

IN LIEU OF THE NLRA

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The National Labor Relations Act (NLRA) deteriorates due to constitutional attacks and political sabotage. As labor law buckles, its preemption regime, a keystone of U.S. labor governance, has become unsustainable. This Article argues that, to survive, labor law must flip its federal default by empowering and expanding state-level labor institutions and by prying open the NLRA preemption doctrine. Eighteen states already maintain NLRA-like statutory frameworks, and fourteen more, as a state public policy, recognize workers' rights to unionize and act collectively. These under-examined laws hint at an alternative labor governance model in lieu of the NLRA.

Building on emerging preemption challenges, weaknesses in federal enforcement, and employers' own challenges to the NLRA, this Article outlines legal strategies turning retreat into opportunity. After describing the slew of state private sector labor laws, this Article uncovers a hidden labor law principle against the use of preemption arguments that create regulatory "no-man's-lands," where workers have no recourse in state or federal labor law. It also introduces a "catch-22" argument, whereby employers who deny NLRA coverage or authority cannot shield themselves from state law with preemption arguments. Then, this Article explores how emerging state labor laws utilize novel trigger mechanisms and the ways regional cooperation can signal the outlines of a bottom-up labor governance model.

Introduction	494
I. "One Ball of Wax": NLRA Preemption and the Erosion of Its Foundations	499
II. State Private Sector Labor Law	504
A. Introduction.....	508
B. Purpose.....	509
C. Scope	510
D. Rights.....	513
E. Union Certification Process	516

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For Ben Sachs, who asked me ten years ago in class what I thought about NLRA preemption.

	F. Administration	517
III.	Working Against a “No-Man’s-Land” Preemption	518
	A. Preemption Depends on Federal Capacity to Enforce the NLRA	520
	B. “Catch-22” Preemption Arguments	523
	1. Employers Who Claim Exclusion from the NLRA: The Example of College Athletes	525
	2. Employers Arguing the NLRA Is Unconstitutional Cannot Enjoy NLRA Preemption	526
	C. New State Laws—Innovations, Triggers, and Challenges	528
IV.	Labor Federalism After Preemption—Defaults, Regions, and Floors	532
	A. Flipping the Default—Toward a Bottom-up Labor Federalism	533
	B. From States to Regions	534
	Conclusion	536

INTRODUCTION

In one field—labor relations—the exercise of federal power has indubitably curtailed the power of the states. In my opinion, this was not only wise but inevitable.

—Archibald Cox¹

The labor movement and its lawyers must come to terms with the disintegration of federal labor governance. The National Labor Relations Act (NLRA, or “the Act”) is buckling under the weight of employers’ ninety-year crusade against unions.² Whether the Act has constitutionally died is uncertain. What *is* certain is the timely demise of the dominant jurisdictional paradigm in U.S. labor law: the federal nature of private sector labor governance.³

1. Archibald Cox, *The Supreme Court and the Federal System*, 50 CALIF. L. REV. 800, 809 (1962) (footnote omitted) [hereinafter Cox, *The Supreme Court and the Federal System*].

2. See Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1001–04, 1007, 1043–46 (2024); Diana S. Reddy, *Relitigating the New Deal: The Stakes of Current Constitutional Challenges to the NLRB*, 22 LAB.: STUD. WORKING-CLASS HIST. 24, 24–25 (2025).

3. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1162–65 (2011) (describing the origins and doctrine of labor law’s “total federal preemption”).

For almost a full year, the sole enforcer of the Act, the National Labor Relations Board (NLRB, or “the Board”), has been powerless. President Trump effectively ordered its legal decapitation through a confused email,⁴ Congress implicitly accepted it,⁵ and the U.S. Supreme Court endorsed the decision.⁶ Three out of three branches of government agree: Labor governance is not a federal concern.⁷

In this Article, I argue that without effective federal labor law, states regain authority over labor relations governance. In lieu of the NLRA, states can, should, and do step in to pursue labor peace and equality of bargaining power through state-based labor institutions.⁸

Ignored in mainstay literature⁹ and buried in a forgotten era of labor law,¹⁰ eighteen states already have private sector labor laws on their books,¹¹ and fourteen more have state constitutional and statutory guarantees for workers’ collective rights.¹² More will follow their lead. This Article provides a snapshot of a federal regime taking its final breaths, the existing surveys and proposed private sector state labor laws, offers paths to pry labor governance from the NLRA’s cold dead hands, and concludes with some thoughts on what a future bottom-up, federalized labor regime might look like.

Contemporary NLRA preemption doctrine offers a simple solution to a set of complicated policy problems. Shaped by 1950s Supreme Court decisions and orchestrated by one of the biggest names in U.S. labor law, Archibald Cox, the NLRA has a uniquely broad preemption model.¹³ At the margins of NLRA preemption, exceptions abound, yet are mostly unavailable for state regulation of private sector concerted activities.

