

RECENT LEGISLATION

LABOR LAW — NLRA PREEMPTION — CALIFORNIA LAW CREATES COUNCIL TO SET MINIMUM WORK STANDARDS FOR FAST-FOOD INDUSTRY. — CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023) (effective Jan. 1, 2023).

In 2012, two hundred fast-food workers in New York City walked out of their jobs demanding \$15 an hour and a union.¹ Since then, the “Fight for \$15” campaign has spread to become a global movement demanding (and winning) wage increases for low-income workers in cities across the country.² Faced with a “weak” and “rigid” federal labor statute³ in the National Labor Relations Act⁴ (NLRA) and the challenges of organizing a transient workforce⁵ in a “fissured” workplace,⁶ the movement has turned to state employment law to protect workers.⁷ Recently, in California, the Fight for \$15 movement achieved its latest victory — the Fast Food Accountability and Standards Recovery Act⁸ (FAST Act), which creates a Fast Food Council of state-appointed employer, employee, and government representatives to set minimum wages and employment standards for the fast-food industry.⁹ The Act is a bold attempt at participatory democracy, but its design opens it up to preemption-based challenges. Far from being preempted, however, the FAST Act should serve as a model for local legislation to protect workers’ rights.

AB 257 was originally introduced by Assemblymember Lorena Gonzalez in January 2021 but failed on the Assembly floor by three

¹ See *About Us*, FIGHT FOR \$15, <https://fightfor15.org/about-us> [<https://perma.cc/QU63-W65Z>].

² See *id.*; Dominic Rushe, “*Hopefully It Makes History*”: *Fight for \$15 Closes in on Mighty Win for US Workers*, THE GUARDIAN (Feb. 13, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights> [<https://perma.cc/BV62-35P3>]; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 51 (2016).

³ Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008) (“[M]ost scholars believe that the NLRA is a failed regime.” *Id.* at 2685–86.).

⁴ 29 U.S.C. §§ 151–169.

⁵ Lela Nargi, *An Inside Look at Union Organizing in the Fast Food Industry*, CIV. EATS (Dec. 7, 2021), <https://civileats.com/2021/12/07/an-inside-look-at-union-organizing-in-the-fast-food-industry> [<https://perma.cc/PX4D-VQLN>].

⁶ Andrias, *supra* note 2, at 61. Even if unionizing is successful, since many fast-food workers work at franchises, joint-employment rules make it next to impossible to bring fast-food companies to the bargaining table. See Eric Morath, *Labor Rule Impedes Fast-Food, Contract Workers’ Ability to Unionize*, WALL ST. J. (Feb. 25, 2020, 12:15 PM), <https://www.wsj.com/articles/labor-rule-impedes-fast-food-contract-workers-ability-to-unionize-11582638300> [<https://perma.cc/5629-EF6Q>].

⁷ Of the more than eight-and-a-half million food-service workers in the United States, only 1.7% are represented by unions, the lowest rate of any industry in the country. Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 19, 2023), <https://www.bls.gov/news.release/union2.to3.htm> [<https://perma.cc/TRH9-KEFC>].

⁸ Assemb. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted) (codified at CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)).

⁹ LAB. § 1471(b).

votes in June 2021.¹⁰ An amended version of the bill was reintroduced in January 2022, and, after further amendments, the bill passed by a bare majority in the Senate.¹¹ After passing the Assembly, the bill was signed into law by Governor Gavin Newsom on September 5, 2022.¹² The Act is the result of collective action by fast-food workers across California who filed hundreds of health, safety, and wage complaints during the COVID-19 pandemic and went on strike to demand better conditions and passage of the bill.¹³ The legislative findings describe the “abuse, low pay, few benefits, and minimal job security” of fast-food workers; the prevalence of “wage theft, sexual harassment and discrimination”; and the industry’s “heightened health and safety risks,”¹⁴ which were exacerbated by the pandemic.¹⁵ Accordingly, the purposes of the Council are “to establish 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 proper living to, fast food restaurant workers,” as well as to coordinate state agency responses to those issues.¹⁶

The Council is composed of ten members: one representative each of the Department of Industrial Relations and the Governor’s Office of Business and Economic Development, two of fast-food franchisors, two of franchisees, two of employees, and two of advocates for employees.¹⁷

¹⁰ *Bill Votes, AB-257 Food Facilities and Employment*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB257 [<https://perma.cc/HY6X-TXDD>] (to see information about the bill as originally introduced, select “01/15/21 - Introduced” from the “Version” dropdown menu at the top right of the page, then click the “Status” tab).

