

EXCLUDED BUT EQUAL

Gali Racabi*

ABSTRACT

Work law is excessively exclusionary. Canonical examples include agriculture workers, independent contractors, and domestic workers. But work law excludes far more workers and employers than those familiar categories. Whole sectors, occupations, business sizes, wage arrangements, geographical areas, and more are excluded from the basic tenets of economic citizenship, including federal, state, and local minimum wage; overtime; and safety and labor protection laws.

Equal protection claims govern the authority of legislatures to determine who is in and who is out of work laws. Excluded workers and included employers now routinely use state and federal constitutional equal protection arguments against exclusionary work laws. Such claims, fail or succeed, tie the contours of equal protection doctrine with the jagged border lines of work law.

By describing the effects of equal protection doctrine on work law's exclusions, this Article offers a path for bending the arc of equal protection doctrine toward inclusion. Doctrinal and institutional changes to how equal protection is administered can create small-scale and radical inclusive shifts in work law writ large.

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* Assistant Professor, Cornell ILR School. Associate Faculty, Cornell Law School. I thank Michelle Berger, Angela Cornell, Kate Griffith, Desirée LeClercq, Leah Vosko, Sidney Tarrow, Yiran Zhang, and the participants of the Exclusions from Work Law Seminar and Low Wage Workers Seminar at Cornell ILR, and the Cornell Law School Faculty Workshop, for helpful discussions. I thank Pranathi Charasala, Genevieve Galluccio, and Lucia Caravella for wonderful research assistance. I thank *William & Mary Bill of Rights Journal* editors, Caroline Olsen, Alexandra Reilly, Helen Gehle, Lauren Miller, Katherine von Schaumburg, Michaela Mazzeo, and Shannon Roy, for their superb work.

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INTRODUCTION

Work law¹ is born universal, yet it is filled with exclusions. From early pre-New Deal wage and hour protections,² to the New Deal federal work law overhaul,³ to your contemporary local prevailing wage ordinance⁴—and everywhere in between—we find general workplace rights and carved-out workers and employers.

Masses of workers and employers slip through designated legal cracks to exchange services for pay outside work law's coverage. Uber and Uber drivers,⁵ agriculture workers and agribusinesses,⁶ prisons and prisoners,⁷ seniors and their

¹ "Work Law" stands for employment, labor, and antidiscrimination laws.

² *Infra* Section I.B.

³ Daiquiri J. Steele, *Enduring Exclusion*, 120 MICH. L. REV. 1667, 1672 (2022).

⁴ *Infra* Section I.D.

⁵ Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 69 n.9, 99 n.121 (2017); Gali Racabi, *Despite The Binary: Looking for Power Outside the Employee Status*, 95 TULANE L. REV. 1167, 1202–03 (2021).

⁶ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335 (1987).

⁷ Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 861 (2008).

domestic workers,⁸ and salaried workers and their employers⁹ are all explicitly excluded from various work laws. All those workers and employers are alike in their exclusion from work law; all of work law is characterized by excluding a myriad workers and employers.

Courts adjudicate exclusions mainly in classification debates. Who is a true independent contractor? Who counts as an agriculture worker?¹⁰ Who is a prisoner?¹¹ Are graduate students' education-related jobs covered work?¹² What about undergraduates?¹³ But increasingly plaintiffs pull courts' attention to the legal categories of work law itself. Instead of trying to fit "square pegs" in "round holes,"¹⁴ plaintiffs urge courts to question the validity of the mix-and-match legal exercise to begin with. The categories themselves are questioned.

Constitutional equal protection arguments shape the boundaries separating those included and those excluded from work law. *Excluded* workers and *included* employers routinely utilize equal protection arguments to contest their status. Such plaintiffs demand that the state justifies its line drawing about who is in and who is out and repeatedly ask courts to scrutinize those explanations.

Equal protection arguments place Uber alongside agriculture workers and droves of other workers and employers.¹⁵ Agriculture workers successfully argued that their *exclusion* from state minimum wages and overtime pay violates their equal protection rights, nulling such exclusions and jump-starting legislative action.¹⁶ In ongoing California litigation, putative employers, such as Uber and DoorDash, contest their *inclusion* in the state labor code, whereas many other supposedly similarly situated employers are excluded.¹⁷ Such constitutional claims pose a radical challenge leveraging the punctured structure of work law itself: exclusionary structures are vulnerable to successful equal protection scrutiny. As all of work law is exclusionary, the stakes in those legal struggles are all of work law.

⁸ Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 431–32 (1995).

⁹ *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 50–51 (2023).

¹⁰ *See U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 347 (4th Cir. 2004) (regarding Christmas tree growers). I thank Brishen Rogers for this festive reference.

¹¹ *See Nwauzor v. GEO Grp., Inc.*, 62 F.4th 509, 514 (9th Cir. 2023).

¹² *See Trs. of Columbia Univ.*, 364 N.L.R.B. 1080, 1080 (2016).

¹³ *See* Liam Knox, 'We're Not Slowing Down,' *Student Workers Say*, INSIDE HIGHER ED (Apr. 26, 2023), <https://www.insidehighered.com/news/faculty-issues/labor-unionization/2023/04/26/were-not-slowing-down-student-workers-say> [<https://perma.cc/3WSX-34F5>].

¹⁴ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

¹⁵ *See* Michelle Berger, *Equal Protection Arguments for Workers' Rights*, ONLABOR (Nov. 13, 2023), <https://onlabor.org/equal-protection-arguments-for-workers-rights> [<https://perma.cc/9QKE-BHXX>].

¹⁶ *Infra* Section I.C.

¹⁷ *Olson v. California*, 62 F.4th 1206, 1214–19 (9th Cir. 2023), *aff'd*, 104 F.4th 66 (9th Cir. 2024).

Exclusions are nothing new. Generation after generation of work law scholars and activists described, analyzed, and struggled to remedy various forms of work law exclusions. Scholars have raised awareness of the fact that the decision as to who is in and who is out of work law's protections is often tied to social and political hierarchies.¹⁸ Persistent political minorities tend to fare less well in the tug of war over who is excluded from work law institutions.¹⁹ Race, gender, and immigration statuses are by now canonical explanatory factors in the exclusions of agriculture, domestic, and independent contractors from work law under the New Deal framework and derivative state work laws.²⁰

But such canonical examples—as important as those sectors and narratives of exclusion and hierarchy may be—are mere examples of myriad different exclusions pervading work law. Instead of focusing on particular trees, this Article aims for the forest—the common legal denominator and harm of exclusions *qua* exclusions.

Exclusions are a source of significant economic, social, and political consequence. For employees, being excluded from a state minimum wage law can mean the difference between being able to pay for rent, or not; having a job, or not; having childcare, or not. The stakes of having a job, not to mention a good job, for individuals' social welfare in the United States are immense.²¹ For employers, being excluded can mean the difference between sustainability and bankruptcy; between jurisdictions, sizes, and business methods; success or failure.²²

Equal protection doctrine polices such monumental stakes, anchored in the Fifth and Fourteenth Amendments to the U.S. Constitution and in many other state constitutions. However, for almost a century now, equal protection in economic spheres is characterized by three features, supposedly inherent to constitutional review of economic legislation, namely, symmetry, deference, and court led.

First, equal protection constitutional review is symmetrical. Equal protection doctrine does not distinguish between employees' equal protection rights of being

¹⁸ IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 78–79 (2005); IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 389, 393–98 (2013) [hereinafter FEAR ITSELF]; Steele, *supra* note 3, at 1699–700; Jon C. Dubin, *The Color of Social Security: Race and Unequal Protection in the Crown Jewel of the American Welfare State*, 35 STAN. L. & POL'Y REV. 104, 115–16 (2024).

¹⁹ See Steele, *supra* note 3, at 1699–700.

²⁰ FEAR ITSELF, *supra* note 18, at 10; Steele, *supra* note 3, at 1684 n.123.

²¹ KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 128–30 (2014); Jacob S. Hacker et al., *The American Political Economy: Markets, Power, and the Meta Politics of US Economic Governance*, 25 ANN. REV. POL. SCI. 197, 206 (2022).

²² Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 3, 24, 28–29, 34 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021), <https://equitablegrowth.org/wp-content/uploads/2021/09/092321-WP-Do-US-Firms-Have-an-Incentive-to-Comply-with-the-FLSA-and-the-NLRA-Stansbury.pdf> [<https://perma.cc/XR9V-4BHP>]; JOY J. KIM, EMPLOYERS' VIOLATIONS OF THE WAGE AND HOUR RULES OF THE FLSA: KNOWLEDGE GAPS AND DATA NEEDS (2022).

included and employers' equal protection rights of being excluded. Surprisingly, perhaps employers have some doctrinal advantages. A second trait of doctrinal equal protection doctrine is that it is deferential to the state, justifying the lowest form of scrutiny: rational basis review. History taught us a lesson, courts tell us, a lesson about what happens when courts become economic regulators. *Lochner*'s lesson is that economic regulations ought to remain in the legislatures' domain, including the classifications of who is in and who is out of economic regulations.²³ Determining work law's coverage is the prerogative of the state, not a constitutional issue. In general, as long as the exclusion of workers does not rely on race or gender, courts will exercise a minimal form of scrutiny. The *Lochner* lesson is practiced with a vengeance. U.S. state courts are excessively available to employers' attempts to quash, exclude, and loophole their way out of work law. Such availability of courts is one of the dominating traits of U.S. law and political economy.²⁴ By tearing further and further into the fabric of work laws, included employers utilize equal protection arguments at the direct expense of workers.

After positing some doctrinal ways in which equal protection in exclusions cases can be enhanced, I turn to institutions. Courts' enforcement of equal protection is arbitrary, partial, and rooted in a judicial history of state deference and labor exceptionalism. Thus, I offer paths for two complementary institutional frameworks to bend equal protection toward inclusion: First are unions. Union-pushed local and state legislation is one of the ways in which work laws have expanded. By internally committing to inclusivity as a constitutional value, unions can remodel and nudge state and local legislation. Second is the federal government. State and localities are dependent on the federal government for funding which is often conditioned.²⁵ Such programs, including specific work law-oriented ones like unemployment insurance, can place inclusivity not just as a constitutional value but also as a designated outcome and a condition for federal support. Such institutional backing can implicitly or explicitly support an inclusive notion of equal protection independent of courts.

This Article proceeds as follows: Part I presents the exclusionary nature of work law using examples from multiple spheres and periods. Part II surveys the equal protection doctrine as reflected in cases of excluded workers and included employers. Part III draws some shared themes in those equal protection cases regarding history, institutions, and substance. Part IV suggests substantive and institutional reforms to equal protection meant to create more inclusive work law. A short Conclusion follows.

²³ See generally *Lochner v. New York*, 198 U.S. 45 (1905).

²⁴ See Kathleen Thelen, *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*, 83 L. & CONTEMP. PROBS. 46 (2020).

²⁵ Scott L. Cummings & Madeline Janis, *Reclaiming the Progressive Potential of Local Procurement*, LPE PROJECT (Jan. 10, 2024), <https://lpeproject.org/blog/reclaiming-the-progressive-potential-of-local-procurement/> [<https://perma.cc/Z3Y5-82GQ>].

I. EXCLUSIONARY WORK LAW AND ITS ANTAGONISTS

Work law writing is obsessed with exclusions.²⁶ But in the process of identifying, scrutinizing, and advocating to change particular exclusions, scholars risk losing sight of the punctured structure of work law as a whole.²⁷ Particular exclusions are challenging to name, blame, and claim, not to mention reverse. And yet the problem of exclusion goes wider and deeper than any particular example might suggest.

Riddled with exclusions, carve outs, conditions, and exemptions to its scope, work law pushes out many workers, employers, sectors, professions, and jurisdictions. Such exclusions, a mishmash heritage of common law statuses, political quid pro quo, common sense assumptions, and sticky administrative layouts, draw the parameters of work law. Contemporary scholars are quick to move from the statutory structure to its lacking enforcement mechanisms or to the inaccessibility of legal remedies to disempowered, excluded worker populations.²⁸ Such second- and third-level exclusionary effects are true, but work law's exclusionary push is much more basic than that: the statutory, regulatory, and common law doctrines of work law.

One issue arising from sidestepping the statutory and doctrinal text and structure and moving straight to societal effects on the enforcement of those laws is missing significant aspects of the politics of exclusions and inclusions. Most exclusions, as are other scope conditions for work law, are instituted by federal, state, and local state legislatures and regulators. And it is the judicial recognition of the importance of deference to those bodies that keeps courts from intervening in those boundary settings.

To exemplify this persistent feature of work law, this Part will highlight five different instances of such exclusions: First, we will examine New York's labor code as an example of a broad legislative text governing multiple aspects of work on the state level. Second, we will examine some early pre-New Deal state legislation and the equal protection claims such legislation was exposed to. Third, we will examine the exclusion of agriculture workers in both state and federal legislation and the ensuing state and federal litigation. Section D will examine a new post-2000s wave of labor-led state and local legislation—what labor policy scholars call “labor's legacy” legislation.²⁹ And Section E will examine exclusions in the context of public sector workers.

The goal in this Part is not to offer a systemic review of *all* work law exclusions, but instead is to use concrete and varied examples to demonstrate the ubiquitous

²⁶ See, e.g., Zatz, *supra* note 7, at 940 n.383; Dubal, *supra* note 5, at 86–87; Racabi, *supra* note 5, at 1217; Steele, *supra* note 3, at 1672.

²⁷ For the example of AB5 in California, see *infra* Section I.D.

²⁸ RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 115, 125, 135–36 (2012); Steele, *supra* note 3, at 1667; Mary Otoo, *Beyond Discriminatory Intent: Agriculture, Labor Rights, and the Shortcomings of Equal Protection Doctrine*, 55 COLUM. J.L. & SOC. PROBS. 237, 239 (2022).

²⁹ See Daniel J. Galvin, *Labor's Legacy: The Construction of Subnational Work Regulation*, 74 ILR REV. 1103, 1103 (2021).

nature of exclusions, immediately tying the exclusion to the equal protection legal claims made against it.

A. The New York State Labor Code's Example

Exclusions are a matter of fact in all state and federal statutory work laws. Exclusions are found in the definitions sections, in the substance of an Act, in its remedial structure, and elsewhere. Often, one can only guess the idiosyncratic politics that placed some exclusions into the law's fabric.

New York's labor code is the legislative text codifying most, if not all, state laws pertaining to the regulation of work and workplaces: minimum wage and overtime; safety and health; matters of discrimination and wage regulations; time off for sick and family leave; and minors' and miners' work. Those broadly stated orders constitute the basic bare-bones framework for the regulation of work in the state—the New York State's workers' "bill of rights," if you may.