4. Matt Bruenig, *Read the Trump Email Firing Member Wilcox and GC Abruzzo*, NLRB EDGE (Jan. 30, 2025), <https://www.nlrbedge.com/p/read-the-trump-email-firing-member> [<https://perma.cc/B5RL-KN3Z>].

5. Sachs, *supra* note 3, at 1163.

6. *Trump v. Wilcox*, 145 S. Ct. 1415, 1416–17 (2025).

7. The NLRA and NLRB are of such low priority that the email terminating Board Member Gwynne Wilcox and the Board’s General Counsel, Jennifer Abruzzo, mistakes their roles. *See* Bruenig, *supra* note 4.

8. *See generally* Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (on the dual purposes of private sector labor law).

9. *See infra* Part II.

10. *See Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767, 777 (1947) (Frankfurter, J., concurring).

11. Gali Racabi, *In Lieu of the NLRA: How State Laws Can Rebuild Worker Power*, POWER AT WORK (May 11, 2025), <https://poweratwork.us/how-state-laws-can-rebuild-worker-power> [<https://perma.cc/8MDJ-F7KU>].

12. *See infra* Part II.

13. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1571–73 (2002) (describing NLRA preemption doctrine and its implications); Sachs, *supra* note 3, at 1164–65.

Despite recent challenges from labor-side advocates¹⁴ and employers,¹⁵ the NLRA preemption regime stands tall. But NLRA preemption rests on outdated descriptive and legal views regarding the role and efficacy of federal agencies and is mostly off the wall in contemporary constitutional adjudication.¹⁶ Contrasting the breadth of NLRA preemption with the weakness and fallibility of the NLRA has become unbearable.

While federal labor law sinks, the stakes for identifying effective collective mechanisms for addressing collective problems are immense. U.S. workers face overlapping nested crises but lack the institutions and vehicles for dealing with those collectively. Technological transformation,¹⁷ climate change,¹⁸ democratic decline,¹⁹ economic and political inequality,²⁰ a mental health epidemic,²¹ and more are all bound together, carrying significant risks and opportunities for U.S. workers. Mega corporations and the wealthiest men alive are set on leveraging those crises to crush their workers' collective voice and power.²²

14. See generally SHARON BLOCK & BENJAMIN SACHS, LAB. & WORKLIFE PROGRAM, HARV. L. SCH., CLEAN SLATE FOR WORKER POWER (2020), <https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf> [https://perma.cc/P4RV-56MV] (providing a blueprint for a novel labor law that among other substantive innovations, deviates from the existing understanding of federal preemption).

15. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1410 (2023).

16. *Trump v. Wilcox*, 145 S. Ct. 1415, 1417–19 (2025) (Kagan, J., dissenting).

17. See generally BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK (2023) (describing how technological change is used by employers to gain power and maximize gains on the job); IFEOMA AJUNWA, THE QUANTIFIED WORKER: LAW AND TECHNOLOGY IN THE MODERN WORKPLACE (2023) (describing how employers utilize novel technologies to “quantify” their workers’, creating privacy and health risks). See Adam Seth Litwin & Gali Racabi, *Varieties of AI Regulations: The United States Perspective*, 77 INDUS. & LAB. RELS. REV. 799, 800–01 (2024).

18. J. MIJIN CHA & LARA SKINNER, REVERSING INEQUALITY, COMBATING CLIMATE CHANGE: A CLIMATE JOBS PROGRAM FOR NEW YORK STATE 4–5 (2017).

19. Assaf S. Bondy, *Workers for Democracy? Trade Unions and the Struggle Against Democratic Backsliding*, 33 DEMOCRATIZATION 344, 344–45 (2026).

20. See generally NELL ABERNATHY, DARRICK HAMILTON & JULIE MARGETTA MORGAN, ROOSEVELT INST., NEW RULES FOR THE 21ST CENTURY: CORPORATE POWER, PUBLIC POWER, AND THE FUTURE OF THE AMERICAN ECONOMY (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_2021-Report_201904.pdf [https://perma.cc/ZHY8-78UF] (identifying economic and political inequality as acute problems and offering institutional innovations in labor law and policy to deal with those).

21. VIVEK H. MURTHY, THE U.S. SURGEON GENERAL’S FRAMEWORK FOR WORKPLACE MENTAL HEALTH & WELL-BEING 6 (2022) <https://www.hhs.gov/sites/default/files/workplace-mental-health-well-being.pdf>.

22. See generally Gali Racabi, *Tech Drift & Powerlessness*, 24 YALE J.L. & TECH. 554 (2022) (providing the argument for power-based technological change).