¹¹ *Id.* The amended version of the bill capped the minimum wage at \$22, reduced the number of government representatives on the Council, and removed franchisor joint liability for labor law violations made by franchisees. Jaimie Ding & Suhauna Hussain, *California Legislature Passes Bill to Protect Fast-Food Workers*, L.A. TIMES (Aug. 29, 2022, 7:38 PM), <https://www.latimes.com/business/story/2022-08-29/california-senate-pass-bill-fast-food-workers> [<https://perma.cc/YF2R-Y7R2>].

¹² Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Legislation to Improve Working Conditions and Wages for Fast-Food Workers (Sept. 5, 2022), <https://www.gov.ca.gov/2022/09/05/governor-newsom-signs-legislation-to-improve-working-conditions-and-wages-for-fast-food-workers> [<https://perma.cc/TX8P-DVXJ>].

¹³ Press Release, Fight for \$15, On Labor Day, Gov. Newsom Signs Landmark Bill to Give Voice to More than Half Million Fast-Food Workers (Sept. 5, 2022), <https://fightfor15.org/on-labor-day-gov-newsom-signs-landmark-bill-to-give-voice-to-more-than-half-million-fast-food-workers> [<https://perma.cc/5X4C-GD4L>].

¹⁴ Assemb. B. 257 § 2(a), 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

¹⁵ “Numerous complaints” filed by workers showed employers “routinely . . . flouted protections.” *Id.* § 2(f). The legislature found the health and safety risks to workers and the public “serious and unacceptable,” *id.* § 2(g), and noted that companies “profited during the pandemic” while their workers remained unable to participate in a “more equitable economy,” *id.* § 2(h).

¹⁶ CAL. LAB. CODE § 1471(b) (West Supp. 2023). In addition to wages and workplace safety, working conditions also include “the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace.” *Id.* § 1470(h). The Council cannot set standards for paid time off or predictable scheduling but may make a recommendation to the legislature to enact laws regarding the former. *Id.* § 1471(d)(2)(B)(7)–(8).

¹⁷ *Id.* § 1471(a)(1). The Speaker of the Assembly and the Senate Rules Committee each appoint one representative of employee advocates; the Governor appoints all other members. *Id.* § 1471(a)(2).

Its standards cover all workers employed by a restaurant that is part of a fast-food chain, meaning it has one hundred or more establishments nationwide that share a common brand or standardized services.¹⁸ The Council may set a minimum wage as high as \$22 in 2023, with that cap increasing at a set rate each year.¹⁹ The Council must conduct a full review of minimum standards at least once every three years,²⁰ and it must hold public meetings no less than once every six months in metropolitan areas across the state where fast-food workers and the public will have the opportunity to be heard on issues of industry conditions.²¹

Once the Director of Industrial Relations receives “a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees,”²² the Council shall promulgate these minimum standards, decided by majority vote, and submit them to the labor committees of the legislature by January 15.²³ The standards take effect October 15 of that year at the earliest, but the legislature may pass legislation to prevent them from going into effect.²⁴ The Council is empowered to direct and coordinate with the Governor and government agencies,²⁵ and where its standards conflict with any existing regulations, the Council’s standards apply.²⁶ The Act makes an exception for standards in collective bargaining agreements that provide better protection than a conflicting Council-promulgated standard.²⁷ Failure to abide by these standards is unlawful, and compliance is enforced by the Labor Commissioner and Division of Labor Standards Enforcement pursuant to their enforcement procedures as well as any which the Council may promulgate.²⁸ The Council will cease operations

¹⁸ *Id.* § 1470(a).

¹⁹ *Id.* § 1471(d)(2)(B).