However, if the New York labor code is this kind of workers' bill of rights, some workers are explicitly kept without some of those rights. Consider some of the labor code's more memorable exclusions: child labor, for instance. Generally, minors under fourteen cannot work legally.³⁰ However, excluded from this provision are child performers,³¹ child models,³² newspaper carriers,³³ work for a family farm,³⁴ work pursuant to a family court order,³⁵ as well as bridge caddies.³⁶ Minors singing in a hotel or restaurant or employed in a resort or a beauty parlor in a rural community as well as minors working in some small cities or towns or generally working during the holidays are excluded from certain hour limitations.³⁷

Child labor is not the only section of the labor code with exclusions. Employees in places presenting motion pictures or vaudevilles are excluded from the obligatory day of rest;³⁸ also excluded from the day of rest are foremen,³⁹ employees in the milk, butter, and cheese factories;⁴⁰ employees in small town seasonal resorts;⁴¹ and the state police.⁴² Farm workers are, for some reason, excluded from the mandate to obtain worker approval before directly depositing their wages to their bank account.⁴³ Employers' size and net income govern how much sick leave employees in their

³⁰ N.Y. LAB. LAW § 130(1) (Consol. through 2024 released Chapters 1–59, 61–117).

³¹ *Id.* § 130(2)(a).

³² *Id.* § 130(2)(b).

³³ *Id.* § 130(2)(c) (if over eleven years of age).

³⁴ *Id.* § 130(2)(d), (e), (g).

³⁵ *Id.* § 130(2)(d), (f).

³⁶ *Id.* § 130(2)(h) (if over twelve years of age).

³⁷ *Id.* § 143(5)(a).

³⁸ *Id.* § 161(1).

³⁹ *Id.* § 161(2)(a).

⁴⁰ *Id.* § 161(2)(b).

⁴¹ *Id.* § 161(2)(e).

⁴² *Id.* § 169-a.

⁴³ *Id.* § 192(2).

establishment are eligible for (where the size brackets are one to four, five to ninety-nine, and more than one hundred employees).⁴⁴ Localities' population size is a factor in determining whether window cleaners are eligible for safety protections.⁴⁵ Farm and domestic workers are carved out of the state-wide definition of a "legal day's work."⁴⁶ Certain workers in nonprofits, religious institutions, rehabilitative institutions; the incarcerated; and youth service employees are by definition *not* employees under the state's labor code.⁴⁷ Airport workers, workers at home manufacturing, and others are also unique in their exclusion from the general provisions of the NY labor code.⁴⁸ The list of exclusions goes on. And this is just one state. Within New York, we can find multiple localities with their own idiosyncratic work regulations. In federal law, we find the same structural feature. Exclusions are everywhere.

Unfortunately for the reader, no curiosity-satisfying answers will be provided here about the (exciting, for sure) stories about how those exclusions found their way into the text of the New York labor code. For the purpose of this Article, it is the labor code's structure that matters: broad, universal, and inclusive orders (no legal work "under fourteen") paved with seemingly random and arbitrary exclusions (unless "a singer in a . . . restaurant").⁴⁹ For some equal protection claims, this structure is the legally significant story, not its idiosyncratic components.

It is perhaps easy to dismiss those labor code exclusions as peculiarly archaic (vaudevilles?) or protectionist (how about that seasonal resort lobby?). But consider, for example, that in 2021, New York State had about 471,000 workers who were employed by a business with fewer than 5 workers and about 3.5 million employees working for employers with 6 to 99 employees.⁵⁰ For those roughly 4 million workers, size-based exclusions and size-based categorizations really matter.

Employers' size is a classic inclusion/exclusion criterion for various legal purposes,⁵¹ including the prohibition on child labor.⁵² Sizes are a relatively easy statistical

⁴⁴ *Id.* § 196-b.

⁴⁵ *Id.* § 202.

⁴⁶ *Id.* § 220(1).

⁴⁷ *Id.* § 563.

⁴⁸ *Id.* § 696-a.

⁴⁹ *See id.* §§ 130(1), 143(5)(a).

⁵⁰ *2021 SUSB Annual Data Tables by Establishment Industry*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html> [<https://perma.cc/4KA4-VWGD>] (choose "U.S. and states, NAICS, detailed employment"; then find "New York" in column B of spreadsheet).

⁵¹ *See, e.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253–54 (codified as amended at 42 U.S.C. § 2000e(b)) (small-employer exception); Title I of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(5)(A), 104 Stat. 327, 330 (codified as amended at 42 U.S.C. § 12111(5)(A)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605–07 (codified as amended at 29 U.S.C. § 630(b)); Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1304, 124 Stat. 119, 171–72 (codified as amended at 42 U.S.C. § 18024); *see also* CAL. GOV'T CODE § 12926(d) (West 2024) (California Fair Employment and Housing

measure to come by to track the impact of exclusions. But size is just one exclusionary factor of many. A significant, yet basically unaccounted for, number of businesses and workers are left outside of work law.

This Article will continue to trace the path of exclusions through the lens of equal protection challenges. The goal for this Part is to continue to demonstrate the two main descriptive themes of this Article: First, exclusions are a structural phenomenon in work law. Second, equal protection claims both trace and constitute this jagged terrain.

B. Early Work Laws

Early state work laws routinely addressed classes perceived as more vulnerable to labor market harms, namely, women and children, or those in hazardous occupations like firefighters.⁵³

But such paternalistic regulation had its own exclusions: For example, a South Carolina act that prohibited women and children's labor on Sundays excluded restaurants. This led to ongoing litigation attempting to distinguish restaurants from other food-selling establishments of the likes of drugstores equipped with a soda fountain.⁵⁴ Or consider a Louisiana act limiting the working time of firemen in particular sectors only⁵⁵ or a Missouri act limiting working days to six in bakeries producing "biscuit, bread or cake bakeries,"⁵⁶ but excluding bakeries making "pies, pastry, crackers, or other confectioneries."⁵⁷ Very similar to contemporary law, early state work law excluded "farm and domestic labor."⁵⁸ Other general laws included pay-scheduling laws (mandating pay at certain intervals) covering only employers of certain sizes⁵⁹ or applying only to workers hired by incorporated employers as distinguished from an individual employer-person.⁶⁰

Some laws were more exclusive than others, and thus more vulnerable to equal protection claims. A 1923 Minnesota law prohibited "more than six days" of work per week.⁶¹ But it also declared that the law shall not apply to the following:

[E]mployees of any common carrier by steam or gasoline or electric railway, nor employees of hospitals, clinics, sanitoriums or

Act's small-employer exception).

⁵² Kelly v. Brennan, No. 74-450, 1974 WL 1288, at *1 (D. Or. Sept. 13, 1974).

⁵³ State v. Barba, 61 So. 784, 786 (La. 1913) (examining equal protection arguments in the context of firemen).

⁵⁴ State v. Seithel, 21 S.E.2d 195, 196–97 (S.C. 1942).

⁵⁵ Barba, 61 So. at 786.

⁵⁶ State v. Miksicek, 125 S.W. 507, 510 (Mo. 1910).

⁵⁷ Id. at 511.

⁵⁸ Low v. Rees Printing Co., 59 N.W. 362, 363 (Neb. 1894).

⁵⁹ See State v. Cullom, 70 So. 338, 338 (La. 1915).

⁶⁰ See State v. Mo. Pac. Ry. Co., 147 S.W. 118, 119 (Mo. 1912).

⁶¹ State v. Pocock, 201 N.W. 610, 610 (Minn. 1925).

dispensaries, who are directly employed in the care of the sick nor to the employees of any telegraph or telephone company or employees engaged in conducting the telegraph or telephone business, nor to employees of any undertaker, undertaking establishment, cemetery association or company, nor to employees of newspaper plants, nor to employees in any canning factory or establishment, nor to employees engaged in the burning of kilns in potteries, sewer pipes or brick and tile factories where continuous fire is necessary, nor to employees in any creamery or cheese factory, in any town, village or city of the third or fourth class, nor employees engaged in the burning of lime or hydrating of lime, nor employees engaged in the manufacture of salt or refining of salt, nor to places of public amusements, nor to automobile garages, repair shops and oil filling stations, nor to licensed pharmacists or assistant pharmacists, nor to persons engaged in caring for live stock, nor to any employee working in or in connection with any flour mill or the operation thereof or in or in connection with the milling industry or carrying on the same, nor heating plants in any building or edifice, when only one person is employed therein, nor to works of necessity or emergency whether caused by fire, flood, or danger to life and property, or otherwise, nor to these engaged in military or naval service.⁶²

Early equal protection challenges to classifications in basic wage and hour regulations were heard repeatedly on both the state and federal levels before the New Deal and in its wake.⁶³ Both Kentucky and South Carolina judicial panels willingly embraced constitutional challenges to the exemption of some employers (like hotel work as exempt domestic work) from state minimum wage, overtime, and child labor laws.⁶⁴ Such challenges were brought by included employers obliged to pay overtime to their included employees. Courts in both states were receptive to claims that the laws included too many arbitrary exemptions and differentiations and could not stand scrutiny.

To make the point, a South Carolina court included a table as part of its decision, highlighting both the scope of exclusions (“Businesses Exempted” in the court’s language) and the seemingly arbitrary nature of the excluded businesses.⁶⁵ Such comparisons of inclusions and exclusions will resonate in contemporary equal protection challenges.⁶⁶

⁶² *Id.* at 610–11.

⁶³ *See, e.g.,* *State v. Barba*, 61 So. 784, 785 (La. 1913).

⁶⁴ *Burrow v. Kapfhammer*, 145 S.W.2d 1067, 1069 (Ky. 1940); *Gasque, Inc. v. Nates*, 2 S.E.2d 36, 42 (S.C. 1939).

⁶⁵ *See Gasque, Inc.*, 2 S.E.2d at 43.

⁶⁶ *See id.* at 46.

Businesses Exempted	Businesses Regulated
Hotels	Boarding houses Tourist camps Y. M. C. A.s and Y. W. C. A.s Clubs with living quarters School dormitories Apartment houses Hospitals
Eating places connected with hotels	Independent restaurants Lunch stands Delicatessens
Office force and truck drivers of laundries	Office force and truck drivers of dry cleaners
Saw mills, planing mills, kaolin industries	Brick and tile works Lumber yards
Canning factories of fruits, vegetables and other farm products	Canning factories of commodities other than farm products Cold storage plants
Cotton mills, oil mills, printing establishments	Fertilizer plants, flour mills Manufacturers of clothing, furniture and all other manufacturing plants
Dairying	Processing and packing of meat
Gatherers and processors of fish, shrimp and oysters	Sale and delivery of milk and milk products Soft drink bottlers Distribution and sale of soft drinks Bakers Processing of tobacco
Gold mining	Mining other than gold and kaolin
Retail liquor stores	Wholesale liquor stores. Beer and light wine dealers
Wholesale and retail shrimp, fish and oyster markets	Drug stores and all other establishments for the sale of goods wholesale or retail
Nurses, prescription clerks and all learned professions	Hospitals and ambulance service Barbers Beauticians Barber and beauty shop supplies Dental laboratories Medical supplies Undertakers and funeral directors Insurance offices Photographers Tailors

Table: Part of a comparison of exempted and regulated businesses in equal protection claims.

After attaching the table comparing exclusions and inclusions in the state's law, the court summarized the implications of the table for the purpose of the plaintiff's (a "regulated business") equal protection argument, by stating:

An examination of these columns will illustrate very clearly that the classification of the Legislature is arbitrary and without reasonable basis. There can be no logical distinction between the work of a waitress in an eating place connected with a hotel and her work in an independent restaurant. There would seem to be no reason why a truck driver for a laundry should be exempt, while a truck driver for a dry cleaning plant should be regulated. There would seem to be no reason why brick and tile works should be regulated and employees of saw mills, turpentine

plants and logging industries should be exempt. Cotton gins and oil mills are not as healthful places of employment as book stores or filling stations, yet the gins and oil mills are exempt while the book stores and filling stations are regulated.⁶⁷

Note the broad structural analysis of work laws that the plaintiffs and judges share. The analysis is focused on a cumulation of legal categories of exempted and regulated workers and establishments yet thin on actual facts and definitions. The court here is not focused on any particular comparator to the regulated business, nor is the court focused on any particular historical narrative about an exemption. It is the structure of the law that troubles the court, and it is that structure that the court highlights in presenting this table. Aside from demonstrating the ubiquitous nature of exclusions in U.S. work laws, another purpose of this Part was to note the striking resemblance of this structural analysis and its mode of scrutiny to some contemporary cases.

C. New Deal Legislation and State Labor Codes—The Example of Agriculture Workers

Following the broad structural analysis in the previous two Sections, this Section will highlight a singular exemption and its equal protection challenges: the agriculture exemption. The goal in delving into one exemption is to clarify how sticky one exemption can be due to the interaction of history, law, and politics cementing exemptions into place.

As early as the nineteenth century, agriculture workers were excluded from many state and federal work law protections.⁶⁸ Canonical historical accounts and official versions of such exclusions offer different narratives explaining their existence. Such histories attempt to tell a thicker story than the straightforward descriptive accounts of agriculture exclusions resulting from workers' political loss to the agriculture lobby.⁶⁹ Such thicker history is available mostly regarding the New Deal exemptions of agriculture.

⁶⁷ *Id.* at 43.

⁶⁸ *Low v. Rees Printing Co.*, 59 N.W. 362, 363 (Neb. 1894); *Doe v. Hodgson*, 478 F.2d 537, 538 n.1 (2d Cir. 1973) (first citing Federal Unemployment Tax Act, 26 U.S.C. § 3306(c)(1)(k); then citing Fair Labor Standards Act, 29 U.S.C. § 206(a)(5); then citing Social Security Act, 42 U.S.C. § 409(H)(2); then citing New York Unemployment Insurance Act, N.Y. LAB. LAW § 511(6)(a) (McKinney 1965); then citing New York Minimum Wage Act, *id.* § 651(5)(b); then citing *id.* §§ 671(6), 673 (Supp. 1972–73); then citing New York Workmen's Compensation Law, N.Y. WKMN'S COMP. LAW § 201(6)(A) (McKinney 1965); and then citing National Labor Relations Act, 29 U.S.C. §§ 152(3), 158(b)(4)). Size as a criterion was challenged during the early challenges to the New Deal legislation. See *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

⁶⁹ Maurice Jourdan, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 384, 386 (1968).