Such challenges would necessitate tough choices, even for a well-functioning labor governance system.²³ But in 2024, union density in the private sector dipped below 6 percent for the first time since the law's enactment.²⁴ The big organizing campaigns of the 2020s at Amazon, Starbucks, and Tesla have yet to produce a collective bargaining agreement.²⁵ First contracts have been a known failure point in the NLRA for decades.²⁶ The NLRA is “ossified”²⁷—designed for different labor markets,²⁸ different workers,²⁹ and a different workplace.³⁰

For U.S. employers as well as for some scholars, this culmination of real-world crises and institutional decay calls for a return to the laissez-faire days of the 1930s, during which workers had no sources of institutional or legal power.³¹ But this view misses a significant part of the legal landscape, namely, state law.

Despite the NLRA's preemption, state and local governments have regulated private sector labor relations for as long as the NLRA has existed. Some states enacted explicit rights for workers to organize in their state constitutions.³² Some states and localities created sector-

23. See generally, e.g., KATHLEEN THELEN, *VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY* (2014) (describing how multiple western liberal democracies respond to financial stress and technological change by liberalizing labor markets, albeit with different institutional structures).

24. Press Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members—2024 (Jan. 28, 2025) (on file with the Wisconsin Law Review).

25. JOHN LOGAN, *CORPORATE UNION BUSTING IN PLAIN SIGHT* 1–9 (2025), <https://www.epi.org/publication/corporate-union-busting/> [<https://perma.cc/QX2D-S533>]; Eli Rechucher, *Tesla's Resistance to Union Efforts*, *LIVING WAGE* S.F. (June 8, 2024), <https://www.livingwage-sf.org/protect-public-sector-jobs/teslas-resistance-to-union-efforts/> [<https://perma.cc/VGB2-G3F5>].

26. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 *INDUS. & LAB. RELS. REV.* 3, 4–8 (2008).

27. Estlund, *supra* note 13, at 1564.

28. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 *BERKELEY J. EMP. & LAB. L.* 79, 90–91 (2022) [hereinafter Racabi, *Abolish the Employer Prerogative*].

29. See Kati L. Griffith, *Discovering “Immemployment” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 *YALE L. & POL'Y REV.* 389, 404–05 (2011).

30. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 9–10 (2014).

31. See, e.g., Alvin A. Velazquez, *The Death of Labor Law and the Rebirth of the Labor Movement*, 67 *B.C. L. REV.* 183, 191 (2026) (“A Supreme Court ruling that the . . . NLRA is unconstitutional would leave a vacuum in labor law, and anger over the death of collective bargaining rights could be widespread. The labor movement and its allies could channel this anger, alongside resentment over the deepening inequality in this country and their remaining resources to galvanize a new social movement.”).

32. CTR. FOR LAB. & A JUST ECON. AT HARV. L. SCH., *BUILDING WORKER POWER IN CITIES AND STATES: A TOOLKIT FOR STATE AND LOCAL LABOR POLICY INNOVATION* 9 (2024), https://clje.law.harvard.edu/app/uploads/2024/08/2024.08.29_CLJE_Toolkit-DIGITAL_FINAL.pdf [<https://perma.cc/3WYN-AN9F>].

specific regulations allowing workers to organize outside the NLRA.³³ But standing above those are eighteen states that have enacted catchall laws offering a path to unionization for private sector workers and fourteen more states that recognize collective bargaining and concerted actions of workers as a public policy.³⁴ States are the alternative institutional route to the federal regime.

As the NLRA weakens, so does its preemption regime. This intuition stems from two complementary legal principles and one argument. First, NLRA preemption breadth is tied to the underlying federal law's effectiveness. Second, the NLRA cannot be read to create a regulatory "no-man's-land," that is, labor market areas that, despite being ostensibly covered, are left outside of both state and federal legal coverage. A third, employer-specific challenge to the scope of NLRA preemption regime stems from employers' own claims: NLRA preemption arguments should not be available for employers arguing against the authority of the Board in general (*e.g.*, in constitutional attacks or in disputes over the Board's authority after its loss of a quorum) or with regard to their own employees (*e.g.*, when an employer misclassifies its employees as independent contractors under the Act). Employers can choose to either enjoy the preemptive regime of a constitutional act of Congress covering their employees or instead reject the authority of the Act, waive preemption arguments, and accept the NLRA's authority.

The default federal model is broken beyond repair and should be discarded for a different baseline. As the legal piranhas continue to eat away the NLRA, we need institutional alternatives to help coordinate collective solutions to workers' collective problems. Luckily, the labor movement has significant expertise in developing local policy solutions.³⁵ Such legal innovation and political mobilization should be used to set the framework and organizing strategy for experimenting, establishing, and broadening private sector state labor law. This conclusion of this Article offers ways of ratcheting up state law into regional law along with a novel

33. See, *e.g.*, Jake Sheridan & Talia Soglin, *Uber, Unions Reach Labor Peace Deal in Exchange for Dropping Driver Wage Hike Ordinance*, CHI. TRIB. (June 16, 2025, at 15:00 CT), <https://www.chicagotribune.com/2025/06/16/uber-unions-reach-labor-peace-deal-in-exchange-for-dropping-driver-wage-hike-ordinance/>.

