes and what powers it reserves to the states.[122] In response, the Court sought to examine the oracular decrees of the NLRA and create a rule to delineate which aspects of labor relations fell within the scope of federal law.[123]

The *Garmon* Court held that the NLRA broadly preempts state or local regulation of any conduct "protected by §7 or prohibited by §8 [of the NLRA]."[124] Section 7 of the NLRA lays out several kinds of protected labor activity.[125] Most notably, Section 7 protects three general kinds of worker conduct: the right to join a union, the right to bargain collectively,

117. U.S. CONST. art. VI, cl. 2.

118. Curtis L. Mack, Keahn N. Morris & Travis S. West, The Fundamentals of Federal Labor Preemption, Presentation to the American Bar Association Section of Labor and Employment Law, 14th Annual Labor and Employment Law Virtual Conference (Nov. 11-13, 2020), https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/fundaments-of-federal-labor-preemption.pdf [https://perma.cc/9T3N-DDEY].

119. *Id. See* San Diego Building Trades Council, Millmen's Union, Local 2020, Building and Material Dump Drivers, Local 36 v. Garmon, 359 U.S. 236 (1959); *see also* Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976).

120. *Id.*

121. 359 U.S. 236 (1959).

122. *Id.* at 241.

123. *Id.*

124. *Id.* at 245.

125. 29 U.S.C. § 157 (2022) (protecting "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 or other mutual aid or protection").

and the right to engage in concerted labor activity, such as strikes.[126] Alternatively, Section 8 proscribes certain activities as unfair labor practices.[127] The Court reasoned that since the NLRA grants primary jurisdiction over labor disputes concerning activity in Section 7 or 8 to the NLRB, state or local claims arising out of such activities are pre-empted.[128] Consequently, any law or regulation which would give rise to such claims will likely run afoul of the rule set forth in *Garmon* and fail to avoid federal preemption.

AB 257 avoids *Garmon* preemption for the simple reason that it does not interfere with the proscribed or protected activities in the NLRA. The policy behind *Garmon* preemption seeks to "produce a uniform federal law governing labor relations under the auspices of a single regulatory body."[129] The Fast-Food Council created by AB 257 does not hold any adjudicatory authority like the NLRB.[130] Rather, the Council establishes minimum standards that apply to union and non-union employees alike.[131] These standards do not touch on labor activities such as collective bargaining, strikes, or union organization. As a result, the standards set by the Council are unlike the kind of laws and regulations contemplated by *Garmon* preemption.

However, one could argue that, by establishing a base level for wages and conditions, AB 257 limits the possible outcomes of collective bargaining and impermissibly interferes with a protected activity under Section 7. By limiting the range of possible bargaining outcomes through the establishment of minimum standards, AB 257 appears to wade into impermissible restriction of a protected activity.

The Supreme Court addressed this concern in *Metro Life Insurance Co. v. Massachusetts*.[132] There, the Court examined a Massachusetts law that instituted minimum requirements for employee health insurance plans offered by employers.[133] In *Metro Life*, the Court stated that federal labor law preemption only occurs where the state or local law at issue "prevents the accomplishment of the purposes of the federal Act."[134] The Court also held that "[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the

126. Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 429 (1998) (citing 29 U.S.C. § 157).

127. 29 U.S.C. § 158 (2022).

128. *Garmon*, 359 U.S. at 242.

129. Befort, *supra* note 127, at 431.

130. CAL. LAB. CODE § 1471 (a)(1) (Deering 2023).

131. *Id.*

132. 471 U.S. 724, 727 (1985).

133. *Id.*

134. *Id.* at 756.

NLRA, it conflicts with none of the purposes of the Act."[135] Even though the Massachusetts law established a base level for employee benefits—limiting the possible outcomes of collective bargaining—the Court upheld the legislation and determined that it did not infringe on any of the protected activities of the NLRA.[136]

In light of *Metro Life*, courts will likely find that minimum standards set by the Council do not impermissibly interfere with the protected right to collective bargaining contained in the NLRA. Since it does not inhibit the exercise of any protected activity nor enable any proscribed activity under the NLRA, AB 257 survives a *Garmon* preemption examination.