In what is now considered the canon in the political history of race and the New Deal, Ira Katznelson describes the exclusion of agriculture and home-care workers, along with other features in the New Deal structure, as the political boon given to Southern Democrats for their support in passing the breakthrough legislation.⁷⁰

Contemporary scholarly and court discussions of the exclusion of agriculture workers echo this historical narrative. For example, in his concurring opinion in *Martinez-Cuevas v. DeRuyter Bros. Dairy*, a decision about agriculture workers' exemptions from overtime pay in Washington State, Justice González of the Washington Supreme Court brought some of that historical canon to support the position that the exemption of agriculture workers was a violation of the farm workers' equal protection rights under Washington State's constitution.⁷¹ In Justice González's words:

When federal lawmakers passed major labor reforms during the New Deal, they excluded farmworkers across the board. . . . Racism directly influenced these exclusionary policies. . . . Plantation agriculture, which dominated the southern economy, depended on the exploitation of a black labor force. . . . To obtain the support of Southern Democrats, proponents of President Roosevelt's New Deal agenda made compromises to preserve a quasi-captive, nonwhite labor force and perpetuate the racial hierarchy in the South by excluding agricultural workers.⁷²

Other historical accounts, however, state different justifications for the exclusion of agriculture and domestic workers. The first reason cited is often the administrative difficulties in enforcing the New Deal orders and encompassing bureaucratic structure within non-traditional (read non-industrial) settings.⁷³ State capacity of taxing and enforcing minimum wage and overtime orders, alongside Social Security, in agriculture would either be too onerous or so inefficient it would, in some rudimentary cost-benefit analysis, defeat its purpose.

The second formal account provided for the explanation of the agriculture exemption is that of subsidizing a favored or a failing economic sector. Subsidizing

⁷⁰ FEAR ITSELF, *supra* note 18, at 260.

⁷¹ 475 P.3d 164, 175–76 (Wash. 2020) (en banc) (González, J., concurring).

⁷² *Id.* at 176 (citations omitted). To support those positions, González cites: Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104 (2011); MARC LINDER, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* 8–13 (1992); Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 178 (2018); Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 448–52 (2004).

⁷³ See Carmichael, 301 U.S. at 513.

agricultural work was framed as keeping parts of an American way of life alive despite unfavorable market conditions. Wage and work law exemptions were framed as those kinds of subsidies.

Such accounts appear both in formal histories, like in contemporary accounts of the Social Security Administration,⁷⁴ and in contemporaneous, 1930s judicial understandings of those exclusions. During the early constitutional onslaught against New Deal legislation, plaintiffs brought an equal protection-like argument about the New Deal exclusions: the existence of exemptions entailed unequal treatment of included sectors.

For example, in *Carmichael v. Southern Coal & Coke Co.*,⁷⁵ an early challenge to the New Deal's unemployment insurance scheme, the Court examined and deferred to the bureaucratic reasoning for exempting agriculture and homebound workers, writing, "Administrative considerations may explain several exemptions. Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax."⁷⁶

Deference to state rationales for exclusions persisted well into the second half of the twentieth century. The 1970s challenges to the agriculture exclusion, now by excluded workers, asserted that arcane bureaucratic and favoritism rationales were no longer relevant. The 1970s state capacity, plaintiffs argued, had changed dramatically since the 1930s. In addition, the agriculture market's median employer shape-shifted from a small family farm into a large agribusiness.⁷⁷ Thus, no tax collection excuses and no need to subsidize industrial behemoths. In *Romero v. Hodgson*, a 1970 case from the Northern District of California, such rebuttals of persistent official narratives were tested, and rejected.⁷⁸

Plaintiffs . . . describe a veritable revolution in American agriculture. Whereas the bulk of American farms in 1935 were small family enterprises dispersed in every corner of the country, today[']s corporate farms are automated, computerized entities which together account for 89% of the farm employment in the United States. Farmers today must keep records for the Internal Revenue Service and the Social Security Administration, and this fact casts further doubt, according to plaintiffs, on the continuing validity of *Carmichael*.⁷⁹

⁷⁴ Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 49 (2010).

⁷⁵ 301 U.S. at 510–11.

⁷⁶ *Id.* at 513.

⁷⁷ *Romero v. Hodgson*, 319 F. Supp. 1201, 1202 (N.D. Cal. 1970).

⁷⁸ *Id.*

⁷⁹ *Id.*

The *Romero* court admitted that the bureaucratic rationale might no longer hold, conceding to the plaintiffs' assertions that low state capacities might no longer justify exempting agriculture from minimum wage and overtime laws.⁸⁰ However, the state interest in subsidizing agriculture as well as the need to maintain a cost-efficient administration was still very much alive regardless of the sectors' composition.⁸¹ Thus, the court ended up rejecting the challenge.⁸²

Twentieth-century courts repeatedly rejected equal protection claims by excluded agriculture workers.⁸³ But claimants persisted, now state courts faced repeated challenges to the exclusion of agriculture workers from various components of their states' labor codes.⁸⁴ Despite century of defeats, the exclusion of agriculture workers remained a live equal protection legal issue, supported by growing legal activism and mobilization of farmworkers.

Finally, one of the first chinks in the agricultural exemption judicial armor appeared. In *Rodriguez v. Brand West Dairy*, the New Mexico Supreme Court decided that the "farm and ranch laborers[']" exemption from the state's workers' compensation act⁸⁵ violated New Mexico's state constitutional demand of equal protection.⁸⁶ The decision aggregated cases of appeals by ranch and farm workers on denial of workers' compensation coverage following workplace accidents workers had suffered. Equipped with a relatively stringent New Mexico version of constitutional rational basis review, the court rejected the link between rationales of administrative difficulties and subsidizing agribusinesses as tied to the exemption, finding it unconstitutional.⁸⁷

In a 2019 case from New York, *Hernandez v. State of New York*, agriculture workers contested their exclusion from the state's labor provisions, including various collective action rights.⁸⁸ Following a determination that the right to organize is a fundamental one under the New York Constitution, the court determined the exclusion from that right could not withstand strict scrutiny.⁸⁹ Following *Hernandez*, the exemption was removed by the legislature, and farm workers were included in the state's labor code.⁹⁰

⁸⁰ *Id.* at 1203.

⁸¹ *Id.*

⁸² *Id.* Not to neglect a heartfelt dissent, see *Romero*, 319 F. Supp. at 1203 (Zirpoli, J., dissenting).

⁸³ See, e.g., *Sellmer v. Ruen*, 769 P.2d 577, 578–79 (Idaho 1989); *Otto v. Hahn*, 306 N.W.2d 587, 589–92 (Neb. 1981).

⁸⁴ *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96, 97 (N.D. 1979), *overruled by Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 196 (N.D. 1994).

⁸⁵ N.M. STAT. ANN. § 52-1-6 (LexisNexis, through all chaptered acts of the 2024 regular session of the 56th Legislature).

⁸⁶ 378 P.3d 13, 17–18 (N.M. 2016).

⁸⁷ *Id.* at 18, 24.

⁸⁸ 99 N.Y.S.3d 795, 798 (App. Div. 2019).

⁸⁹ *Id.* at 801–03.

⁹⁰ Assemb. B. 8419, 2019 Leg., Reg. Sess. (N.Y. 2019).

Soon after *Hernandez*, the Washington Supreme Court's *Martinez-Cuevas* decision determined that the state's agricultural exemption from overtime pay⁹¹ violated the state's constitutional privileges and immunities clause, guaranteeing Washington citizens equal protection of the laws.⁹²

The agriculture exemption's persistence against repeated challenges across federal and state laws reveals another facet of the exclusions and of the weakness of the equal protection arguments against it. Agriculture workers stand as perhaps *the* example for race-based exclusion from work law, and yet not only does it persist in most state and in federal work laws, but it has been there for nearly a hundred years, surviving repeated legal, organizing, and political attacks. The agriculture exemption is stable despite the fact that both of its official justifications (bureaucratic obstacles and failed sector-subsidies) have been strongly empirically contested and despite its canonical historical anchoring in racial politics. It represents the most clear-cut case of an exclusion that the equal protection clause was meant to do away with, and yet only a handful of states recognized such arguments.

D. Labor's Legacy: Local and State Statutes

Following the review of exclusions in a state's labor code, early state wage and hour laws, and a deep dive into the exemption of agriculture workers, this Section will examine a series of recent local and state laws animated by the lobbying and mobilization of the labor movement. Unions and their local and state allies have enacted an impressive series of work laws. However, with those victories also comes the determination of who is in and who is out. Exclusions are found, again and again, even in those impressive wins. And when exclusions happen, equal protection arguments closely follow.

One of the most fundamental shifts in U.S. labor relations in the past fifty years is the change in focus of organized labor from collective bargaining to policymaking, notably in state and local regulations. Daniel Galvin of Northwestern University called it "labor's legacy": shifting resources and energy to legislative and regulatory lobbying and the drafting, endorsing, and enforcing state and local policies.⁹³ Currently, the legislative process, its candidates, and its inner operations are as much of a part of today's U.S. labor movement as the shop floor and industrial actions. This trend is manifest in the growing numbers of local and state work law legislative initiatives and its qualitative and quantitative correlation to labor's outposts.

Tracing the rationales of those union-led state and local regulations helps explain some of its substantive contents and challenges. Labor's transition into a more

⁹¹ WASH. REV. CODE ANN. § 49.46.130 (LexisNexis, through legislation from the 2024 Regular Session), *amended by* S.B. 5172, 67th Leg., Reg. Sess. (Wash. 2021).

⁹² *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 475 P.3d 164, 167 (Wash. 2020); WASH. CONST. art. I, § 12. This clause is often referred to as Washington's equal protection clause. *See Martinez-Cuevas*, 475 P.3d at 168; *Nw. Grocery Ass'n v. City of Burien*, No. C21-0203-JCC, 2021 WL 1554646, at *4 n.3 (W.D. Wash. Apr. 20, 2021).

⁹³ Galvin, *supra* note 29, at 1103.

regulatory role stems, at least in part, from the growing difficulty of winning with traditional organizing strategies aimed at the facilitation of a traditional collective bargaining relations.⁹⁴ This labor soul-searching led to various innovations in organizing strategies, including a significant shift in priorities and focus.⁹⁵ However, labor's regulatory moves were also a result of significant weaknesses both at the federal level—the repeated lack of ability to reform private sector labor law—as well as at the local levels. Locally, labor had to navigate significant legal, organizational, and political obstacles in devising policy solutions to workers' problems, forming ad-hoc and hard-to-maintain political coalitions necessary to push policy forward and keeping their gains despite relentless legal and political attacks by employers, their allies, and associations.⁹⁶ Such political weakness, and the need to form broad quid-pro-quo coalitions affected the scope of those local initiatives.

Of the exemptions found in such local legislation, one can find distinctions within sectors (like health care or hoteling) based on various federal regulations and type of facility (e.g., outpatient clinic or hospital).⁹⁷ These include state regulations aimed at counties with a population over a certain number, excluding the rest of the state,⁹⁸ and a City of Chicago fair scheduling ordinance applying only to employers in certain sectors, sizes, and composition that did not opt out by a collective bargaining agreement.⁹⁹ Regulating employers by size (in terms of number of employees) is a common feature of such legislation,¹⁰⁰ but consider a City of Los Angeles worker retention ordinance that differentiates between large grocery stores and smaller ones (in terms of square feet), member grocery stores and non-member ones, grocery stores and restaurants, grocery stores that opted out with a collective bargaining agreement and those that have not.¹⁰¹ Prevailing wage laws¹⁰² in construction include numerous

⁹⁴ Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 153, 154 (2013).

⁹⁵ Andrew Elmore, *Labor's New Localism*, 95 S. CAL. L. REV. 253, 262–63 (2021); Scott L. Cummings & Andrew Elmore, *Mobilizable Labor Law*, 99 IND. L.J. 127, 131 (2023).

⁹⁶ Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939, 1150 (2015).

⁹⁷ *Mont. Med. Ass'n v. Knudsen*, 645 F. Supp. 3d 999, 1021 (D. Mont. 2022) (declaring a violation of equal protection); *R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17, 40 (1st Cir. 2011) (holding that such distinctions are rationale in hoteling sector regulations).

⁹⁸ *Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846, 851–53 (Ill. 2007) (declaring Illinois' break regulation in the hoteling sector, applying only in Cook County, Chicago, constitutional under equal protection arguments).

⁹⁹ *Bldg. Owners & Managers Ass'n of Chi. v. City of Chicago*, 513 F. Supp. 3d 1017, 1022 (N.D. Ill. 2021).

¹⁰⁰ *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015) (regarding a Seattle ordinance regulating wages according to employer size).

¹⁰¹ *Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1022–23 (Cal. 2011); *see also* *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1168 (N.M. 2005) (holding that size-based minimum wage is constitutional).

¹⁰² Prevailing wage laws establish the minimum compensation for workers employed in

exceptions and inclusions that were challenged. For example, such was the inclusion of “delivery drivers of ready-mix concrete” into California’s prevailing wages regulations in 2015.¹⁰³

Several repeating legal themes appear in labor’s legacy exclusions and their challengers. One repeating equal protection claim is that such ordinances, and the decision as to which employers are included and which employers are excluded, are tied to labor’s strategic goals and aims. For example, the city of Berkeley, California, extended a wage ordinance to a geographical area called “the Marina.”¹⁰⁴ However, the extension was not universal and covered only entities employing more than 6 employees and having a gross revenue greater than \$350,000.¹⁰⁵ One argument the now-covered employers made was that the extension of the wage ordinance was driven solely by unions’ political allies drawing the boundaries of the ordinance according to their organizing interests.¹⁰⁶

Berkeley is no exception. Employers’ attacks on labor-led local legislation often are characterized as union protectionism. In some, it is the exemption from the regulation of employers with collective bargaining agreements that is attacked.¹⁰⁷ In others, it is in the stated purpose of protecting unionized workplaces from competing against non-union workplaces and the creation of a “race to the bottom.”¹⁰⁸ And in others, it is the peculiar setting of timelines for employers’ immunity from legal claims based on union-led litigation schedules.¹⁰⁹ Interestingly, allowing unions to opt out of state regulations via the signing of collective bargaining agreements is considered a legal good, as it makes the regulation more immune to NLRA pre-emption claims.¹¹⁰

public works. *See, e.g., Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1058 (9th Cir. 2018). Such laws, mostly state and local, differ in scope and substance. *See, e.g., id.*

¹⁰³ *Id.* at 1057.

¹⁰⁴ BERKELEY, CAL., MUN. CODE ch. 13.27 (2019).

¹⁰⁵ *Id.*

¹⁰⁶ *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004) (“RUI contends that these were not the real reasons motivating the City Council’s decision, but that the City Council was instead motivated by a desire to help in the unionization campaign at a Marina hotel . . .”).

¹⁰⁷ *See, e.g., Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 913 (9th Cir. 1993); *ESI/Employee Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 724 (E.D. Tex. 2020); *Am. Hotel & Lodging Ass’n v. City of Los Angeles*, 834 F.3d 958, 960 (9th Cir. 2016).