²⁰ *Id.* § 1471(f). The Council is constrained by a one-way ratchet: any new regulation cannot be less protective or beneficial than the one it replaces. *Id.*

²¹ *Id.* § 1471(g). In cities or counties of more than 200,000 people, the Act allows for the establishment of “Local Fast Food Councils” — composed of at least one fast-food franchisor or franchisee, one fast-food worker, and a majority of representatives from relevant local agencies — which also host public meetings and may provide the Council with recommendations. *Id.* § 1471(i).

²² *Id.* § 1471(c)(2).

²³ *Id.* § 1471(d)(1)(A)–(B).

²⁴ *Id.* § 1471(d)(1)(B).

²⁵ *Id.* § 1471(c)(1).

²⁶ *Id.* § 1471(d)(1)(A). Where contemplated standards fall within the jurisdiction of the Occupational Safety and Health Standards Board, however, the Council is not authorized to promulgate those standards but shall petition the Board to adopt them. *Id.* § 1471(e). The Board must respond within six months, or three months in an emergency. *Id.*

²⁷ *Id.* § 1471(k)(3). The collective bargaining agreement’s standard applies so long as the agreement provides “a regular hourly rate of pay not less than 30 percent more than the state minimum wage for those employees, . . . [it] provides equivalent or greater protection than the standards established by the council,” and state law on the issue authorizes such an exception. *Id.*

²⁸ *Id.* § 1471(k)(1). The Commissioner can investigate an alleged violation, order temporary relief by issuing a citation, and initiate a civil action for which a court may grant injunctive relief. *Id.* § 1471(k)(2). The Act also protects workers from employer retaliation for whistleblowing, testifying before any council, or refusing to work based on a serious safety concern, providing the worker with a right of action and entitling them to reinstatement and treble damages. *Id.* § 1472(a)–(b).

on January 1, 2029.²⁹

The FAST Act is an important attempt to create a participatory legislative structure to protect workers within the NLRA regime. Where federal labor law has failed an entire industry, California has stepped in to create a political structure that is responsive to workers' needs. In many ways, this approach is nothing new: state legislatures, including the California Assembly, often delegate quasi-legislative authority to expert boards;³⁰ and wage councils proliferated in the Progressive and New Deal Eras.³¹ But one likely challenge to the Act is rooted in an unlikely source: the NLRA itself. While the NLRA grants workers the affirmative right to unionize and bargain collectively, it also preempts any state and local legislation attempting to regulate the same.³² But any preemption challenges to the Act should fail. State minimum labor standards are not preempted by the NLRA, and the Council's structure does not displace the NLRA's private collective bargaining regime. Instead, states and municipalities should look to the FAST Act's structure as an effective way to protect workers through employment legislation, especially in industries where unionizing is untenable.

Though nothing in the NLRA expressly states that it preempts state legislation, a series of Supreme Court decisions has elaborated a broad implicit preemption regime that rivals that of most other federal statutes.³³ In its landmark 1959 decision *San Diego Building Trades Council v. Garmon*,³⁴ the Court held that if an activity is "arguably" protected or prohibited by the NLRA, states do not have jurisdiction to regulate that activity because allowing them to do so "involves too great a danger of conflict with national labor policy."³⁵ The Court elaborated a separate and even more expansive preemption regime in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*,³⁶ holding that an activity can be "protected"³⁷ under the NLRA where Congress intended it to be left unregulated as a "permissible 'economic

²⁹ *Id.* § 1471(m). If the Council is inoperative on that date, the minimum wage for fast-food workers will continue to increase annually at a set rate. *Id.* § 1473.

³⁰ Catherine L. Fisk & Amy W. Reavis, *Protecting Franchisees and Workers in Fast Food Work*, AM. CONST. SOC'Y (Dec. 2021), <https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf> [<https://perma.cc/4NXM-QLTE>].

³¹ See Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650–53 (2019) ("By 1938, twenty-five states had some form of minimum wage law. . . . [N]early all of these early wage-and-hour statutes used some form of industry committee" *Id.* at 652.); *id.* at 667–69 (describing the Fair Labor Standards Act's tripartite industry committees that set wages by industry).

³² Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

³³ See *id.* at 1154.