2. *Machinists* Preemption

The second major category of federal labor law preemption stems from the Supreme Court's decision in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission.*[137] *Machinists* involved a breakdown in collective bargaining negotiations that resulted in a union's refusal to take on overtime hours.[138] The employer subsequently filed a charge with the NLRB, who rejected the complaint.[139] Unperturbed by the NLRB's dismissal, the employer filed a second complaint with the Wisconsin Employment Relations Commission who ordered that the union "immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments."[140] The Supreme Court disagreed with the Commission, however, and held that the NLRA's refusal to protect or prohibit certain economic actions indicates Congress' desire that the parties involved maintain the freedom to "use economic weapons to resolve labor disputes."[141]

In *Machinists*, the Supreme Court assumed that "in providing in the NLRA a framework for self-organizing and collective bargaining, Congress determined how much the conduct of unions and employers

135. *Id.* at 757.

136. *Id.*

137. 427 U.S. 132, 140 (1976).

138. *Id.* at 134.

139. *Id.* at 135. ("The Regional Director [of the NLRB] dismissed the charge on the ground that 'the policy prohibiting overtime work by its member employees . . . does not appear to be in violation of [the NLRA] . . . .'").

140. *Id.* at 136. The Commission reasoned that, since "the concerted refusal to work overtime" is not an activity that is protected by Section 7 of the NLRA nor proscribed by Section 8, State regulation of the activity is not barred by federal preemption.

141. Robert Rachal, Machinists *Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain* 58 LA. L. REV. 1065, 1068 (1998).

should be regulated, and how much it should be left unregulated."[142] *Machinists* preemption asserts that federal law preempts any state regulation of economic weapons or pressure tactics not protected or prohibited by the NLRA.[143] This idea fits neatly within the private-enterprise framework established by the NLRA. The Court reasoned that, by placing limitations on the economic weapons available to employers and employees, state regulations interfere with the "free play of contending economic forces" in a way that contravenes the broad goals of the NLRA.[144] By granting parties in a labor dispute access to a full arsenal of economic weapons, *Machinists* preemption reflects the NLRA's desire to preserve an essentially laissez-faire economic order.

Similar to possible objections raised under *Garmon* preemption, one could argue that AB 257 exerts an indirect influence over the collective bargaining process by establishing minimum standards for the terms of bargaining agreements struck through the traditional NLRA framework.[145] This indirect influence, in turn, could limit the practical availability or effectiveness of certain economic weapons parties may employ in a dispute—stifling the free interaction of contending forces.[146] For example, an employer might contend that the wage floor set by AB 257 would reduce the potency of a lockout.[147] While the Bill itself does not explicitly proscribe lockouts—a licit economic weapon[148]—it does provide employees with the knowledge that even if their employer rejects their proposals concerning wages, AB 257 guarantees their ability to earn the minimum wage set by the Council.

Despite this argument, AB 257's creation of minimum standards does not fail *Machinists* preemption. In the years after *Machinists*, the Supreme Court "upheld various state statutes that only indirectly impact[ed] the collective bargaining process by imposing minimum labor standards."[149] AB 257 survives *Machinists* preemption because it does not attempt to limit access to economic weapons as understood by the Supreme Court. The Bill does not prohibit the use of any economic weapons; parties are

142. Mack et al., *supra* note 113, at 9-10 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985)).

143. Befort, *supra* note 127, at 433.

144. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 150 (1976) (quoting Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COL. L. REV. 469, 478 (1972)).

145. CAL. LAB. CODE § 1471(k)(3).

146. *See* Mack et al., *supra* note 119, at 9.

147. 1 EMPLOYMENT LAW DESKBOOK § 17.10 (2023) ("A lockout is the temporary withholding of work or denial of employment to a group of workers during a labor dispute.").

148. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965) ("[W]e cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or the right to strike.").