¹⁰⁸ *See, e.g., Allied Concrete*, 904 F.3d at 1064 (discussing the protectionism theme of prevailing wage laws and characterizing it as preventing a “race to the bottom”).

¹⁰⁹ *Fowler Packing Co. v. Lanier*, 674 F. Supp. 3d 851, 883–84 (E.D. Cal. May 25, 2023) (describing carve outs in those terms and accepting an equal protection argument on this basis); *Fowler Packing Co. v. Lanier*, 854 F.3d 1045, 1046 (9th Cir. 2016) (accepting the argument for equal protection purposes); *see also Labor & Workforce Dev. Agency v. Super. Ct.*, 227 Cal. Rptr. 3d 744, 747 (2018) (noting that Fowler, the plaintiff in the previously cited case, requested correspondence between regulatory agencies and UFW).

¹¹⁰ *Cal. Grocers Ass’n v. City of Los Angeles*, 254 P.3d 1019, 1039 (Cal. 2011) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987)).

After 2015, one of labor's main legal and policy efforts concerned Uber and the classification of its drivers as independent contractors.¹¹¹ Uber represented a possible future for a labor market, composed of platforms and independent contractors, a future labor broadly considered as incompatible with its goals.

California was located at the beachhead of the labor challenge against Uber's vision. As classification was seen as the main harm of Uber's business model, labor advocates lobbied and pushed for Assembly Bill 5 (AB5), adding a stricter classification scheme to the California labor code.¹¹² Passing AB5 through the California legislature was not smooth sailing, and alongside platform companies, AB5 drew scrutiny from many other workers, contractors, and associations in other sectors and occupations about the detrimental potential it had for their existing business models and livelihoods.¹¹³ The political outcome of those pressures was a set of legislative exemptions from AB5's stringent classification scheme for numerous sectors and occupations.

Among others, those exemptions from AB5's classification scheme included:

California-licensed insurance businesses or individuals; physicians and surgeons; dentists; podiatrists; psychologists; veterinarians; lawyers; architects; engineers; private investigators and accountants; registered securities broker-dealers and investment advisers; direct sales salespersons; commercial fishermen working on American vessels for a limited period; marketers; human resources administrators; travel agents; graphic designers; grant writers; fine artists; payment processing agents; certain still photographers or photo journalists; freelance writers, editors, or cartoonists; certain licensed estheticians, electrologists, manicurists, barbers, or cosmetologists; real estate licensees; repossession agents; contracting parties in business-to-business relationships; contractors and subcontractors; and referral agencies and their service providers.¹¹⁴

A significant list of professions and sectors.

Two subsequent amendments of AB5 expanded the list of exclusions, adding newspaper distributors working under contract with a newspaper publisher and

¹¹¹ Gali Racabi, *Effects of City-State Relations on Labor Relations: The Case of Uber*, 74 ILR REV. 1155, 1155 (2021); Racabi, *supra* note 5, at 1172; Veena B. Dubal, *Economic Security & the Regulation of Gig Work in California: From AB5 to Proposition 22*, EUR. LAB. L.J. 51, 55 (2021).

¹¹² See Dubal, *supra* note 111, at 55.

¹¹³ See Racabi, *supra* note 111, at 1213.

¹¹⁴ *Olson v. California*, 62 F.4th 1206, 1211 (9th Cir. 2023).

newspaper carriers.¹¹⁵ An additional amendment exempted various recording artists: songwriters, lyricists, composers, and proofers; managers of recording artists; record producers and directors; musical engineers and mixers; vocalists; musicians engaged in the creation of sound recordings; photographers working on recording photo shoots, album covers, and other press and publicity purposes; and independent radio promoters.¹¹⁶

As AB5 garnered sufficient legislative support to be enacted, numerous lawsuits were filed using the carved-out structure of the law as an argument against its constitutionality. Among those claimants were firms who sign people onto state ballot initiatives—now risking misclassification claims;¹¹⁷ associations of journalists and photographers—now facing a challenge to their existing business models and practices;¹¹⁸ a challenge from entities contracting door knockers and canvassers;¹¹⁹ and even a challenge from Uber itself.¹²⁰ Uber's claim, part of an ongoing litigation, is that the combination of multiple unexplained exclusions, in addition to the targeting of Uber by the California State Legislature, means that Uber and similar entities' equal protection rights were violated by the company's inclusion in AB5 as many other firms are excluded.

Labor has led the charge in passing novel and important work laws, leading to a significant improvement of the working conditions of both union and non-union members across the United States. However, such local and state laws are replete with exclusions and are often attacked in court using equal protection arguments based on those exclusions. The recent peak of such claims saw a punctured California AB5 classification scheme successfully attacked by an included (to-be) employer, namely, Uber. Uber used AB5's structure as part of its equal protection arguments, and at least one Circuit panel thought those arguments plausible. Such a claim, reminiscent of the early attacks on state work laws and then the New Deal, is not an outlier and accompanies many such labor legislative initiatives.

E. Public Sector

Work law is filled with exceptions. Although much attention is focused on private sector work laws, public sector employees' work is highly regulated by the

¹¹⁵ Assemb. B. 170, 2019 Leg., Reg. Sess. § 1(b)(7) (Cal. 2019).

¹¹⁶ Assemb. B. 2257, 2020 Leg., Reg. Sess. §§ 2779(a), 2780(a)(1) (Cal. 2020).

¹¹⁷ *Crossley v. California*, 479 F. Supp. 3d 901, 912–13 (S.D. Cal. 2020) (rejecting the challenge).

¹¹⁸ *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV 19-10645, 2020 WL 1434933, at *1 (C.D. Cal. Mar. 20, 2020).

¹¹⁹ *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 930 (C.D. Cal. 2022) (raising First Amendment free speech challenge only).

¹²⁰ *Olson v. California*, 62 F.4th 1206, 1210 (9th Cir. 2023). Amongst the other challenges are preemptions under the FAAA, see *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 662 (9th Cir. 2020).

state in its capacity as a legislature and regulator in addition to its role as employer. After surveying New York State's labor code, early state laws, the example of agriculture workers' exemption, and the recent local and state labor-led policy wins (and attacks), we will now survey exemptions involving public sector workforce.

Distinguishing between private and public sector workers is prevalent. For example, California passed a law making it voluntary for employees to take workplace-related polygraph tests but excluded from this law the entirety of its public sector.¹²¹ This meant that following this law, public sector workers in California had no right to refuse a demand made by their employer to take a polygraph, but California private sector employees could refuse a polygraph, and private sector employers could not retaliate against their workers for choosing not to take it. Under equal protection scrutiny brought by the excluded public sector worker, and because polygraph testing involves privacy harms, the California Supreme Court declared that such distinctions between public sector workers and private sector workers could not stand unless justified by a compelling government interest.¹²² Such an interest was missing from the case, and the excluded worker-plaintiffs won their equal protection challenge.¹²³

Classifications of exclusions and inclusions within the public sector workforce are also abundant. In Wisconsin's 2010 administration's struggles against unions, the state passed what was known as Act 10, which, among other things, distinguished between classes of public sector employees based on their affiliation with unions with regard to the permissible subjects of negotiations between those unions and the state.¹²⁴ Namely, Act 10 limited the available scope of subjects for negotiations for union-affiliated employees to wage-base only.¹²⁵ Public sector workers argued for an equal protection claim distinguishing them from private sector workers and excluded public sector workers who are able to negotiate many more issues with their employers.¹²⁶ After noting that the public sector workers are not a protected class for strict scrutiny purposes,¹²⁷ the Wisconsin Supreme Court followed by rejecting the equal protection claims altogether.¹²⁸ Similar claims involving equal protection rights against limitations of representation and concerted activities were also unsuccessful.¹²⁹

Similar public sector union limitations have become common, and with it, so too have exceptions from those limitations to particular public sector unions like police unions. For example, in SB7, Kentucky placed limitations on public employers'

¹²¹ Long Beach City Emps. Ass'n v. City of Long Beach, 719 P.2d 660, 666 (Cal. 1986).

¹²² *Id.* at 669.

¹²³ *Id.* at 672.

¹²⁴ Madison Teachers, Inc. v. Walker, 851 N.W.2d 337, 347 (Wis. 2014).

¹²⁵ *Id.* at 365.

¹²⁶ *Id.*

¹²⁷ *Id.* at 363.

¹²⁸ *Id.* at 365.

¹²⁹ Stone v. Sweeney, 698 N.Y.S.2d 645, 646 (App. Div. 1999) (rejecting plaintiff's equal protection arguments against limited representation rights).

authority to deduct certain pay items from employees' wages and mandated unions to disclose certain financial information.¹³⁰ The Act exempted from its reach "organizations which primarily represent public employees working in the protective vocations of active law enforcement officer, jail and corrections officer, or active fire suppression or prevention personnel."¹³¹ Such excluded unions, as contended by the included unions, were political allies of the administration.

In a challenge to SB7's structure, a federation of teachers' unions claimed the exemption violated teachers' right to equal protection under the Kentucky Constitution.¹³² The explanation Kentucky's Attorney General offered for the distinction between the plaintiffs' teachers' unions and the exempted unions was about a certain relation between risk on the job and the focus of the union on its members' interests.¹³³ The riskier the job, the more likely a union is to actually advocate for its members. Plaintiff teachers' unions contended, however, that the rationale is political.¹³⁴ Kentucky's Circuit Court accepted the challenge.¹³⁵

In addition to those public sector workers, many state and local governments had legislated prevailing wage ordinances for private sector workers engaging in public works. Such laws routinely classify types of public work, types of jurisdictions covered by it (for example, those with more than 3,000 residents), and more. Such laws are also routinely attacked with equal protection arguments.¹³⁶

Work law is the barebones structure defining the basic bill of rights for workers and, correspondingly, the obligations of employers. Substantively, this covers multiple areas of significant importance for employers, employees and the broader public: wages, hours, safety, labor, antidiscrimination, and more. However, across all of work law, we find significant populations of employers and employees excluded from it. As a result, across all of work law we find claims that such exclusions harm constitutional rights of equal protection—mainly stemming from excluded workers and included employers. Such claims leverage the pierced structure of work law to their advantage. Both employers and employees have been pressing those claims for at least a hundred years. Yet both the punctured structure of work law and such equality claims have been left largely uninvestigated.

Following this Part's description of multiple case studies of the exclusionary nature of work law, the next Part will briefly survey some of the features of the

¹³⁰ S.B. 7, 2023 Leg., Reg. Sess. (Ky. 2023).

¹³¹ KY. REV. STAT. ANN. § 336.180(10) (West 2024).

¹³² Ky. Educ. Ass'n v. Link, No. 23-CI-00343, at *3–4 (Ky. Cir. Ct. Aug. 30, 2023).

¹³³ *Id.* at *12.

¹³⁴ *See id.*

¹³⁵ The case is now pending appeal. Commonwealth, *ex rel.* Att'y Gen. Daniel Cameron v. Ky. Educ. Ass'n, No. 2023-CA-1025 (Ky. Ct. App. 2023).

¹³⁶ *See, e.g.,* Joplin v. Indus. Comm'n of Mo., 329 S.W.2d 687, 688–89 (Mo. 1959).

equal protection claims brought forward. Following that, the Article will draw historical, institutional, and substantive themes from those cases.

II. EQUAL PROTECTION ARGUMENTS AGAINST EXCLUSIONS

Equal protection arguments draw the boundaries between included and excluded employers and workers. Courts routinely see excluded workers argue that their exclusion from a specific work law violates their equal protection rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and similar state constitutional provisions. Included employers, on the other hand, argue that their inclusion violates their similarly anchored equal protection rights. Equal protection arguments stem from, respond to, and constitute the legal structure of work laws.

Work law scholars have examined the merits of constitutional equal protection arguments as a tool for vulnerable groups of workers.¹³⁷ Agriculture workers' exclusions are a main case study of such equal protection arguments. Alongside agriculture, scholars examined the availability of equal protection arguments for workers with diverging immigration and citizenship status,¹³⁸ employees of nonprofits,¹³⁹ workfare programs,¹⁴⁰ and others. Those claims honed their equal protection arguments on race, sex, and immigration status.

But focusing on worker-oriented race, sex, and citizenship-based claims exposed, again and again, the weakness of equal protection arguments.¹⁴¹ Traditional routes for proving that a regulatory scheme violated equal protection rights because of race or immigration status necessitated either an explicit categorization (to substantiate a disparate treatment claim) or an evidentiary smoking gun about legislature's intent (to substantiate a disparate impact claim).¹⁴² Both thresholds were hard to achieve, even in the most clear-cut cases of exclusions based on racial motivations, like the case of agriculture workers.¹⁴³

Workers' race-based equal protection weakness is perceived in the literature as enabling an exclusionary race-based regime.¹⁴⁴ Through this view, the equal protection doctrine is portrayed as a weak legal shield against race-based exclusions. Perhaps due to that weakness, the vast majority of contemporary exclusion-related equal

¹³⁷ GARCIA, *supra* note 28, at 25; LeAnne K. Jabs, *Workers Compensation: Equal Protection Challenge to the Agricultural Exemption and Use of Rational Basis Scrutiny*, 71 N.D. L. REV. 781, 787 (1995); Dubin, *supra* note 18, at 108–09.

¹³⁸ GARCIA, *supra* note 28, at 76–77, 130.

¹³⁹ Senator Thomas Laverne, *Toward Equal Protection for the Non-Profit Employer: The New York Experience with Collective Bargaining and Social Welfare Protection for Non-Profit Employees*, 5 SUFFOLK U.L. REV. 365, 366 (1971).

¹⁴⁰ Noelle M. Reese, *Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers' Compensation Laws*, 31 RUTGERS L.J. 873, 902 (2000).

¹⁴¹ Perea, *supra* note 72, at 128.

¹⁴² *Id.*

¹⁴³ *Id.* at 127–28; GARCIA, *supra* note 28, at 76.

¹⁴⁴ Perea, *supra* note 72, at 99.

protection claims are not those kinds of explicit sex- or race-based claims. Thus, to understand the constitution of exclusions and inclusions, one must traverse beyond the traditional foci of work law scholarship and adopt a broader view of the connection between equal protection doctrine and exclusions from work law.