34. See *infra* Part II.

35. See generally Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988) (detailing the decline of collective bargaining and the rise of statutory law, including in states, as the policy device for correcting unequal bargaining power in the U.S.); Daniel J. Galvin, *Labor's Legacy: The Construction of Subnational Work Regulation*, 74 INDUS. & LAB. RELS. REV. 1103 (2021) (empirically surveying and demonstrating the trend of state policymaking). See Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REGUL. 355, 366 (1990) (recognizing the trend of state workplace policymaking).

proposal for a federalized floor preemption designed to encourage, rather than discourage, labor peace and equality of bargaining power through the formation of unions and collective bargaining.

This Article proceeds as follows. Part I describes contemporary NLRA preemption and lays out its animating principles. Part II describes the components of contemporary state private sector labor laws. Part III offers paths of enabling state labor coverage using the capacity principle and the no-man's-land, a catch-22 argument, and describes novel state statutory trigger claims. Part IV then offers some novel ideas about broader goals for labor law federalism, including regional cooperation and a federal floor for labor relations. A short conclusion follows.

I. "ONE BALL OF WAX": NLRA PREEMPTION AND THE EROSION OF ITS FOUNDATIONS

NLRA preemption is Supreme Court created. However, the Court's insistence on federal centrality in the governance of private sector labor relations is not obvious. In the first decades after the NLRA came to life, the Court did not interpret it as an exclusive jurisdiction for adjudicating labor relations' harms.³⁶ Statutory interpretation to this effect relied on the text of the NLRA stating that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by . . . law, or otherwise."³⁷ This means Congress recognized alternative legal sources of "adjustment or prevention" of labor violations.

But following the scholarly advocacy of Cox,³⁸ in the 1950s the Supreme Court reinterpreted the NLRA to create a unique rule-exception preemption structure. The default is "a rule of total federal preemption"³⁹ of state and local government regulation of private sector labor relations, and the exceptions allow for narrow and specific statutory and doctrinal deviations from that rule.

Anchored in two Supreme Court decisions, the NLRA was first interpreted to preempt states from regulating conduct protected under the NLRA, conduct prohibited under the Act, and conduct the NLRA arguably protects or prohibits;⁴⁰ second, the NLRA was interpreted to preempt states from regulating conduct that Congress meant to be left

36. Gottesman, *supra* note 35, at 386–87.

37. National Labor Relations Act, 29 U.S.C. § 160(a); *see United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665–66 (1954).

38. Gottesman, *supra* note 35, at 389.

39. Archibald Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1315 (1954) [hereinafter Cox, *Federalism in the Law*]

40. *S.D. Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

completely unregulated and left for the free forces of the market.⁴¹ From the breadth of those doctrines, colloquially called in labor law jargon *Garmon* and *Machinists* preemption, respectively, a default rule emerged wherein unless proven otherwise, private sector labor regulations are federally coded and federal-agency governed.

However, all rules have exceptions. Even at its peak, NLRA preemption allowed for significant portions of labor governance to be state regulated. First, workers and employers excluded from the NLRA, such as public sector workers, agriculture workers, or independent contractors, can be regulated by state labor law.⁴² Additionally, states are allowed in section 14(b) of the Act to enact right-to-work laws limiting certain collective bargaining agreements.⁴³ The Board can also decline to assert jurisdiction over a particular set of workers under section 14(c)(1), which would leave that area to state regulations.⁴⁴

Section 14(c) carveouts of federal jurisdiction include an explicit clause recognizing state dominion over areas the Board relinquished.⁴⁵ Those sections were added to the Act in the Labor Management Relations Act,⁴⁶ following *Guss v. Utah Labor Relations Board*,⁴⁷ and were explicitly aimed to prevent a situation whereby workers face a no-man's-land of labor regulations, that is, where the Board steps back—and no state power is allowed to step in.⁴⁸

Doctrinally, courts have developed multiple exceptions to the strict preemption regime. The state can act as a market participant in its own contractual endeavors, including the setting of labor-related requirements like labor peace agreements.⁴⁹ Additionally, states can regulate issues related to labor relations that have a strong connection to local sentiments, like intentional infliction of emotional distress (IIED) claims or property-related issues.⁵⁰

In the NLRA preemption rule-exception model, *Garmon* and *Machinists* are the rule, and state regulation must fit an exception.

41. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Rels. Comm'n*, 427 U.S. 132, 140–41 (1976).