³⁴ 359 U.S. 236 (1959).

³⁵ *Id.* at 245–46.

³⁶ 427 U.S. 132 (1976).

³⁷ *Id.* at 141 (quoting *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 492 (1960)).

weapon[]” wielded by parties in the collective bargaining process.³⁸ In addition to “arguably” protected activities, activities intended to be “controlled by the free play of economic forces” are also preempted.³⁹ Any local attempt to regulate those activities enters into the “substantive aspects of the bargaining process” and is thus preempted.⁴⁰ Under *Machinists*, the “crucial inquiry” is whether the local regulation at issue “would frustrate effective implementation of the Act’s processes.”⁴¹ However, because “[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms” reached through that process,⁴² “state laws of general application” that set minimum standards of employment — like the FAST Act — are not preempted so long as they do not interfere with the NLRA’s collective bargaining process.⁴³

But the FAST Act’s ambitious design could face an equally ambitious challenge under *Machinists*. The argument might go something like this: by creating a forum for labor and management to negotiate binding employment standards, the Act replaces the NLRA’s collective bargaining regime with its own alternative bargaining process to effectively define all “the substantive aspects of the bargaining process” for the fast-food industry.⁴⁴ With employer and employee representatives deciding on comprehensive industry standards, the Act’s challengers will argue that the Council does not simply “form a ‘backdrop’” against which fast-food “employers and employees come to the bargaining table.”⁴⁵ Rather, they will argue, it forms the bargaining table itself.⁴⁶

³⁸ *Id.* (quoting *Ins. Agents’ Int’l Union*, 361 U.S. at 489).

³⁹ *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); see also *id.* at 150.

⁴⁰ *Id.* at 149–51 (quoting *Ins. Agents’ Int’l Union*, 361 U.S. at 498).

⁴¹ *Id.* at 147–48 (quoting *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

⁴² *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985); see also *id.* at 754.

⁴³ See *id.* at 753–54 (“The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment.” *Id.* at 754.).

⁴⁴ *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents’ Int’l Union*, 361 U.S. at 498).

⁴⁵ *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (quoting *Metro. Life*, 471 U.S. at 757).

⁴⁶ Indeed, fast-food-industry attorneys are already suggesting these arguments as potential challenges to the Act. See, e.g., Riley Lagesen et al., *How the NLRA May Slow Down the FAST Act*, GREENBERG TRAURIG LLP (Oct. 14, 2022), <https://www.gtlaw.com/en/insights/2022/10/published-articles/how-the-nlra-may-slow-down-the-fast-act> [https://perma.cc/Q6MX-BHK4] (“By requiring another form of collective bargaining, the FAST Act may face challenges arguing that it interferes with or is preempted by federal law under the National Labor Relations Act.”). And because the bargaining table is such a familiar labor paradigm, even the Act’s proponents have used that language when referring to the Council. Service Employees International Union president Mary Kay Henry told Bloomberg News that “the bill effectively offers ‘another form of collective bargaining’ for fast food workers.” Josh Eidelson, *California Moves to Give Fast Food Workers More Power, Heeding “Fight for \$15,”* BLOOMBERG NEWS (Aug. 29, 2022, 6:12 PM), <https://www.bloomberg.com/news/articles/2022-08-29/california-moves-to-give-fast-food-workers-say-in-regulations> [https://perma.cc/ENV7-ZLHA]. Union leaders might be forgiven for using collective bargaining language more abstractly to describe how the Act amplifies workers’ political voices in setting employment standards, but the phrase is legally inapt.

Situating this atmospheric argument within the governing doctrine, two distinct preemption challenges emerge, both of which prove unavailing. The first is to the Act's substantive standards. Challengers are likely to argue that the Council's broad mandate to set industry-specific standards effectively defines the terms of fast-food employment contracts and thus interferes with the collective bargaining process. This idea has not been directly addressed by the Supreme Court, but it has received attention from the Ninth Circuit, whose precedent would likely control any challenge to the Act. In *Chamber of Commerce of the United States v. Bragdon*,⁴⁷ the Ninth Circuit found that the NLRA preempted a Costa County ordinance requiring employers in certain private industrial construction projects to pay a prevailing wage set by reference to industry collective bargaining agreements.⁴⁸ The panel based its holding on the fact that the ordinance applied only to "particular workers in a particular industry and [was] developed and revised from the bargaining of others."⁴⁹ In dicta, it went further, stating that "in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract," thus interfering with the "free-play of economic forces" in the bargaining process.⁵⁰ In subsequent decisions, however, the Ninth Circuit has "made a significant retreat" from *Bragdon*, "effectively revers[ing]" its holding with respect to single industry standards⁵¹ and limiting its application to "extreme situations."⁵²