Canonically, courts examine equal protection claims using a three-tier structure based on the type of classification involved in the state action. The laxest form of analysis is called a rational basis analysis, where the court juxtaposes a conceivable state objective against the state action selected for achieving that aim. The most stringent form of scrutiny that demands a strong justification and a lack of alternative means, strict scrutiny, involves claims of harms to fundamental rights or suspected classes. And between those two levels of scrutiny are claims that involve state action with some indirect harm to an important right, or with some implication on a semi-suspected population.¹⁴⁵ In this intermediate scrutiny, the state must demonstrate a substantial governmental interest and a substantial relation between that goal and the means selected to achieve it. Disparate impact claims—those that tie a facially neutral category to suspected categories—are increasingly difficult to prove and are rarely made in a straightforward way in the work law context.¹⁴⁶

The work law context offers some unique features for this traditional trio of levels of scrutiny. Namely, the Supreme Court declared that a class-of-one equal protection claim is unavailable for public sector workers against the state.¹⁴⁷ Such treatment of claims can be conceptualized as an additional tier of scrutiny for equal protection claims—no scrutiny at all, and are unique to such employees' claims.

Courts routinely treat work laws as social economic regulations,¹⁴⁸ which most often are treated as awarded with a rational basis tier. “[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*”¹⁴⁹

This Part surveys equal protection arguments made by workers and employers regarding work law exclusion/inclusion schemes.¹⁵⁰ This review does not cover equal protection arguments made against the state as allocator of welfare. Although there are significant overlaps between the two areas, and welfare provisions such as unemployment insurance and workers' compensation schemes are notoriously exclusionary, the context of their application is different from that of work law writ

¹⁴⁵ *Bullock v. Carter*, 405 U.S. 134, 145–46 (1972).

¹⁴⁶ *Otoo*, *supra* note 28, at 245–48.

¹⁴⁷ *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 614–15 (2008).

¹⁴⁸ Michael C. Duff, Noe Rodriguez v. Brand West Dairy: *Balancing Equal Protection Rights and a State's Economic Interests*, 3 INT'L LAB. RTS. CASE L. 106, 107 (2017).

¹⁴⁹ *Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1038 (2011) (alterations in original) (quoting *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993)).

¹⁵⁰ *See Breen v. Carlsbad Mun. Sch.*, 120 P.3d 413, 415 (N.M. 2005).

large in important ways. Most of all, welfare decisions tie the courts' decisions to public funds and resources, such as unemployment insurance funds, in a way that is much more straightforward than the regulation of work.

A. Rational Basis

Rational basis review is extremely deferential to states' reasoning. Plaintiffs must provide evidence to demonstrate that such deference is not justified in their case.¹⁵¹ Plaintiffs are asked to achieve that high bar by providing evidence that there is no possible rational connection between the aims and means of the statutory scheme.¹⁵² Simply asserting that the public authority has been engaged in an "arbitrarily, unfairly, and without rational basis"¹⁵³ is not sufficient to rebut the state's deference.

Plaintiffs' attempts to carve themselves out of rational basis scrutiny by claiming to be a part of a heretofore unrecognized protected group or coming up with a novel claim for a protected fundamental right, is extremely challenging, as courts are reluctant in recognizing those exceptions. Among those famous court rejections are low-income,¹⁵⁴ public/private sector,¹⁵⁵ duration of time employed,¹⁵⁶ businesses with or without a fixed establishment,¹⁵⁷ size,¹⁵⁸ and more.

Just for the taste of the subject matter, courts have decided that it is rational for the state to decide that a particular area within the state has some distinct market features that justify special treatment, like providing workplace protections for hotel workers in heavily populated localities.¹⁵⁹ It is also repeatedly considered rational for work law to include large employers that can "absorb the costs" of work law regulations,¹⁶⁰ as it is rational to enact protective regulations for low-wage workers,

¹⁵¹ Bldg. Owners & Managers Ass'n of Chi. v. City of Chicago, 513 F. Supp. 3d 1017, 1027 (N.D. Ill. 2021).

¹⁵² See, e.g., *id.* at 1028 (noting that plaintiffs bear the burden to demonstrate characterization of covered employers and sectors is without rational basis).

¹⁵³ *Id.* at 1027.

¹⁵⁴ Ertman v. Fusari, 442 F. Supp. 1147, 1152 (D. Conn. 1977) (rejecting income thresholds challenge); Estelle v. Eysinki, 147 So.3d 1136, 1140–41, 1143 (La. App. 2014) (same).

¹⁵⁵ Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 491–92, 497 (1976) (in the context of strikes).

¹⁵⁶ Martin v. Unemployment Comp. Bd. of Rev., A.2d 107, 108, 119 (Pa. 1983).

¹⁵⁷ Desarrollos Metropolitanos, Inc. v. OSHRC, 551 F.2d 874, 875 (1st Cir. 1977).

¹⁵⁸ *Id.* at 877.

¹⁵⁹ Ill. Hotel & Lodging Ass'n v. Ludwig, 869 N.E.2d 846, 852 (Ill. Ct. App. 2007). The same amendment was later subject to NLRA preemption arguments.

¹⁶⁰ Bldg. Owners & Managers Ass'n of Chi. v. City of Chicago, 513 F. Supp. 3d 1017, 1028 (N.D. Ill. 2021).

effectively exempting higher earners.¹⁶¹ Similarly, it is rational for a state to exempt workers who are covered, and thus theoretically empowered, through collective bargaining agreements.¹⁶²

Courts are highly deferential to quantitative classifications. While some early pre-New Deal challenges to exclusions and inclusions by size of workforce were successful,¹⁶³ later courts summarily rejected such challenges.¹⁶⁴ Such enumerative distinctions between employers with eight or seven employees are “the type of distinction[s] which the law is often called upon to make.”¹⁶⁵ Lines must be drawn somewhere, and while near the distinguishing line there might be resemblance, the line-drawing exercise itself is justified.

Even within rational basis review, there are tiers of scrutiny. Consider public health, for example. Facing the COVID pandemic and ensuing state immunization requirements, followed by an immunization backlash, the Montana legislature enacted Section 49-2-312 into its Human Rights title.¹⁶⁶ The legislation prohibited various entities from mandating disclosure of and discriminating based on immunization status. Importantly for our purposes, the legislation protected employees from being coerced into sharing their immunization status and being discriminated against by employers as a result of refusing to answer questions about their immunization status.¹⁶⁷ However, the legislation, as enacted, exempted certain health-care-sector employers while including others in a seemingly arbitrary classification scheme.

An equal protection suit was filed by included employers and immunocompromised patients against those employers’ conflicting immunization disclosure requirements under both the Montana and the federal constitutions.¹⁶⁸ The District Court for the District of Montana accepted the equal protection claim in *Montana Medical Ass’n v. Knudsen*.¹⁶⁹

Within the equal protection analysis, the *Montana Medical Ass’n* court first identified the type of statutory intervention as one aimed at protecting employees from “discrimination” and protecting employees’ “privacy” as opposed to public

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Booth v. Indiana*, 237 U.S. 391, 397–99 (1915).

¹⁶⁴ *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

¹⁶⁵ *Id.* at 510–11 (“It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.”).

¹⁶⁶ MONT. CODE ANN. § 49-2-312 (LexisNexis, LEXIS through all 2023 legislation, inclusive of the final Chapter 783 of the 68th Legislature’s concluded Regular session).

¹⁶⁷ *Id.* § 49-2-312(1)(b).

¹⁶⁸ *Mont. Med. Ass’n v. Knudsen*, 645 F. Supp. 3d 999, 1005–06 (D. Mont. 2022).

¹⁶⁹ *Id.* at 1018 (appeal filed).

health purposes.¹⁷⁰ The decision as to the subject matter of the act as dealing with privacy and discrimination rights reduced the level of deference to the state and elevated the weight of the equal protection claims.¹⁷¹ Such a comparison between public health and workers' rights framing allowed the court to examine the workers' routines and identities, finding the states' arguments in distinguishing between health-care workers on the basis of their employers' classification not convincing. It concluded that as a result, the statutory scheme, as a whole, is unconstitutional, enjoining its enforcement on health care as a whole.¹⁷²

Most equal protection claims and cases surveyed in the Article were decided using rational basis scrutiny. However, we saw that portrayal does allow for courts to distinguish within the category of rational basis scrutiny between various state interests. Identifying the cases in which courts will ratchet up scrutiny resists categorization. And yet, some types of arguments—like the one above on traditional state policy powers—can have some traction in some cases. The next Section compiles some of those arguments for increased equal protection scrutiny in the adjudication of exclusions.

B. Rational Basis +

A major premise of most of the contemporary equal protection litigation presented in this Part is that social and economic statutory schemes compel significant deference unless those scheme “employ suspect classifications or impinge on fundamental rights.”¹⁷³ What matters, the Supreme Court tells us, is not the scope of the stakes involved in the categorization but the basis of the categorization and whether it is constitutionally protected.¹⁷⁴ The Court has been reluctant in acknowledging novel categories worthy of strict scrutiny.¹⁷⁵

The classic distinction between levels of scrutiny is whether the state's distinction is based on a suspect class like race or whether the distinction affects a “fundamental right” such as the right to vote.¹⁷⁶ The following examples start with plaintiffs' arguments about an additional harm or right in addition to the equal protection argument.

¹⁷⁰ *Id.* at 1017.

¹⁷¹ See more on the question of the framing of the statutory schemes with regard to equal protection claims in Section IV.D.

¹⁷² *Mont. Med. Ass'n*, 645 F. Supp. 3d at 1021.

¹⁷³ *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 91 (2d Cir. 2015) (citing *Hodel v. Indiana*, 452 U.S. 314, 331 (1981)).

¹⁷⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

¹⁷⁵ See, e.g., *Crossley v. California*, 479 F. Supp. 3d 901, 912 (S.D. Cal. 2020) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985)).

¹⁷⁶ See, e.g., *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 543 (9th Cir. 2004).

1. Additional Harms or Interests

In some cases, plaintiffs argue, often inconclusively, that an exemption or inclusion affects some suspected population. In a case of COVID hazard pay for agriculture workers, an employers' association argued that the ordinance discriminates on the basis of immigration status and wealth.¹⁷⁷ The court was "not persuaded" that the facially neutral ordinance in fact classified on those bases and rejected the premise that if it did, the ordinance would be under the strictest level of scrutiny.¹⁷⁸

One way to distinguish whether a state distinction scales up to an intermediate or strict scrutiny from a rational basis review is whether plaintiffs managed to demonstrate an additional *legal* harm to the equal protection violation. For example, in *Long Beach City Employees Ass'n v. City of Long Beach*,¹⁷⁹ an association of public sector employees argued that its exclusion from a statute making polygraph tests voluntary for the California private sector is an equal protection harm. Such harm necessitated increased level of scrutiny, according to the plaintiffs, because of the nature of the substantive right affected by their exclusion—their right to privacy.¹⁸⁰ Thus, although the California Supreme Court recognized the state's rationale of the importance of maintaining trust in the public sector, supporting the exclusion of public sector workers from the Act, the court did not perceive complete exclusion of the public sector as the least restrictive means available to achieve such a goal.¹⁸¹

Courts tend to recognize privacy as a right justifying increased scrutiny of equal protection claims because of its constitutional valence. In similar terms, in *Hernandez v. State of New York*, a case about the agriculture workers' exemption from the state's labor protections, the court accepted the right to organize as a fundamental right under New York's constitution.¹⁸² Thereby, exclusions from the right to organize, like *Hernandez's* exclusion as an agriculture worker, deserved strict scrutiny.¹⁸³

So, privacy and organizing are rights that in some cases elevated the level of scrutiny in equal protection claims. What about speech? In *American Society of Journalists & Authors, Inc. v. Becerra*, associations of journalists and photographers argued that their inclusion in AB5 (California's strict classification scheme), as opposed to other similarly situated occupations' exclusion from the legislation, was a violation of their equal protection rights.¹⁸⁴ Their argument for a stricter scrutiny revolved around their (self-described) role as "speaking professionals," wherein any sorting of such professionals into excluded and included groups inherently involves

¹⁷⁷ *W. Growers Ass'n v. City of Coachella*, 548 F. Supp. 3d 948, 960–61 (C.D. Cal. 2021).

¹⁷⁸ *Id.* at 961.

¹⁷⁹ 719 P.2d 660, 661 (Cal. 1986).

¹⁸⁰ *See id.*

¹⁸¹ *Id.* at 670.

¹⁸² 173 A.D.3d 105, 105–06 (N.Y. App. Div. 2019).

¹⁸³ *Id.* at 106–07.

¹⁸⁴ No. CV 19-10645 PSG (KSx), 2020 WL 1444909, at *1–3 (C.D. Cal. Mar. 20, 2020).

the fundamental right of free speech.¹⁸⁵ In rejecting this argument, the California Central District Court stated that the classification scheme does not “directly” regulate speech.¹⁸⁶ Moreover, the court said that even if it did, free speech rights are not a trump card that always require strict scrutiny and, nonetheless, AB5 is not such a case.¹⁸⁷

Also of note is an attempt made by the Northwest Grocery Association litigating a Seattle workplace conditions ordinance. In their arguments, the plaintiffs stated that in addition to their equal protection harms they suffer as a result of distinguishing between member-employers according to size, they also suffered a constitutional Contracts Clause violation.¹⁸⁸ Such an additional legal harm was used (unsuccessfully) in their argument for a stricter level of scrutiny under the equal protection doctrine.¹⁸⁹

One way some employers’ groups have tried to tie their inclusion in a statutory scheme to a fundamental right was in the case of *Concerned Home Care Providers, Inc. v. Cuomo*.¹⁹⁰ There, the New York legislature adopted an act that expands New York City’s home-aid sectoral wage ordinances into the entirety of the state.¹⁹¹ Included employers from outside New York City argued that by being exposed to a regulatory scheme and wage levels determined in political processes, they were excluded from (being employers outside the city) their (fundamental) right to political participation and were thus injured.¹⁹²

The Second Circuit accepted the gist of the employers’ equal protection argument, namely, that an injury to political participation rights can be treated as a harm to a fundamental right and justify strict scrutiny.¹⁹³ But the court rejected its premise—that the plaintiffs, “five corporations and a not-for-profit trade organization”¹⁹⁴ have such a right to equal representation and participation in legislative procedures.¹⁹⁵

Another way in which employers tried (and failed) to tie their inclusion to political participation rights is by linking particular sectors or occupations to the political process itself. One of the many challenges to California’s 2019 AB5 classification scheme was brought by firms whose line of business was collecting signatures for

¹⁸⁵ See *id.* at *5–7.

¹⁸⁶ *Id.* at *5.

¹⁸⁷ *Id.*

¹⁸⁸ *Nw. Grocery Ass’n v. City of Seattle*, 526 F. Supp. 3d 884, 893 (W.D. Wash. 2021).

¹⁸⁹ *Id.* (“Plaintiffs argue the Ordinance is subject to strict scrutiny because it burdens their right guaranteed by the Contracts Clause”); see also *Cal. Grocers Ass’n v. City of Long Beach*, 521 F. Supp. 3d 902, 913 (C.D. Cal. 2021) (using the same argument).