42. See the discussion in Gali Racabi, *Excluded but Equal*, 33 WM. & MARY BILL RTS. J. 209, 220–30 (2024) [hereinafter Racabi, *Excluded but Equal*].

43. 29 U.S.C. § 164(b).

44. § 164(c)(1).

45. § 164(c)(2).

46. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 701, 73 Stat. 519, 541–42.

47. 353 U.S. 1 (1957).

48. See *Airway Cleaners LLC*, 363 NLRB 1575, 1576 n.4 (2016) (describing the congressional background).

49. See *Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould, Inc.*, 475 U.S. 282, 289–90 (1986) (describing the market participant exception to NLRA preemption).

50. See generally *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977) (ruling that the NLRA does not preempt IIED claims in state courts).

Because of this legal structure, NLRA preemption claims have become a go-to claim employers use against any local or state regulation of work.⁵¹ This is because the doctrine's structure forces states and localities to justify that their actions align with an existing exception to federal preemption before engaging in anything that could arguably be identified as regulating private sector labor relations.

For a rationale of this preemption structure, scholars routinely turn to Cox's writings.⁵² Cox identified how the distribution of federal and state authorities over labor relations involves tremendously difficult and contested policy questions involving the relations of states to their economies and the federal government, along with the huge variety of labor relation compositions and attributes across the U.S. and the limited resources of a federal agency at the intersection of it all.⁵³ But, having recognized the complexity of the underlying policy questions, Cox celebrated what he described as an inevitable rule of federal preemption.⁵⁴

Per Cox, robust preemption is inevitable because he conceived of U.S. private sector labor relations as "one ball of wax" inextricably intertwined. According to Cox,

[l]abor-management relations, in the popular phrase, is "one ball of wax." At every point the formulation of a national labor policy involved balancing the various interests of management, union, employees, and the public. To allow a state to prohibit conduct that the federal policy requires to be free, or to allow a state to license conduct that the federal policy prohibits, would upset the balance contemplated by federal law.⁵⁵

Cox placed the NLRB at the heart of this complicated balancing act. For one ball of wax, Congress has placed one governor. Only an expert federal agency, carefully situated at the heart of U.S. labor relations, can properly decide on all of the myriad contesting policy considerations and properly balance the distributive stakes between employers, employees, and the public interest across the country.

Much has changed since Cox wrote those passages. First, private sector labor union coverage has declined to the lowest point since the NLRA's enactment.⁵⁶ For Cox, that might signal both that even if there

51. See Racabi, *Excluded but Equal*, *supra* note 42, at 213.

52. Gottesman, *supra* note 35, at 355 n.2; Estlund, *supra* note 13, at 1571 n.191; Sachs, *supra* note 3, at 1164 n.39.

53. Cox, *Federalism in the Law*, *supra* note 39, at 1297–1302.

54. Cox, *The Supreme Court and the Federal System*, *supra* note 1, at 809.

55. *Id.*

56. Hayley Brown, *Union Membership Stagnated in 2025*, CTR. FOR ECON & POL'Y RSCH. (Jan. 26, 2026), <https://cepr.net/publications/union-membership-stagnated->

is a center for private sector labor relations, it is not at all clear that D.C. is it.⁵⁷ And second, it might hint that this centralized regime is failing in balancing workers' rights against employer oppression or perhaps that the concept of internalizing employers' interests into Wagner's model was always doomed.⁵⁸ Such claims, anchored in the undeniable failures of the NLRA, have been made by scholars against the federal preemption regime for at least two decades.⁵⁹

More recently, the basic set of assumptions that Cox held about federal governance have been dissipating—namely, the positioning of the NLRB as an independent, expert agency capable of governing all private sector labor relations.⁶⁰ It is true that the Board has a sole ally in the rapidly declining U.S. labor movement.⁶¹ But it is unclear what that allegiance means.

Regarding the Board's independence, if the current moment offers us a unique perspective on labor law, it is this: The Trump administration, Congress, the Supreme Court, and employers perceive that having a functional NLRB is not at all a priority—President Trump, by unilaterally ending its mandated three-member quorum, the Supreme Court by signing on to those moves explicitly, and Congress by doing nothing to the contrary to address this. Employers, on their end, are rushing to utilize the shelled agency as an excuse to not recognize their workers' unions⁶² and to then lobby the Trump administration to

in-2025/; Doug Henwood, *Unions Lose Some More*, LBO NEWS FROM DOUG HENWOOD (Jan. 28, 2025), <https://lbo-news.com/2025/01/28/unions-lose-some-more/> [<https://perma.cc/LJS6-EETN>].

57. Compare Cox, *supra* note 39, at 1299 (recognizing a congressional choice about centralization of labor law governance), and Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355–56 (1972) (offering examples of legitimate state concerns in labor relations: property, bodily security, public order, etc.), with Fred B. Jacob & Anne Marie Lofaso, *Beyond Loper Bright: Iterative Construction at the National Labor Relations Board*, 77 U.C. L.J. 38, 64–66 (2025) (describing current iterations of this mode of centralizing federal labor with the NLRB).