Even applying *Bragdon's* dicta, nothing about the Act is "extreme." In *Bragdon*, the law at issue set a prevailing wage based on other collective bargaining agreements, forcing the employer to pay that wage rate whether it entered into an agreement or not — effectively "eviscerat[ing] the purpose of collective bargaining negotiations."⁵³ In contrast, the Council can set only a traditional minimum wage, capped by numbers hardcoded into the Act by the legislature.⁵⁴ The Council's

⁴⁷ 64 F.3d 497 (9th Cir. 1995).

⁴⁸ *Id.* at 498–99, 504.

⁴⁹ *Id.* at 504.

⁵⁰ *Id.* at 501 (quoting *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 140 (1976)).

⁵¹ *Fortuna Enters., L.P. v. City of Los Angeles*, 673 F. Supp. 2d 1000, 1010–11 (C.D. Cal. 2008) (citing *Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004)); see *Nunn*, 356 F.3d at 990 (citing *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1034 (9th Cir. 1999); *Nat'l. Broad. Co. v. Bradshaw*, 70 F.3d 69, 71–73 (9th Cir. 1995); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996)) ("It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.").

⁵² *Nunn*, 356 F.3d at 990.

⁵³ *Fortuna Enters.*, 673 F. Supp. 2d at 1009 (discussing *Bragdon*, 64 F.3d at 502–04).

⁵⁴ See CAL. LAB. CODE § 1471(d)(2)(B) (West Supp. 2023); see also *Bragdon*, 64 F.3d at 502 (finding ordinance preempted because its "specific minimum wage and benefits" for "specific construction projects" derived from collective bargaining agreements "affect[] the bargaining process in a much more invasive and detailed fashion" than "a minimum wage law, applicable to all employees, guarantying a minimum hourly rate.").

ability to set other minimum employment standards is constrained as well: the Act expressly prohibits regulation of paid time off or work scheduling, and the Council's mandate is limited to "wages, working hours, and other working conditions *adequate to ensure and maintain the health, safety, and welfare* of . . . fast food restaurant workers."⁵⁵ The Council's standards do not intrude into private collective bargaining at all — in fact, the Act explicitly provides an *exception* for collective bargaining agreements.⁵⁶ Moreover, other courts have upheld far more "extreme" regulations like for-cause protection,⁵⁷ including at the industry level,⁵⁸ most recently for fast-food workers in New York City.⁵⁹ Like any minimum standards, the Council's regulations simply set a backdrop for, but do not "dictate the results of,"⁶⁰ collective bargaining.

The second preemption challenge concerns the Council's structure. To start, the Supreme Court in *Chamber of Commerce of the United States v. Brown*⁶¹ stated that "[i]n NLRA pre-emption cases, 'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'"⁶² Because states can set minimum employment standards, it should be irrelevant whether those standards are set through legislation, a wage board, or a fast-food council.⁶³ In the eyes of its challengers, however, the FAST Act creates a separate forum for sector-wide bargaining, infringing not only on a single economic weapon but on the entirety of "economic forces" of the collective bargaining regime.⁶⁴

But that argument falls flat. The Council's structure is not novel: the Progressive Era saw over a dozen states establish commissions to set industry wages and standards, including California's own Industrial Welfare Commission (IWC), a tripartite board consisting of employer, worker, and state representatives.⁶⁵ In 2015, Fight for \$15 pressured New York State into creating a tripartite wage board that raised the

⁵⁵ LAB. § 1471(b) (emphasis added).

⁵⁶ *Id.* § 1471(k)(3); see *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, surely one that permits such bargaining cannot be pre-empted." (citation omitted)).