149. Befort, *supra* note 127, at 434.

free to resolve labor disputes in the same manner they would have before the statute's passage. Rather, the Council creates a wholly separate arena in which employees and employers can agree upon broad standards. In this respect, AB 257 reflects a recent trend in historically unorganized low-wage sectors.[150] While the creation of minimum labor standards might exert an ancillary influence on the efficacy of economic weapons, it does not restrict them in a manner prohibited by the NLRA.

3. Section 301 Preemption

The third major branch of federal labor law preemption does not emerge from litigation based on the NLRA. Instead, Section 301 preemption comes from the LMRA's rule that private sector collective bargaining agreements "may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[151]

The Supreme Court considered the doctrine of Section 301 preemption in *Lingle v. Norge Division of Magic Chef*.[152] *Lingle* involved an Illinois employee who, although covered by "a collective-bargaining agreement that provide[d] her with a contractual remedy for discharge without just cause," sought to bring a worker's compensation claim in state court.[153] The Seventh Circuit found that, since the state law claim could be resolved via arbitration pursuant to the collective bargaining agreement, Section 301 preempted state litigation.[154] However, a unanimous Supreme Court reversed and held that "an application of state law is preempted by Section 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement."[155] Since state adjudication of the employee's claim would not require an interpretation of the collective bargaining agreement, the Court determined that Section 301 did not prevent the state law claim.[156]

While the employee in *Lingle* could proceed with her state law claim, the effects of Section 301 preemption have reinforced the privatization of labor relations. The Supreme Court has bolstered the system of private,

150. Andrias, *supra* note 22, at 46-47. Andrias describes these extra-Wagnerian trends as a "new labor law" in which "contemporary low-wage worker movements operate outside of traditional labor law[,] . . . rejecting the notion that unions' primary role is to negotiate traditional private collective bargaining agreements, with the state playing a neutral mediating and enforcing role." *Id.*

151. 29 U.S.C. § 185(a) (2022).

152. 486 U.S. 399 (1988).

153. *Id.* at 401.

154. *Id.* at 402.

155. *Id.* at 413.

156. *Id.* at 408-9.

"mini-democracy" at the individual workplace.[157] Section 301 preemption seeks to allow for the resolution of employment grievances through shop-level arbitration rather than state law claims. In enforcing this goal, the "Court erected a structure in which rulings by labor arbitrators were placed effectively beyond the reach of judicial review."[158]

AB 257 does not directly concern Section 301 preemption. The Bill establishes a "right of action" for certain types of retaliatory discharge of a fast-food employee.[159] This right of action protects employees from discrimination or retaliation arising from actions which expose a franchisor's noncompliance with the Council's standards, refusal to work due to violations of such standards, or participation in Council proceedings.[160] However, claims pursuant to AB 257 do not stem from a collective bargaining agreement, but California state law.[161] Consequently, any claims arising under AB 257 would be brought in California state courts rather than federal district court. Employees and employers may still establish collective bargaining agreements in addition to the minimum standards set by AB 257.[162] These agreements, unlike the minimum standards set by AB 257, would likely trigger Section 301 preemption if an employee brings a state law claim that required their interpretation.

B. Unique Advantages of AB 257

This Part examines unique or novel aspects of AB 257 and how they will likely provide necessary change in California's fast-food sector. For example, the Bill specifically seeks to address sectors of the labor force that do not fit neatly into the traditional American labor law framework. Additionally, the minimum standards and increased stability that will come from the Bill will increase competition in a way that benefits consumers, workers, and employers. Finally, this Part surveys the national landscape and assesses the prospects for similar legislation

157. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 624 (1992).

158. *Id.*

159. CAL. LAB. CODE § 1472(a)-(b) (2023) ("Any employee of a fast food restaurant operator discharged or otherwise discriminated or retaliated against in the terms and conditions of employment in violation of subdivision (a) shall have a right of action for, and shall be entitled to, reinstatement, and treble the lost wages and work benefits caused by the discrimination or retaliation, and the employee's reasonably incurred attorney's fees and costs.").