¹⁹⁰ See 783 F.3d 77, 91 (2d Cir. 2015).

¹⁹¹ *Id.* at 80–82.

¹⁹² *Id.* at 91.

¹⁹³ *Id.* (citing *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 265 (1977)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

ballot initiatives.¹⁹⁶ Such firms contract independent workers to collect the signatures and were under heightened risk of misclassification once included in AB5's novel classification scheme.¹⁹⁷ The argument those firms used was that their operation is inherently tied to the voting process, and any intervention in their operation is equated to intervention in the voting process itself.¹⁹⁸ Thus, once an equal protection argument was made by those firms, strict scrutiny was mandated.¹⁹⁹ The Southern California District Court rejected their argument for a strict scrutiny analysis by stating that plaintiffs failed to demonstrate that the right to vote is "denied or limited"²⁰⁰ and followed by rejecting the equal protection challenge as a whole.

2. Targeted Inclusion

In some cases, the work law regulation is framed in a neutral way but aims to include only a limited number of employers or selectively exclude others. Such selective inclusions offer a way for plaintiffs to beef up their arguments and plead for a higher level of scrutiny to their equal protection arguments. For example, in *Southern California Healthcare System, Inc. v. City of Culver City*, the city's only hospital was the sole employer included in a COVID-context ordinance mandating the creation essential pay for some covered workers.²⁰¹ The hospital, trying to ratchet up rational basis review, argued for a class-of-one equal protection argument.²⁰² Here, the court was not persuaded by the merits of the claim, nor was it convinced that such an affinity in harms created any advantage for plaintiffs over rational basis review.²⁰³

In *Retail Industry Leaders Ass'n v. Fielder*, size of workforce and for-profit status were the criteria used to determine the scope of a new health-care taxing scheme in Maryland, placing the line at 10,000 employees.²⁰⁴ That effectively made Walmart the "only entity subject to the . . . requirement."²⁰⁵ Yet the court was reluctant, lacking other evidence of animus, to accept this fact as mandating an equal protection harm.²⁰⁶ But defendants may face a high bar of proof in cases whereby the state or court cannot identify any valid rationale for the selective inclusion or exclusion, and when plaintiffs provide a theory that raises a valid suspicion that the reason for such a seemingly arbitrary inclusion or exclusion is favoritism or animus.

¹⁹⁶ Crossley v. California, 479 F. Supp. 3d 901, 908 (S.D. Cal. 2020).

¹⁹⁷ *Id.* at 908–09.

¹⁹⁸ *Id.* at 912.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 913.

²⁰¹ No. 2:21-cv-05052-MCS-RAO, 2022 WL 1394751, at *1 (C.D. Cal. Jan. 19, 2022).

²⁰² *Id.* at *5.

²⁰³ *Id.* at *5–7.

²⁰⁴ 435 F. Supp. 2d 481, 484, 498–501 (D. Md. 2006) (questioning yet accepting this distinction for rational basis scrutiny).

²⁰⁵ *Id.* at 501.

²⁰⁶ *Id.*

For example, in *Fowler Packing Co. v. Lanier*,²⁰⁷ the issue at hand was a timeline-based carve out for some wage law claims under California state law. The timeline carve out was challenged by plaintiff-employers included within the scope and not eligible for the carve out.²⁰⁸ The plaintiffs' argument was that the carve out was custom tailored by the legislature to sustain union-led ongoing litigation efforts and was placed there to get the backing of the union for the legislation.²⁰⁹ After grappling with and rejecting the state's explanations, the court concluded that "the only conceivable explanation for AB 1513's carve outs is that they were necessary to procure the UFW's support in passing that legislation,"²¹⁰ which could not survive rational basis scrutiny.

The most recent example of such a claim was made in the ongoing litigation in *Olson*, whereby the Ninth Circuit was persuaded by employer-plaintiffs that their inclusion in California's strict classification scheme, compared with other similar employers that were excluded, raised a viable equal protection challenge.²¹¹ The main reasons the court decided so was: (1) its inability to distinguish included Uber from its excluded comparators; (2) the vast number of listed exclusions in the law; and (3) the seeming singling out of Uber by certain members of the California legislature.²¹²

III. HISTORICAL, INSTITUTIONAL, AND SUBSTANTIVE THEMES

Equal protection claims are a hidden aspect of work law's exclusionary nature. After reviewing some examples for the vast exclusionary nature of work law and outlining some of the main legal tenets of the terrain, this Part will step back to examine some running themes in the adjudication of equal protection claims with regard to exclusions. This Part will draw on both case law and scholarly writing on equal protection claims writ large, connecting some of the themes underlying the exclusion cases described in the last two Parts. Namely, this Part will illustrate running historical, institutional, and substantive themes underlying the case law. Doing so will later be infused into normative ideas about reforming equal protection doctrine and institutions with an aim for greater inclusion of work law.

A. Historical Narrative

One dominant theme appearing in equal protection court cases is the deference courts must bestow to legislatures on socioeconomic issues. This lesson is presented as learned from the *Lochner* era of judicial review.²¹³ Rational basis review of

²⁰⁷ 844 F.3d 809, 811 (9th Cir. 2016).

²⁰⁸ *Id.* at 811–12.

²⁰⁹ *Id.* at 816.

²¹⁰ *Id.*

²¹¹ *Olson v. California*, 62 F.4th 1206, 1220 (9th Cir. 2013).

²¹² *Id.*

²¹³ *See United States v. Lopez*, 514 U.S. 549, 605 (1995) (Souter, J., dissenting).

economic decision-making is a hard-learned lesson of courts' institutional capacities and role. From the historical point of the courts' contemporary approach to the review of economic and social legislation, some commentators argue that a split in the path of judicial scrutiny opens. One path tries to push the court back into a *Lochner*-like judicial review of socioeconomic regulations. A second path calls to maintain the deferential status quo. And a third path, yet to be fully articulated, suggests a progressive version of constitutionalism—one that is neither going back to *Lochner* nor content with the contemporary status quo. This subpart will present this running theme in equal protection litigation, accompanying the case law with commentators' perspectives.

1. *Lochner* Era Legacy

A dominant view of the interaction between equal protection arguments and workers is an oscillation in the courts' treatment of state regulations. In this view, equal protection arguments are just one more legal tool, perhaps the "last resort of constitutional arguments,"²¹⁴ available for anti-state and worker-hostile justices in attacking protective work laws and the agencies enforcing those. This historical gloss works, roughly, for the canonical pre-New Deal, post-New Deal, and contemporary description of a neo-conservative court.

Pre-New Deal courts were rough on workers and their supporting state legislatures.²¹⁵ Cases utilizing equal protection claims against worker-oriented state laws are part of that canon, intertwined with the contemporary zeitgeist of the *Lochner* era. Cases include *Truax v. Corrigan*,²¹⁶ in which the Supreme Court declared an Arizona state law prohibiting courts from issuing injunctions against picketing workers unconstitutional because of the harm to employers' constitutional equal protection rights. The *Truax* Court described the harm done by the picketing workers and compared it to other non-worker originated harms and could not find a way to distinguish between the two:

Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character . . . except when committed by [employees] of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be.²¹⁷

²¹⁴ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

²¹⁵ *But see* *Mountain Timber Co. v. Washington*, 243 U.S. 219, 237 (1917) (accepting classification of hazardous occupations in workers' compensation state scheme).

²¹⁶ *See generally* 257 U.S. 312 (1921).

²¹⁷ *Id.* at 335–36.

In pushing back against such pre–New Deal judicial scrutiny, the Court adopted an existing view on the Court—one of the dissents called for judicial restraint. Such was Justice Holmes’s dissent in *Truax*:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.²¹⁸

But Holmes’s dissent emphasized the rule—intensive scrutiny and distrust of work law legislatures. State courts partook in this judicial approach. In 1913, the Louisiana Supreme Court nullified a state law prohibiting overwork for firemen in certain sectors because such law included exclusions for other sectors.²¹⁹ Shortly afterward, the same court nullified similar firemen protections applying only in certain large cities because such distinctions had “no relation to the health or morals or safety of the public, or to the health, morals, or safety of the class of persons to whom the statute is confined.”²²⁰ A significant concern of overinclusiveness hovers all around those early cases, meaning that, courts were concerned that the state does not custom tailor its work laws for particular wards of the state or for public interest concerns.²²¹

Alongside this overinclusiveness theme is another under-inclusiveness concern. Such was the case regarding the exclusion of domestic and agriculture workers from worktime legislation in Nebraska.²²² The exclusion of those workers, which the court stated causes the general prohibition of overwork to

lose[] much of its force when these very desirable benefits are, by the statute itself, restricted to certain defined classes of laborers, no one of which, independently of the statute, devotes so many hours to labor as do the classes denied the protection of the statute [farm and homeworkers].²²³

In Minnesota, where a 1923 law excluded more than twenty occupations, the court was puzzled as to the rationale of who is in and who is left out: “The need for a day of rest is the same whether the employee is . . . in one or another of the lines of

²¹⁸ *Id.* at 344 (Holmes, J., dissenting).

²¹⁹ *See generally* State v. Barba, 61 So. 784 (La. 1913).

²²⁰ State v. Legendre, 70 So. 70, 71 (La. 1915).

²²¹ *See* Commonwealth v. Bos. & M.R.R., 110 N.E. 264, 265 (Mass. 1915) (nullifying wage and hour laws applying on railway as well as adjacent occupations as overbroad).

²²² Low v. Rees Printing Co., 59 N.W. 362, 363 (Neb. 1894).

²²³ *Id.* at 364.

business [excluded], and the excluded employers are as clearly within the class which the law sought to benefit as are those brought within it.”²²⁴ A Missouri law distinguishing between types of baked goods for the purpose of the prohibition of more than six days of work received similar treatment.²²⁵

Yet judicial scrutiny of economic issues was not uniform. Just thirteen days after nullifying the firemen jurisdiction bill, the Louisiana Supreme Court sustained a wage-scheduling law (mandating pay for certain sectors every two weeks).²²⁶ It did so on purely, seemingly contemporary, deferential grounds:

If the Legislature in its wisdom has concluded that the public welfare requires the providing of stringent rules for compelling prompt payment in large labor centers . . . we do not see that the courts are at liberty to pronounce the legislation unnecessary or uncalled for. And if, in undertaking to declare how large the aggregation of employees should be in order that the law should have application, the Legislature has fixed the number at 10, we do not see that this necessarily imports an unjustifiable classification. In such a case, the line has to be drawn somewhere, and it is not for this court to say that if it had been drawn at 100, or at 50, or at 20²²⁷

Pre–New Deal case law might be mixed, but its image in courts’ and scholarly imagination is much more schematic—a time of relentless judicial scrutiny. This historical narrative dominates contemporary discussions and is intertwined as an anti-canon of legal work in the justification of contemporary deference.

2. Post–*Carolene Products*

The *Carolene Products* decision in 1938 is considered the guidepost for a post-*Lochner* judicial review of economic regulations. In *Carolene Products*’ celebrated “footnote 4,” the Court refocused judicial review on state actions that harmed persistent political minorities, enumerated fundamental rights, or interfered with the political process.²²⁸ Other state actions, especially those that touch on economic as opposed to political rights or interests would justify only a lax form of judicial review—rational basis review.²²⁹

²²⁴ State v. Pocock, 201 N.W. 610, 611 (Minn. 1925).

²²⁵ State v. Miksicek, 125 S.W. 507, 509, 511 (Mo. 1910).

²²⁶ State v. Cullom, 70 So. 338, 338–39 (La. 1915).

²²⁷ *Id.* at 339. See generally State v. Mo. Pac. R.R. Co., 147 S.W. 130 (Mo. 1912).

²²⁸ See Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1414 (2023).

²²⁹ *Id.*

As Diana Reddy argues, *Carolene Products* served a goal but came with a price.²³⁰ The goal was to release major New Deal legislation from the threat of judicial nullification, but the price was the *de facto* de-constitutionalizing of economic interests.²³¹ All interests unrelated to the political process, or to an insular minority, or to other constitutional provisions are left outside the Constitution. Such a move, per Reddy and other scholars,²³² had a significant effect on the way unions as the vehicles of economic regulations are perceived: economic tools or burdens, outsiders to constitutional values and institutions.²³³ *Carolene Products*' effects were not immediate on exclusion equal protection arguments.²³⁴ As we've seen in Section I.B, most state-based challenges to work laws and judicial scrutiny of those challenges persisted. Under the shadow of the *Lochner* era,²³⁵ the post-New Deal court embraced constitutional deference to federal and state legislation on economic and social issues.

Imbedded in this historical narrative is a consensus on how courts got here, but a split as to where courts should go. The canon is a story of courts transferring from scrutiny to deference. The question is where courts ought to go from here. The two clear options are: (1) maintaining the status quo and (2) going back to *Lochner*-like scrutiny. But the conjoining of agriculture workers and Uber's winning from a stricter form of scrutiny seems to shuffle the usual political interpretation of judicial intervention. Both *Lochner*-like scrutiny and *Carolene Products*-type scrutiny did not create an inclusive work law. Such an intervention will be offered in Part IV—rejecting the choice between *Lochner* and *Carolene Products* dichotomies.

One main reason to reject the *Lochner* dichotomy and its historical narrative is because it is court focused. This theme and its implications are constant features in exclusion cases and will be highlighted in the next Section.

B. Institutional Theme

Work law and vast constitutional scholarship have critiqued the court-dependent nature of constitutional adjudication.²³⁶ Indeed, governing inclusions and exclusions

²³⁰ *Id.*

²³¹ *Id.*

²³² See generally Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People,"* 35 YALE L. & POL'Y REV. 271 (2016).

²³³ See Reddy, *supra* note 228, at 1414.

²³⁴ For example, *State v. Barba*, 61 So. 784, 786 (La. 1913) (rejecting worktime protections for certain firemen, citing *Lochner* approvingly), was cited approvingly by *West v. Winnsboro*, 211 So. 2d 665, 672 (La. 1968), as standing for the proposition that "an ordinance cannot invidiously discriminate between those in the same business who properly belong in the same class." *Id.* at 672.

²³⁵ JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1399 (2023).

²³⁶ Perea, *supra* note 72, at 135 (identifying legislative strategies that rest on equal protection obligations). See generally JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

from work law by a court-administered equal protection clause has some built-in features that have a significant effect on outcomes. Alongside a court-focused history, some unique features of court-based adjudication keep popping up in the case law, highlighting some of the features of deciding those matters in courts. These features are less explored aspects of the court-focused constitutional institutional design but have had an effect on what is perceived as a constitutional equal protection foul without a clear or straightforward link to the merits of the claim.