⁵⁷ See, e.g., *St. Thomas–St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands*, 218 F.3d 232, 246 (3d Cir. 2000).

⁵⁸ See *R.I. Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 667 F.3d 17, 33 (1st Cir. 2011).

⁵⁹ *Rest. L. Ctr. v. City of New York*, 585 F. Supp. 3d 366, 372–74 (S.D.N.Y. 2022).

⁶⁰ *Chamber of Com. of the U.S. v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995).

⁶¹ 554 U.S. 60 (2008).

⁶² *Id.* at 69 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 n.5 (1986)).

⁶³ *Cf. id.* ("California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.")

⁶⁴ See Andrias, *supra* note 2, at 91; Lagesen et al., *supra* note 46.

⁶⁵ Nelson Lichtenstein, *Sectoral Bargaining in the United States: Historical Roots of a Twenty-First Century Renewal*, in *THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY* 87, 88–90 (Angela B. Cornell & Mark Barenberg eds., 2022). The IWC is "currently inoperative." *Id.* at 90.

minimum wage to \$15 for fast-food workers.⁶⁶ Like these boards, the Council is a creature of old-fashioned political, not workplace, democracy. Employer and employee representatives are chosen by elected officials, and where there is any disagreement, government representatives have tiebreaking votes.⁶⁷ The legislature retains full control over whether these standards become law and can pass legislation to prevent them from taking effect. Moreover, there is no “bargaining” at all: there are no “economic weapons” to be wielded in a two-sided adversarial battle, only multi-party political deliberations. The table is round, not square. Though it may expand democratic participation, the Act does not provide an alternative avenue for workplace organization, self-determination, or collective bargaining, such that it might undermine those processes in the NLRA — the crucial inquiry in *Machinists*.

In both substance and form, the FAST Act sits squarely outside the bounds of NLRA preemption. When the NLRA established a regime of private collective bargaining, it did not mean to foreclose public policy as a recourse for workers to seek greater protection.⁶⁸ What is at stake here is greater than employment terms — it is how democracy itself can be leveraged to protect workers. Where “ossified” federal labor law provides no help in practically un-unionizable workplaces,⁶⁹ the FAST Act forms part of a growing trend of local legislation that expands workplace protections by involving workers in the political process.⁷⁰ The Act’s fate will ultimately be decided by referendum vote after fast-food companies poured over \$13 million into a signature-gathering campaign to place the law on the ballot in 2024.⁷¹ Whatever the result, fast-food workers have made clear that they demand a change. Whether it’s for a union, a living wage, or better working conditions, the fight continues.

⁶⁶ Andrias, *supra* note 2, at 64–66.

⁶⁷ See CAL. LAB. CODE § 1471(a)(2) (West Supp. 2023); see *id.* § 1471(d)(1)(A) (“Decisions by the council . . . shall be made by an affirmative vote of at least six . . . members.”).

⁶⁸ See *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 87 (2d Cir. 2015) (“*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those protections may also be the subject of collective bargaining.” (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21–22 (1987))).

⁶⁹ See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

⁷⁰ Aurelia Glass & David Madland, *Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries*, CTR. FOR AM. PROGRESS (Feb. 18, 2022), <https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries> [https://perma.cc/4CT2-BLTM] (discussing growth of tripartite boards in four states and three cities since 2018). These are examples of what Professor Kate Andrias has called “social bargaining,” Andrias, *supra* note 2, at 8, and Professor Cynthia Estlund has called “sectoral co-regulation,” Cynthia L. Estlund, *Sectoral Solutions that Work: The Case for Sectoral Co-regulation 2–4* (Nov. 23, 2022) (unpublished manuscript) (on file with the Harvard Law School Library), a promising alternative model for building worker power in the new economy.

⁷¹ Aneurin Canham-Clyne, *FAST Recovery Act Referendum Approved, Opening Political Duel in California*, REST. DIVE (Jan. 25, 2023), <https://www.restaurantdive.com/news/fast-recovery-act-referendum-opens-political-duel-in-california/641196> [https://perma.cc/XGY6-VSAD].