160. *Id.* § 1472(a).

161. *Id.* § 1472(k)(3).

162. *Id.*

across the United States. Overall, this Part argues for vigorous enforcement of AB 257 due to the legislature's clear intent to address an urgent situation in California's fast-food industry.

1. The Bill Specifically Addresses an Industry That the NLRA Framework Struggles to Regulate.

AB 257 recognizes that the traditional system of labor organization provides fast-food workers with "inadequate means to amplify their voices and their experience, and [a need] to address the pervasive problems plaguing the sector."[163] Unlike the majority of American industry at the NLRA's inception, the modern fast-food sector is ill-suited to traditional, shop-level collective bargaining.[164] High rates of turnover, part-time employment, and social perceptions about what kind of industries are "appropriate" for union activity depress the level of worker organization in the service economy as a whole and the fast-food industry in particular.[165]

Furthermore, the fissured nature of fast-food restaurants makes it particularly difficult to hold employers accountable for systemic behaviors that create harmful and unjust outcomes for workers.[166] Labor standards are usually established either by collective bargaining between employees and the employer at a given workplace or through legislation which establishes broadly applicable standards, such as a minimum wage. However, the fissured nature of the franchise model requires novel approaches to the creation and enforcement of labor standards.[167]

AB 257 provides such a novel approach. The traditional logic of imposing minimum standards of employment posits that most of the state's enforcement efforts should focus at the "level where workplace violations are occurring."[168] In the fast-food industry, however, this tactic merely treats the symptoms, rather than the root cause of systemic noncompliance with existing labor standards. By forcing employees, employers, and nationwide franchisors to agree upon certain minimum standards in the sector, AB 257 draws corporate behemoths out of their

163. AB 257, 2021-2022 Assemb., Reg. Sess., § 2(d) (Cal. 2022).

164. *But see* Alex N. Press, *The Starbucks Union Drive is Spreading with Impressive Speed*, JACOBIN (Feb. 5, 2022), https://jacobin.com/2022/02/starbucks-union-drive-movement-workers-united-seiu [https://perma.cc/4EGQ-AERT] ("Rather than negotiate a top-down brokered agreement, the sectoral bargaining that has been a goal of other low-wage service sector organizing campaigns such as the Fight for $15, the Starbucks union drive is going through the constricting NLRB election process . . . .").

165. Sam Bloch, *Why Don't Restaurant Workers Unionize?*, THE COUNTER (Apr. 29, 2019, 9:04 AM), https://thecounter.org/restaurants-unionize-seiu-aoc-warren [https://perma.cc/787N-YWCC].

166. Weil, *supra* note 10, at 44.

167. *Id.*

168. *Id.*

usual, clouded background role and requires them to take responsibility for the working conditions in their establishments.

2. Sector-Wide Standards Will Benefit Competition and Innovation in the Fast-Food Industry.

The higher wages and workplace standards provided by AB 257 will not only benefit fast-food workers. Employers will likely benefit from increased certainty in terms of fixed costs and will enjoy lower rates of turnover.[169] Decreased turnover will reduce employers' expenditure related to marketing newly opened positions, hiring, and training new employees.[170] Additionally, workers who earn a higher wage "can focus more on work and are less distracted by the cognitive demands of poverty."[171] Professor Susan Helper has recognized that, when faced with increased minimum wage costs, firms can "take the high road" and institute practices that benefit workers and consumers without culling their workforce.[172] These "high road practices" such as leaner marketing campaigns, eliminating logistical waste, and cross-training of employees allow firms to increase their payroll budget without reducing profitability.[173]

A common objection to proposed increases in minimum labor costs, whether in the form of higher wages or better working conditions, posits that by increasing labor costs, legislative acts decrease total employment, making workers worse off in the long run.[174] While this oft-repeated refrain creates significant opposition to legislative action like AB 257, reductions in employment are not always a necessary outcome.[175] Rather, employers could choose to out-compete other firms by engaging in "high road practices" that leave workers, business, and society better off in the long term. By engaging in these practices, firms can compete against each other in a way that benefits employers and consumers without decreasing