58. See Gali Racabi, *Balancing Is for Suckers*, 109 CORN. L. REV. 63, 66–69, 73–74 (2023).

59. Gottesman, *supra* note 35, at 373 n.75 (noting potential arguments regarding the failure of the NLRA as a reason to modify its preemption rule); Estlund, *supra* note 13, at 1527–28, 1530–31; Sachs, *supra* note 3, at 1155.

60. See Cox, *Federalism in the Law*, *supra* note 39, at 1306–07, 1344, 1348.

61. Press Release, Bureau of Lab. Stat., *supra* note 24 (“The union membership rate in the private sector declined by 0.1 percentage point over the year to 5.9 percent.”).

62. See, e.g., *Transdev Servs., Inc.*, No. 01-RC-358638 (Decision and Direction of Election May 16, 2025), <https://www.nlr.gov/case/01-RC-358638> (on file with the Wisconsin Law Review) (describing employers' argument that a lack of NLRB quorum means a lack of authority to conduct elections).

unilaterally declare labor policy independent of the Board's traditional adjudicatory processes.⁶³

Legal deference to the Board's expertise, for those who still believe there is such a thing,⁶⁴ has been nearly erased from existence by recent courts' practices.⁶⁵ But even before the recent administrative law skepticism regarding agency interpretation of law, Board declaration and reversals of labor policy dependent on the presidential affiliation of the majority of the members cannot be regarded as an emblem of some politics-independent expertise.⁶⁶

There was once a time the Board could argue for subject matter expertise on areas such as labor relations, work, employers, workers, what moves them, and how legal decisions affect bargaining power.⁶⁷ But today, even board advocates recognize that *that* kind of expertise is absent and instead rely on a different, adjacent concept of labor *law* expertise.⁶⁸

Without an independent expert agency standing at the heart of federal labor relations carefully balancing the complex policy and distributive stakes of labor relations, Cox's vision, and its actualizing legal architecture, is obsolete. Enforcing a rule of absolute preemption without a federal agency at least marginally capable of enforcing labor law across the country is a farce.

But after seven decades of absolute federal preemption, labor advocates and scholars are wedded to the NLRA as the default path to workers' labor rights. One reason for that is a "dictatorship of no alternatives,"⁶⁹ a lack of competing paradigms and institutional venues for federally centered labor law.

In the next part, I will uncover a set of state laws regulating private sector labor relations ready to operate in lieu of the NLRA. Those laws

63. See Matt Bruenig, *Anti-Union Trade Association Urges Attorney General to Invalidate 15 NLRB Cases*, NLRB EDGE (Apr. 16, 2025), <https://www.nlrbedge.com/p/anti-union-trade-association-urges> [https://perma.cc/4E6N-9HSB].

64. See generally Mark Tushnet, *Trust the Science but Do Your Research: A Comment on the Unfortunate Revival of the Progressive Case for the Administrative State*, 98 IND. L.J. 335 (2022) (detailing progressive critiques of expertise, while recognizing the need to rely on expertise for policy and daily life).

65. Robert Lafolla, *Labor Board Loses Edge in Court Review as Judges Avoid Precedent*, BLOOMBERG L. (June 23, 2025, at 04:14 CT), <https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SYAXNMT0AFB4>.

66. See, e.g., Yiran Zhang, *Workification*, 73 UCLA L. REV. (forthcoming 2026) (manuscript at 10–16) (on file with author) (describing Board fluctuations regarding students' employee status).

67. Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 655–56 (2021) (describing the history of the Board's research unit and its closure).

68. See, e.g., Jacob & Lofaso, *supra* note 57, at 6–8, 20.

69. See ROBERTO MANGABEIRA UNGER, *THE LEFT ALTERNATIVE* xi–xii, 1 (2009) (describing the lack of alternative institutional imagination as a key political problem for left actors).

reveal, first, an existing alternative and policy path to the federal regime and second, a forgotten realm of state action and responsibility to labor peace and equality of bargaining power in their economies.

II. STATE PRIVATE SECTOR LABOR LAW

It is conventional wisdom that because the NLRA preempts state's private sector labor regulations, no such laws exist.⁷⁰ And what follows is, first, that because no state or local alternatives exist to the NLRA, labor law policy must first focus on protecting, mending, and caring for the NLRA and the NLRB.⁷¹ And, second, labor law must create *non*-labor policy and *quasi*-labor organizing strategies at the state and local levels.⁷² Facing the breakdown of federal labor law and relying on this perceived absence of state labor law, scholars now view the labor movement as lacking institutional and legal sources of power.⁷³

But this common trope is premised on a false assumption. Eighteen states have NLRA-like private sector labor laws,⁷⁴ fourteen states enacted statutory declarations of a policy recognizing organizing rights of workers,⁷⁵ and six states explicitly recognize collective bargaining rights in their constitutions.⁷⁶ Labor rights and institutions do exist at the state level.