1. Plaintiff and Respondent Identities and Procedural Decisions

One unique feature of court adjudication is that the identity of the concrete plaintiff and its past actions may bear significant, formal weight on their substantive claims. In a case from Illinois, a national employer association argued against the unequal burden of rest-and-break regulation in one county alone (Cook County), excluding the rest of the state.²³⁷ For the Appellate Court of Illinois, in analyzing the plaintiffs' equal protection arguments, it really mattered that the same plaintiff itself lobbied the state legislature arguing that there are significant differences between Cook County employment conditions and those of the rest of the state.²³⁸ Such statements were considered devastating to plaintiffs' contemporaneous arguments that there are many relevant similarities between workers and employers within and outside Cook County.²³⁹

In *Rodriguez v. Brand West Dairy*,²⁴⁰ challenging exemptions from New Mexico's state workers' compensation schemes, the court rejected the state's rationale (common in other agriculture and domestic workers litigation) of bureaucratic difficulties in enforcing its regulatory scheme on "farm and ranch laborers." In doing so, the New Mexico's Supreme Court used the state's own arguments in a different case, stating that such difficulties are insignificant against the state's current position.²⁴¹

Such small but significant peculiarities are byproducts of a court-dependent constitutional forum. Surely history and precedent matter outside of courts, in other political arenas. However, this formal treatment of plaintiffs' history is only loosely connected to the substantive stakes of the case.

2. Bundling Claims

Another less explored feature of having courts adjudicate such constitutional stakes aside from plaintiffs' identity is plaintiffs' strategy. Here one clear strategic use will be brought forward—the bundling of claims.

²³⁷ Ill. Hotel & Lodging Ass'n v. Ludwig, 869 N.E.2d 846, 851 (Ill. App. Ct. 2007).

²³⁸ *Id.*

²³⁹ *Id.* ("Plaintiff's argument is unavailing, as the record indicates that in lobbying against the passage of section 3.1, plaintiff itself raised distinctions between hotels in Chicago versus hotels located outside of Cook County.").

²⁴⁰ 378 P.3d 13, 24 (N.M. 2016).

²⁴¹ *Id.* at 29.

In recent equal protection cases surveyed, equal protection arguments were not the only claims made against the excluding/including state action. Often, due process claims, special legislation claims, and contractual intervention claims were also made. It is possible that such litigation strategy is encouraged as an attempt to ratchet up the level of equal protection scrutiny for cases involving other fundamental rights. But often claims of distinct and separate harms are argued under those differing legal regimes. In addition, almost all post–New Deal local and state adjudications surveyed here were charged with numerous federal pre-emption arguments, some with significant implications.²⁴²

The bundling of claims creates both a descriptive obstruction and clarification. It obstructs the analysis, as the analysis is never really “just” equal protection claims. Rather, it is part of a broader ensemble of statutory and constitutional arguments with differing weights and possible interconnections. Bundling claims make it analytically harder to identify the weight and importance of the particularities of the doctrine. However, bundling also helps clarify that equal protection arguments, alongside pre-emption arguments,²⁴³ and perhaps Fifth Amendment Takings claims,²⁴⁴ are now a go-to legal claim to make if an employer objects to state regulations. And as part of the arsenal of legal arguments employers and their associations rely on, they offer us a purview into employers’ constitutional vision.²⁴⁵

²⁴² 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1121 (7th Cir. 2008) (hotel regulations attacked also for equal protection grounds preempted under the NLRA); Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 80–81 (2d Cir. 2015) (NLRA preemption and Equal Protection arguments against NY state wage statutes); Bldg. Owners & Managers Ass’n of Chi. v. City of Chicago, 513 F. Supp. 3d 1017, 1021 (N.D. Ill. 2021) (NLRA preemption and Equal Protection arguments against a Chicago work scheduling ordinance); R.I. Hosp. Ass’n v. City of Providence, 667 F.3d 17, 23 (1st Cir. 2011) (NLRA preemption, contracts clause, and equal protection); Cal. Grocers Ass’n v. City of Los Angeles, 254 P.3d 1019, 1022 (Cal. 2011) (rejecting various preemption arguments, including NLRA, plus equal protection arguments); *id.* at 1040 (Grimes, J. dissenting) (finding NLRA preemption arguments persuading); Nw. Grocery Ass’n v. City of Seattle, 526 F. Supp. 3d 884, 889 (W.D. Wash. 2021) (NLRA preemption and equal protection arguments); S. Cal. Healthcare Sys. v. City of Culver City, No. 2:21-cv-05052-MCS-RAO, 2022 WL 1394751, at *2 (C.D. Cal. July 23, 2021) (same); Nw. Grocery Ass’n v. City of Burien, No. C21-0203-JCC, 2021 WL 1554646, at *1 (W.D. Wash. Apr. 20, 2021) (same); Babler Bros, Inc v. Roberts, 995 F.2d 911, 912, 916 (9th Cir 1993) (same); Allied Concrete & Supply Co. v. Baker, 904 F.3d 1053, 1057–58 (9th Cir. 2018) (equal protection and preemption under the Federal Aviation Administration Authorization Act of 1994 (FAAAA)); RHC Operating LLC v. City of New York, No. 21-CV-9322 (JPO), 2022 WL 951168, at *1 (S.D.N.Y. Mar. 30, 2022).

²⁴³ Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1064 (2024).

²⁴⁴ Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257, 2259–60 (2024); Andrias, *supra* note 243, at 1064.

²⁴⁵ Andrias, *supra* note 243, at 1064.

3. Symmetric Plaintiffs(?)

Both types of repeating actors (excluded workers; included employers) utilize equal protection arguments, yet both ask for slightly different legal pleas. Excluded workers seek inclusion and the nullification of the exclusion itself. Included employers seek to nullify the legislation as a whole or seek an order not to enforce it on the employer and its likes. Exceptions to this general lay of the land exist, but these are rare.²⁴⁶

Court-focused constitutional adjudication entails not only substantive strategic decision-making but also multiple representation strategic decision-making. *Hernandez v. New York*²⁴⁷ was a case challenging the exemption of agriculture workers from New York's labor provisions. But the state announced it would not argue against the plaintiffs-workers' exemption so "the state's largest agricultural advocacy organization" took the position of defendants.²⁴⁸

Employers as corporate actors are part and parcel of the development of equal protection doctrine.²⁴⁹ Repeating institutional actors in this type of litigation are industry associations and workers' unions. From as early as the 1950s, corporate associations have been challenging work laws with the argument of unequal inclusion.²⁵⁰

Oftentimes associations represent both excluded and included employers. For example, the Illinois' Hoteling Association represented both employers included in a Cook County regulation of break times and employers excluded by being located outside Cook County;²⁵¹ the Northwest Grocery Association represent both small (excluded) and large (included) employers.²⁵²

A similar repeating theme is employers' associations trying to argue on behalf of employees—in rhetoric or substance.²⁵³ For example, in *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*,²⁵⁴ the Chamber of Commerce (an employer association) sought the nullification of a prohibition on inquiring into candidate wage history that Philadelphia had enacted. The purpose of the prohibition was an attempt to curb persistent wage differentials on the basis of race and sex.²⁵⁵ In their arguments, so the Third Circuit describes, the Chambers argued "in all

²⁴⁶ See, e.g., *supra* Section I.C.

²⁴⁷ 173 A.D.3d 105, 108 (N.Y. App. Div. 2019).

²⁴⁸ *Id.* at 109.

²⁴⁹ Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581, 604 (2022).

²⁵⁰ N.J. Rest. Ass'n v. Holderman, 131 A.2d 773, 775 (N.J. 1957).

²⁵¹ See *supra* Section I.E for some of the procedural problems this may cause.

²⁵² Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884, 893 (W.D. Wash. 2021).

²⁵³ See, e.g., S. Cal. Healthcare Sys. v. City of Culver City, No. 2:21-cv-05052-MCS-RAO, 2022 WL 1394751, at *5 (C.D. Cal. July 23, 2021).

²⁵⁴ 949 F.3d 116, 121 (3d Cir. 2020).

²⁵⁵ *Id.* at 155.

seriousness” against the inclusion of “White men” candidates in the ordinance.²⁵⁶ The Chamber’s argument was that the prohibition was overly broad and that white men were expected to suffer from the prohibition more than enjoy the regulation.

Such legal action undertaken by an association of employers is not a unique feature. Comparative political economists described the accessibility of courts to employers’ concerted actions as one of the central policy features undercutting a more coordinated economy.²⁵⁷ According to this thesis, instead of engaging in direct political or labor relations-style negotiations, U.S. courts invite employers to use them as a means to attack workers and their protections. Courts and their availability substitute political action on the employers’ side, reducing, in comparative terms, the coordination capacity of the U.S. political economy.

Claims made by *included* workers arguing against their inclusion in work laws are outliers. Aside from token workers and employer-like entities mobilized on these included workers’ behalf in litigation, we find other, perhaps more genuine claims of harms by included workers. In *American Society of Journalists & Authors, Inc. v. Becerra*, associations of journalists and photographers argued against their inclusion in California’s AB5 classification scheme.²⁵⁸ Employee classification harms raised by such associations include a loss of members’ copyrights for their work, reduced net take-home pay, a loss of flexibility, and general uncertainty (and downstream economic loss) resulting from the shift in the legal and business environment.²⁵⁹

C. Substantive Theme

1. Politics Justified

It is clear to all involved in the litigation of exclusions and inclusions that the process in which employers and employees are included in or excluded from work law is a political one. Here is a court’s explanation of an FLSA’s exemptions: “Complex, sweeping regulatory schemes such as the Fair . . . Labor Standards Act are replete with compromises and subtle adjustments. These result in exemptions and classifications which, whether in the name of politics or economics, are often impossible of explanation in strictly legal terms.”²⁶⁰

It is also clear that when the court demands a rational for legislation, the fact that one firm had a better lobbyist or that the bill would not have passed without certain votes is not sufficient justification. For example, in *Fowler Packing Co. v. Lanier*,²⁶¹ the Ninth Circuit treated a justification that a carve out from some wage

²⁵⁶ *Id.*

²⁵⁷ Thelen, *supra* note 24, at 24.

²⁵⁸ No. CV 19-10645 PSG (KSx), 2020 WL 1444909, at *2 (C.D. Cal. Mar. 20, 2020).

²⁵⁹ *Id.* at *2.

²⁶⁰ Kelly v. Brennan, No. 74-450, 1974 WL 1288, at *4 (D. Or. Sept. 13, 1974) (quotation marks omitted) (quoting Romero v. Hodgson, 319 F. Supp. 1201 (N.D. Cal. 1970)).

²⁶¹ 844 F.3d 809, 816 (9th Cir. 2016).

laws was politically necessary to “procure” a union’s support for the bill as one that could not survive rational basis scrutiny.²⁶²

Indeed, when plaintiffs use the descriptive, political argument as to why they were included or excluded, courts consider that an insufficient rationalization. Bringing this descriptive statement to court as a reason that an inclusion or an exclusion deserves higher levels of scrutiny fails repeatedly. For example, employers included in California’s AB5 stricter classification scheme argued that their inclusion compared with the exclusion of other similarly situated employers was due to “arbitrar[y] [decisions] or . . . political favors to groups who lobbied for [exclusions].”²⁶³ In this case, plaintiff-employers who contract with independent contractors to go home by home to sign voters onto ballot initiatives were included, whereas direct salespeople were excluded.²⁶⁴ The court rejected the push of the argument stating that plaintiffs had failed to demonstrate that there is no conceivable rationale to distinguish their ballot signature collection business from sales and concluded that “[w]hile some of these exemptions may arguably have been arbitrarily designed or the result of political motives, [a]ccommodating one interest group is not equivalent to intentionally harming another.”²⁶⁵

Such depoliticization still necessitates the court’s stating or embracing the parties’ sanitized contentions regarding the nonpolitical, public-facing purpose of a piece of legislation. For example, prevailing wage laws that provide for minimum compensation for workers on public works are aimed “to benefit and protect employees on public works projects,”²⁶⁶ and to “ensure [s]uperior [public] [p]rojects.”²⁶⁷ No coalitions, no lobbying, no pressure groups—a public-facing purpose. Even when an explicit goal of legislation is “to permit union contractors to compete with nonunion contractors,”²⁶⁸ the court dresses this purpose in nonpolitical garb—the prevention of an economic race to the bottom.

The task then of scrutinizing whether or not the legislature decides who is and who is not a “public works” worker is measured according to this standard. This includes, for example, whether it is rational for the legislature to decide that quick-cement delivery drivers are workers in public works but that pipe-delivery drivers are not.²⁶⁹

2. Incrementalism

A constant defense marshalled against equal protection arguments is that the excluding authority is perhaps irrational when examined at the current moment but

²⁶² *Id.*

²⁶³ *Crossley v. California*, 479 F. Supp. 3d 901, 913 (S.D. Cal. 2020).

²⁶⁴ *Id.* at 909.

²⁶⁵ *Id.* at 914 (quotation marks omitted) (quoting *Gallinger v. Becerra*, 898 F.3d 1012, 1021 (9th Cir. 2018)).

²⁶⁶ *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1061 (9th Cir. 2018).

²⁶⁷ *Id.* at 1063.

²⁶⁸ *Id.* at 1064.

²⁶⁹ *Id.*

in fact should be examined against the whole legislative scheme when completed in due time.²⁷⁰ For example, the reason the City of Providence includes only employers in the hoteling industry, and not other employers in the tourism industry, is because this inclusion is part of an actual plan.²⁷¹ That plan is a long-term statutory goal that strives toward a more equitable inclusion of employers. Or the reason grocery stores and not restaurants are covered in a city's workers-retention scheme might be rational considering those employers might be covered in a future "phase" of the scheme.²⁷² Raw political power is not an appealing justification for the court.²⁷³

One feature of the rational basis scrutiny level is the court's willingness to devise possible explanations for the rationale behind the discriminating state action.²⁷⁴ Incrementalism, or the rationale that carving out seemingly arbitrary members from the scope of a regulation might be just part of a longer-term plan.

Incrementalism logic seems to depend on some baseline assumptions. As rhetoric, it works best when the assumption is that the state actor includes various, seemingly arbitrary entities that have first dibs at a problem. An example of this is regulating scheduling issues only in hoteling and only in a single county as part of a wider plan to expand the legislation. The rhetoric of incrementalism works less well in situations where the benchmark is broad universal legislation out of which particular employers are carved out.

IV. TOWARD AN INCLUSIVE EQUAL PROTECTION

Contemporary equal protection doctrine is highly deferential to legislatures (and to the political process) in making decisions as to who is in and who is out of work law. Equal protection also rarely distinguishes between claims aiming to increase inclusivity and claims aiming to exclude actors. Work law equal protection is court governed, which almost guarantees elitist interpretation and arbitrary intervention. Such looseness in equal protection claims enables persistent political minorities to be left out of work laws and group power lobbying to dominate the contours of U.S. social protections and responsibilities. Fourteenth Amendment-facilitated arbitrariness and deference to power plays shape the borderlines of work law.