169. Susan Helper, *Businesses Can Thrive with a Higher Minimum Wage, and Government Can Help*, ECON. POL'Y INST. (Apr. 1, 2021), https://www.epi.org/blog/businesses-can-thrive-with-a-higher-minimum-wage-and-government-can-help [**https://perma.cc/SY4X-EBEH].**

170. Ethan Karp, *The Case for Raising Minimum Wage in Manufacturing*, FORBES (Mar. 2, 2021, 10:07 AM), https://www.forbes.com/sites/ethankarp/2021/03/02/the-case-for-raising-wages-in-manufacturing [https://perma.cc/YS4A-EY42].

171. Helper, *supra* note 170.

172. *Id*. Helper notes that "adopting a high-road strategy requires not just changes in labor practices, but also changes in marketing, product development, and information technology to take advantage of the higher-skilled (but also higher-cost) labor entailed by the new policies."

173. Zeynep Ton, *Why "Good Jobs" Are Good for Retailers*, HARV. BUS. REV. (Jan.-Feb. 2012), https://hbr.org/2012/01/why-good-jobs-are-good-for-retailers [https://perma.cc/8SNM-BXN8].

174. Paul Beaudry, David A. Green & Ben M. Sand, *In Search of Labor Demand*, 108 AM. ECON. REV. 2714, 2751 (2018).

175. Helper, *supra* note 170.

the quality of their services.

3. The National Landscape is Suitable For Similar Legislation in Other Industries.

The passage of AB 257 could serve as a catalyst for similar legislation in a panoply of industries and jurisdictions across the United States.[176] The birth of AB 257 occurred amid an energetic moment in the American labor landscape.[177] Union victories at multinational corporations like Amazon and Starbucks just months before Governor Gavin Newsom signed AB 257 reflect "teeming pro-union excitement among many workers, especially young workers."[178] This uptick in union activity, particularly among young people, could provide the impetus for other states to adopt similar legislation as California.[179] As workers and union-friendly policymakers look for ways to improve the conditions in other low-wage industries, a sectoral model like AB 257 could serve as an invaluable model.

On the other hand, efforts to enact similar legislation will face hearty resistance from employers. Officials at the U.S. Chamber of Commerce have voiced fierce opposition to AB 257 and the alternative model of labor relations it proposes.[180] Sean P. Redmond, the Chamber's Vice President of Labor Policy, lambasted the sectoral approach adopted by the Bill.[181] Redmond claimed that AB 257 "essentially creat[es] a form of sectoral bargaining more commonly seen in other countries."[182] Redmond goes on to refer to this system as "anathema to American labor policy"

176. Jackson Todd, *California's Fast Food Sectoral Bargaining Law Could Revolutionize the Labor Movement*, PEOPLE'S WORLD (Sept. 13, 2022, 11:10 AM), https://www.peoplesworld.org/article/californias-fast-food-sectoral-bargaining-law-could-revolutionize-the-labor-movement [https://perma.cc/GMK3-59NU] ("The passage of the FAST Recovery Act provides an example of sectoral bargaining for the rest of the country to follow. . . .With the right deal, sectoral bargaining could revolutionize the labor movement.").

177. Steven Greenhouse, *Is Organized Labor Making a Comeback?*, THE ATLANTIC (Apr. 4, 2022), https://www.theatlantic.com/ideas/archive/2022/04/how-build-union-victory-amazon-staten-island/629464 [https://perma.cc/Z44R-7UCA].

178. *Id.*

179. Marissa Sheldon, *Fast Food Council to Improve Working Conditions in CA Fast Food Industry*, HUNTER COLL. N.Y.C. FOOD POL'Y CTR. (Nov. 8, 2022), https://www.nycfoodpolicy.org/food-policy-snapshot-california-fast-food-council-ab-257[https://perma.cc/NMR5-AD6Z].