70. Estlund, *supra* note 13, at 1530 ("The core of American labor law has been essentially sealed off—to a remarkably complete extent and for a remarkably long time . . . from local experimentation and innovation."); Sachs, *supra* note 3, at 1155 ("[T]here are no state statutes governing private sector union organizing . . ."); Cf. Gottesman, *supra* note 35, at 369 n.59 (describing state "Little Wagner Acts" in the context of termination against public policy).

71. See, e.g., Estlund, *supra* note 13, at 1530 (describing the inability to reform the NLRA as the "[m]ost important[]" factor in its ossification).

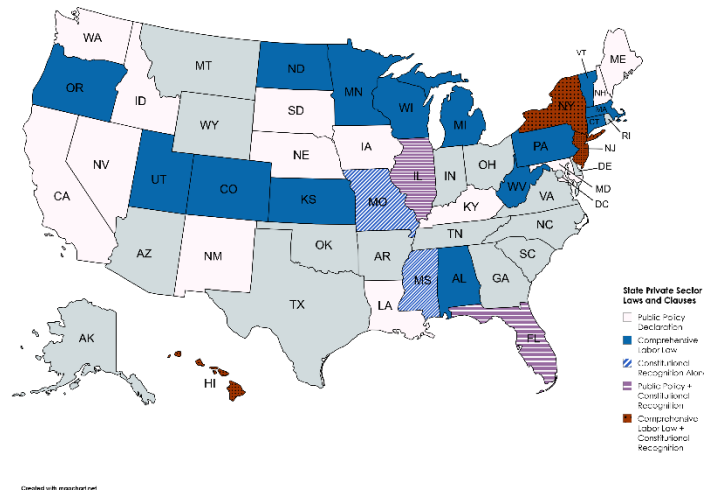
72. See Galvin, *supra* note 35, at 1125, 1127.

73. See generally Velazquez, *supra* note 31 (describing pre-NLRA mass bottom-up organizing as the most viable path forward for labor). See also Gottesman, *supra* note 35, at 356–57 (describing how preemption conceptions stop states from innovating in the area of private sector labor law).

74. These eighteen states include Alabama, Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin. See *infra* note 96.

75. These fourteen states include Florida, Idaho, Maryland, Indiana, Kentucky, South Dakota, Illinois, Louisiana, New Mexico, New Hampshire, Nebraska, Nevada, Maine, and Washington. See *infra* note 82.

76. CTR. FOR LAB. & A JUST ECON. AT HARV. L. SCH., *supra* note 32, at 9.



Map 1. *State Labor Law Types and Spread: Comprehensive Laws, Public Policy, and Constitutional Recognition*

Notably, these laws are not perfect, and the scattered aggregation of these laws cannot solve the fundamental problems that the NLRA was meant (but is unable) to solve. Instead of a solution, these laws present a decentralized, alternative path to private sector labor governance.

States have been setting policies and regulating private sector labor relations for as long as federal labor law has existed.⁷⁷ Those policies and regulations are limited in effect because of federal preemption. However, prior to the judicial creation of a strong NLRA preemption, and in the shadow of contemporary federal preemption of private sector labor law, states found a way to do so.

States enacted constitutional provisions and amendments recognizing the rights of workers to associate, organize, form unions, and bargain collectively.⁷⁸ Arkansas's constitution, for example, prohibits retaliation against workers because of union membership status.⁷⁹ Such clauses have been used to protect workers from legislative and regulatory encroachment on their rights. For example, New York's constitution was used to push back against the exclusion of farmworkers from New York private sector labor law.⁸⁰ But without an actualizing

77. See Gottesman, *supra* note 35, at 369 n.59.

78. See CTR. FOR LAB. & A JUST ECON. AT HARV. L. SCH., *supra* note 32, at 8–12.

79. ARK. CONST. amend. 34, § 1.

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

statutory framework, few instances of actualizing such state constitutional rights against employers were found.⁸¹

States also recognize organizing rights as a state's public policy.⁸² Even "red" states, such as Alabama or Florida, have made statutory headways toward protecting workers' labor rights.⁸³ In a way that is reminiscent of section 7 of the NLRA, Florida statutorily recognizes the following:

Employees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.⁸⁴

Some states with no comprehensive private sector labor law, such as California, prohibit contracts that condition employment on not joining a union (known as "yellow dog" contracts),⁸⁵ prohibit the hiring of professional strikebreakers,⁸⁶ and declare:

Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and

81. Gottesman, *supra* note 35, at 369 n.59 (citing *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 254 (Mo. 1963)).