²⁷⁰ CHOPER ET AL., *supra* note 235, at 1399.

²⁷¹ R.I. Hosp. Ass'n v. City of Providence, 667 F.3d 17, 40 (1st Cir. 2011) (citing *FCC v. Beach Communications*, 508 U.S. 307, 316 (1993), for the proposition that in drawing lines, Congress may approach a problem incrementally).

²⁷² Cal. Grocers Ass'n v. City of Los Angeles, 254 P.3d 1019, 1038–39 (Cal. 2011) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

²⁷³ Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 308–09 (1991).

²⁷⁴ *Beach Commc'ns*, 508 U.S. at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

I offer two main avenues by which to construct more inclusive equal protection. The first is in its doctrinal substance, and the second is in its institutional environment. The suggestions are premised on the notion that neither the *Lochner*-type kill-all type of review nor the market-like deference to claims of exclusions works to promote universal and equal labor markets and economic citizenship. For those who share this goal, I hope the following will provide some fresh ideas (or at least clarify my thinking of equal protection). For those who do not share this goal, I hope the following will provide an interesting thought experiment for how equal protection doctrine and institutions can be shaped to reach alternative societal goals.

A. Inclusion by Doctrine—The Inclusion Default

What is the difference between exclusions and inclusions and any other classifying state action? There are two connected reasons why exclusion-related equal protection claims are unique. First, is the structure of work law itself—constituting broad universal coverage and then excluding workers or exempting employers. Second, and stemming from the first, is the normative value of economic citizenship out of which excluded populations are carved out. Those two features ought to guide courts' application of equal protection claims in exclusion and inclusion cases.

Canonically, equal protection claims are done in three steps: identifying a classifying or sorting state action (means), identifying a goal (ends), and identifying the proper judicial scrutiny for the relations between the two (rational basis, strict, etc.). But before engaging in those canonical equal protection steps, courts also identify, implicitly or explicitly, a background rule, a legal baseline on top of which the state action is done.²⁷⁵

In exclusion cases, courts often only answer that question implicitly. Is the baseline the application of work law on employers and employees, or is the baseline exemption from work law? Excluded workers' claims assume that the exclusion from a universal underlying norm is the act that changed a baseline. Employers assume that it is the inclusion that changed a baseline state being free from state regulations. Courts treat those seemingly symmetrical assumptions interchangeably depending on the identity of the plaintiff and the direction of the legal attack—from outside in or from inside out. Thus, equal protection baselines flip-flop, depending on plaintiffs.

Equal protection is inclusions or exclusions blind, if you will. And for equal protection purposes it does not matter whether the plaintiff is an agriculture worker or an agriculture business. The exclusion of one is tantamount to the inclusion of the other. Both pose equal harm to an equality principle. Such treatment is reminiscent of courts' similar equal protection scrutiny of overinclusive (state action covering more actors than necessary) and underinclusive (state action covering fewer actors than necessary) legislation.²⁷⁶

²⁷⁵ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 683 (7th ed. 2013).

²⁷⁶ CHOPER ET AL., *supra* note 235, at 1399.

At the core of this Part is a normative argument for stabilizing this flip-flop and adopting an inclusive baseline and application of equal protection claims. The analysis starts from somewhere, and that somewhere in work law is inclusion.

The first building block in this argument is the structure of work law itself. At least since the New Deal, work laws on the federal, state, and local levels have a relatively uniform structure: broad, often circular definition for employers and employees, a statement of broad and encompassing employees' rights and corresponding employers' duties, and exemptions. The substance of those acts might be thin, but their application, at first, is broad. Exemptions are carved throughout, but always chipped from an existing block of legal material—the broad definition, or a broad set of rights.

Work law's structure ought to be constitutionally meaningful in two ways. First, it outlines a legal benchmark for most work law claims—for work law qua work law the baseline is coverage. Both *included* employers and *excluded* employees' claims are always aimed at the second stage—the exclusions part. And second, the born-universal-later-carved structure of work law is significant because it outlines a benchmark for economic citizenship. This citizenship aspect of work law binds it with the equal protection clause. This path crosses the abyss separating the economic from the political in contemporary constitutional thought.

The distinction between political issues and social economic issues has deep roots in contemporary constitutional culture, so much so that it is perceived as a significant tenet of what some scholars called the twentieth-century synthesis of constitutional legal analysis.²⁷⁷ Courts' deference to legislatures on issues of social and economic rights is also reminiscent of some courts of the dark *Lochner* era, wherein such deference by courts to legislatures was narrower. Contemporary constitutional analysts will perhaps support the collapsing of the distinction between the political and the social and economic legislation but will veer away from court scrutiny for all legislative acts.²⁷⁸

Another possibility is to highlight the political rights harm of the classification of social and economic rights. This path, explored in some classification cases, might entail two upshots. First, it could help plaintiffs ratchet up claims for court scrutiny from a rational basis to higher levels by tying work law classification to political rights; and second, it could put some daylight between the two classes of plaintiffs—employees and employers.

The desensitization of normative values from constitutional adjudication and debate of economic matters is not inherent in constitutional thought and discourse. Multiple authors have promulgated the view that progressive reimagination of the constitutional normative order—especially perhaps in economic matters—is a viable and desirable path forward.²⁷⁹

²⁷⁷ Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1790 (2020).

²⁷⁸ See Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 200–04 (2021).

²⁷⁹ See generally FISHKIN & FORBATH, *supra* note 236; Reddy, *supra* note 228; Racabi, *supra* note 244.

Among the normative values such authors identified as pertinent to contemporary constitutional analysis are: (1) a thick conception of equal opportunity embedded in a century of progressive constitutional interpretation;²⁸⁰ (2) inclusion as a master, small-c value embedded in labor's organizing and policy fronts; and (3) collective action and solidarity—both in the workplace and toward the polity—as a constitutionally recognized value, regardless of the ends it strives to achieve or the outcomes it produces.²⁸¹ Earlier writings identified the New Deal as a constitutionally significant event in the sense that it bent the common law labor markets' multiple statuses and features into a more unified, universal benchmark of rights and obligations.²⁸²

The common denominator of those writings is treatment of workplace rights and obligations as a constitutional matter and identifying a value of inclusivity and universality—juxtaposed with the harms of selective coverage and exclusions—in how those rights and obligations ought to operate.

Equal economic citizenship is the benchmark of contemporary equal protection arguments. It is not a matter embedded in the equal protection clause itself but ought to guide the way equal protection interacts with contemporary structures of work law. As a concept, economic citizenship ties political equality to economic conditions. In its early forms it was meant as a lever to push for greater state involvement in economic life. But in its weakest form it guarantees a default of equal state involvement in economic life. And when most, if not all, state actions in work law are structured as universal carved with exclusions, the meaning of equal state involvement is a preference toward inclusion.

In *Martinez-Cuevas v. DeRuyter Bros. Dairy*, a Washington Supreme Court case about the exclusion of agriculture workers from overtime pay, the court explicitly recognized the connection between economic rights and citizenship under the Washington State Constitution.²⁸³

Most work law central legislative frameworks, including state and federal minimum wage and overtime, labor legislation, safety and health, antidiscrimination, workers' compensation schemes, and retirement and savings protections are similarly structured. These benchmarks are characterized by general, inclusive orders with exceptions. Such legislative frameworks work to create the basic bare-bones structure of work law rights and obligations. Embedded in the structure of those acts is a default of universality and inclusivity. Sure, such defaults are circumvented, but a clear default is present.

Such inclusivity default is constitutionally significant. This is so because in a world constructed of universal, all-encompassing orders, as a default, the equal protection of laws entails an equal application of this legislative default. It also means that inclusion and exclusion out of work law is not just a matter of classification, or

²⁸⁰ See generally FISHKIN & FORBATH, *supra* note 236.

²⁸¹ Reddy, *supra* note 228, at 1453–54.

²⁸² See *id.* at 1407.

²⁸³ 475 P.3d 164, 172 (Wash. 2020).

a matter of subsidies for a failed sector, or a matter up for a simple cost-benefit calculation of enforcement costs; it is, instead, a constitutional matter. Circumventing the default is a matter requiring, at least, substantive justification.

Unequal inclusion, for example, the selective inclusion of a particular employer under work law, is not as harmful to economic citizenship as is unequal exclusion. Adding components and layers to workers' protections is constitutionally different from placing workers out of a universal basic order. Both harms might be an unequal treatment of a public authority, but the rights implicated are different. This makes the best plaintiffs for unequal inclusion claims the excluded workers, not the included employers.

This also entails that the framing of legislation as work law legislation has some costs because it bears some defaults legally significant. This feature is not foreign to equal protection case law. Recent literature stresses the role of health and public health in the regulation of work. This framework is devastating to workers' rights, as seen in cases like *Montana Medical Ass'n* wherein workers succeeded in challenging an exclusionary bill premised on the definition of the act as employee oriented and not a public health measure:

Montana's treatment of Exempted Facilities differently from similarly situated classes of other health care settings is irrational when the ostensible purpose of the law is to prevent discrimination. There are obvious differences. If § 49-2-312's purpose was to promote public health, not to prevent discrimination, this law may well pass rational basis review assuming a logical connection between purpose and impact.²⁸⁴

The enactment of broad universal in scope work laws changed something constitutionally significant in the world. If anything, creating basic facets of economic citizenship changed the constitutional default about coverage and raised the bar for the state (in all of its capacities) in excluding workers from it.

B. Inclusion by Institutions

1. Leading with Unions

Unions are significant political actors. Their presence in local, state, and federal policy making is undeniable. This has been evident in recent decades in the starkest terms since the "Fight for \$15" struggles and the scholarly declaration of a "New Labor Law."²⁸⁵ A New Labor Law was meant as a moniker describing finding

²⁸⁴ *Mont. Med. Ass'n v. Knudsen*, 645 F. Supp. 3d 999, 1017 (D. Mont. 2022).

²⁸⁵ Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8 (2016).

avenues for turning from catering to members outward toward the broader polity, be they union members or not. A new function of unions was discovered. It is a movement that sees itself as standing for something broader than its dues-paying interest. Sustainable or not, good or bad, the change in focus of the U.S. labor movement is undeniable. Such change involved a revived discussion of normative goals and stakes and was echoed in scholarly work.²⁸⁶

One core normative goal is inclusivity. In their actions around local and state laws, unions have demonstrated time and again their commitment to populations and sectors excluded from work law. But, as Section I.D demonstrated, the path is still a long one, and rightfully so.

All action entails dilemmas and choices, and a choice of inclusion is no exception. In policy, inclusion and coverage demands the possibility of compromising over substance. Inclusion might also suggest adding opponents that can be left out or ones that are routinely left out (small businesses for example). Inclusion as a direction entails changes. Inclusion as an organizing default also means challenging some preconceptions about who is in and who is out of the labor movement.

Inclusion as a value to live by is hard; so too is committing to values in political action that necessitate compromises. But without the commitment of work law's most effective engine, little will be done. With it and with fresh eyes on the scores and scores of repeating exclusions in work law, significant headway can be made in making work law more inclusive.

2. Federal Government

In areas of social welfare regulations, like Social Security and unemployment insurance, federal government involvement encourages via economic incentives certain state uniform attributes.²⁸⁷ However, state and local work law legislation are lacking such direct involvement, and one can imagine leveraging the federal government's significant auditing and matching programs toward a more inclusive state work law.

Scholars have called such constitutional scrutiny within the administrative state "administrative constitutionalism."²⁸⁸ The Department of Labor, as the auditor of federal-state workplace interaction, ought to adopt an explicit or implicit inclusivity-oriented interpretation of an equal protection clause. Such an interpretation could expose excluded and included populations in practice from state and federal laws. Such a targeting of inclusion along multiple sectors and populations could expose the effectiveness and actual coverage of work law, data we currently do not possess. This data collection could be augmented at the state and local level by the federal

²⁸⁶ Reddy, *supra* note 228, at 1394; Andrias, *supra* note 243, at 1071, 1075.

²⁸⁷ Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 842–43 (2014).

²⁸⁸ *Id.* at 829.

government's significant involvement in budgeting work law-related funds and enforcement activities in the states, similar to Tani's scholarly emphasis.²⁸⁹ A good place to start is with unemployment insurance schemes whereby the federal government is deeply involved in auditing and funding significant portions of each state's apparatus.

Taking equal protection seriously entails taking its interpretation out of the courts. Unions and the federal government are primary actors in work law's political and policy ecosystem. Embracing a commitment to inclusivity as a constitutional value of equal protection could jump-start significant real-life inclusive shifts in our work laws. The promise that work law provides workers with its universal statements and assertions, which is then robbed from workers by exclusions, conditions, and exemptions, could be restored. Equal protection values can support that effort, augmenting legal and political with a constitutional gloss. No more excluded but equal.

CONCLUSION

Complete universality is perhaps too much. Even in one of the most progressive policies ever brought to America's congressional floor, a right to full employment, you will find exceptions. In this case, the right to full employment was guaranteed for all except students and people with domestic responsibilities (mostly women, at that time).²⁹⁰ Creating progressive policies, even pie-in-the-sky ones, without such exceptions, was, according to the promoters of the bill, "impossible."²⁹¹

Perhaps. But demanding a path toward inclusion is within reach. Organizing doctrine and institutions to work as an inclusivity ratchet—where it is easier to be covered by the basic tenets of economic citizenship and harder to be excluded—is a feasible normative goal. There is no need to cower from substantive constitutional arguments; constitutional values and institutions matter.

This Article had two descriptive goals. First, it is meant to describe exclusions in work law as greater than the sum of the traditional examples and narratives for exclusions (agriculture, prisoners, domestic servants, etc.). I did so by providing accounts of exclusions from state labor codes, early work laws, agriculture workers, new local and state "labor legacy" laws, and the public sector. The Article's second descriptive goal is to demonstrate that, again and again, such exclusions are constantly (and recently, successfully) challenged under equal protection claims.

The normative goal of this Article is to persuade the reader that equal protection doctrine and institutions can be bent toward inclusivity, namely, reframing the harm

²⁸⁹ See generally *id.*

²⁹⁰ ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 19 (2001).

²⁹¹ *Id.* at 20.

in exclusions as an economic citizenship harm and distinguishing it from the harms of unequal inclusion. Furthermore, I offered two institutional vehicles in addition to courts in which equal protection arguments and aspirations ought to control—in unions' lobbying and policy initiatives and with the federal government's powers to allocate resources.

Some exclusions are justified politically and normatively. Others are not. Equal protection doctrine can bend work law toward inclusivity by making it harder to be excluded and equal than included and equal.