180. Kaitlyn Ridel, *How California's AB 257 Fast Food Law Could Affect Small Businesses*, U.S. CHAMBER OF COM. (Nov. 7, 2022), https://www.uschamber.com/employment-law/how-californias-ab-257-fast-food-law-could-affect-small-businesses [https://perma.cc/JU45-9GMX].

181. Sean P. Redmond, *California Enacts Radical AB 257 Restaurant Law*, U.S. CHAMBER OF COM. (Sept. 8, 2022), https://www.uschamber.com/employment-law/unions/california-enacts-radical-ab-257-restaurant-law [https://perma.cc/469J-6UJR].

182. *Id.*

and derides the Bill as "destructive legislation."[183]

Employers may adapt their tactics to provide a more effective opposition to both legislative reforms like AB 257 and traditional organizing campaigns.[184] This opposition could sap some of the vitality from the reinvigorated labor movement and slow the progress of labor activists. However, the passage of AB 257 will likely serve as a boon to the American labor movement on a whole and it will likely inspire similar legislation across the United States. On top of the boost that workers will receive from the legislative victory, the Bill's results will also provide a lift. The increased wages and improved working conditions received by workers in California' fast food sector will likely provide enough energy for the labor movement to overcome opposing interests and continue to advocate for similar legislation in other places.

IV. CONCLUSION

AB 257 takes an important step toward adjusting the American labor relations framework to meet the needs of a modern, service-dominant workforce.[185] The California legislature recognized that the unique needs of fast-food workers were not addressed by the existing labor law regime. In response, it enacted a supplementary system that relies on collaboration and cooperation between workers, employers, and the government to set minimum standards within the fast-food sector. This system works alongside, and within, the existing NLRA structure to empower workers in a highly fissured sector of the economy. As a result, California has set an example for other states when it comes to legal remedies to the problems faced by workers in the fast-food industry.

The American labor movement and American courts have not always seen eye to eye. Professor William Forbath, speaking of the early twentieth century United States, claimed that "[n]owhere else did trade unionists contend so constantly for so many decades with judge-made law."[186] Previously, American courts resisted the implementation of novel

183. *Id.*

184. Steven Greenhouse, *Starbucks' Aggressive Union-Busting Is a New Model for American Corporations*, SLATE (Nov. 3, 2022, 11:16 AM), https://slate.com/news-and-politics/2022/11/starbucks-union-busting-tactics-workers-labor-wave-nlrb.html [https://perma.cc/N78N-XUB3].

185. *Services, Value Added (% of GDP) - United States*, THE WORLD BANK, https://data.worldbank.org/indicator/NV.SRV.TOTL.ZS?locations=US&most_recent_value_desc=true [https://perma.cc/7XV9-YMHL] (last visited Apr. 10, 2023). Services as a percentage of the United States' GDP has increased steadily over the past twenty years, reaching 80.1% in 2020—the seventh highest percentage in the world. *Id.*

186. Forbath, *supra* note 23, at 1114. Forbath particularly cites the nascent period of American labor law and claims that "nowhere else among industrial nations did the judiciary hold such sway over labor relations as in nineteenth-and early twentieth-century America." *Id.* He identifies the judiciary's influence over labor relations as a major cause of the unique, enterprise-based ideology that permeates American

regulatory systems that address fundamental changes in the economy.[187] These courts responded by undercutting legislative attempts to ameliorate the plight of workers in a rapidly changing system of political economy.[188] AB 257 takes care to avoid many of the existing legal restraints that would invalidate its regulation of the fast-food industry. A careful analysis of relevant precedent reveals that the Bill will survive all three canons of federal labor law preemption. Rather than undercut the legislative authority vested in the Council, contemporary American courts should allow for workers and employers—those best positioned to make rules and regulations that govern the fast-food sector—to set the minimum standards they deem necessary for the well-being of the fast-food industry.

labor law. *Id.*

187. *Id.* at 1144.

188. *Id.*