82. See FLA. STAT. § 447.03 (2025); 22 GUAM CODE ANN. § 5302 (2024); IDAHO CODE § 44-701 (2025); MD. CODE ANN., CRIM. LAW § 9-707 (LexisNexis 2025); IND. CODE § 22-7-1-2 (2025); KY. REV. STAT. ANN. § 336.130 (West 2025); 820 ILL. COMP. STAT. 5/1.2 (2025); LA. STAT. ANN. § 23:822 (2025); N.M. STAT. ANN. § 30-21-2 (LexisNexis 2025); N.H. REV. STAT. ANN. § 649:10 (2026); NEB. REV. STAT. § 48-904 (2025); NEV. REV. STAT. § 614.090 (2025); ME. STAT. tit. 37-B, § 1003 (2025); S.D. CODIFIED LAWS §§ 60-9A-2, -12 (2026); WASH. REV. CODE § 49.32.020 (2025); YUOK TRIBE OF THE YUOK RESERVATION, CALIFORNIA CODE § 5.60.040 (2025).

83. Alabama specifies the right to join unions and a prohibition on interfering in union activities as well as the protection of the right to strike. See ALA. CODE §§ 25-7-3, -6, -11 (2026).

84. FLA. STAT. § 447.03 (2025).

85. CAL. LAB. CODE § 922 (West 2026); see also N.H. REV. STAT. ANN. § 275:1 (2026) (prohibiting yellow dog contracts).

86. CAL. LAB. CODE § 1134 (West 2026). Similar laws can be found in 820 ILL. COMP. STAT. 30/2-3 (2025).

conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁸⁷

Such declarations were used as evidence of state policy in the case of common law claims of public policy contracts' exceptions and wrongful discharge claims⁸⁸ along with more common labor law claims.⁸⁹ In other jurisdictions, policy proclamations that included a recognition of workers' right to engage in concerted activities were interpreted by courts to directly prohibit employer interference in such activities.⁹⁰

In addition, states and localities have been regulating the labor relations of particular sectors. For example, following massive organizing campaigns by agriculture workers and their allies, California began regulating labor relations in the agriculture sector.⁹¹ Seattle attempted to do the same for ride-hail drivers⁹² and more.⁹³ Such experimentation is now a canonical example for how states and localities can have a significant, yet limited, effect on private sector labor relations despite preemption.⁹⁴

The focus in this Article, however, is on describing those states with comprehensive regulatory schemes for organizing, negotiating a collective bargaining agreement, and enforcing it. Such state regulations of private sector labor relations have been at the periphery of labor law scholars.⁹⁵ However, as radical winds threaten to tear down whatever is

87. CAL. LAB. CODE § 923 (West 2026).

88. *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 796, 798 (Cal. Ct. App. 1961).

89. *See Wetherton v. Growers Farm Lab. Ass'n*, 79 Cal. Rptr. 543, 547 (Cal. Ct. App. 1969).

90. *Bravo v. Dolsen Cos.*, 888 P.2d 147, 154–55 (Wash. 1995) (applying Washington state's recognition of public policy supporting concerted activities to prohibit employers from interfering in such activities).

91. For a recent review of the process leading to the enactment of the law and its current legal status, see generally Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021).

92. Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, 95 TUL. L. REV. 1167, 1217–20 (2021) [hereinafter Racabi, *Despite the Binary*].

93. See, for example, Montana's regulation of nursing collective bargaining rights, MONT. CODE ANN. §§ 39-32-101 to -106, -109 to -110 (2025).

94. Sachs, *supra* note 3, at 1154–57; see Gali Racabi, *Effects of City-State Relations on Labor Relations: The Case of Uber*, 74 ILR REV. 1155, 1175 (2021) [hereinafter Racabi, *Effects of City-State Relations on Labor Relations*].

95. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 316–18 (1950) (describing state labor innovation as a route to Taft Hartley). See generally CHARLES C. KILLINGSWORTH, STATE LABOR RELATIONS ACTS (1948) (surveying state labor laws). See Kati L. Griffith, *Worker Centers and Labor Law*

left of federal labor law, such peripheral status that state labor law possesses should be reexamined.

A. Introduction

Eighteen states have private sector labor laws.⁹⁶ This means that some 102 million people, along with about 3.5 million private sector union members residing in Alabama, Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin, have an existing non-NLRA statutory framework under which to organize, form unions, bargain collectively, and sign collective bargaining agreements under the auspices of their states.⁹⁷

States began passing private sector labor relations laws after the Supreme Court found the NLRA to be constitutional. New York, Wisconsin, Massachusetts, Pennsylvania, and Utah were first.⁹⁸ In the decade between the Court's decision that the NLRA was constitutional and the passage of the Taft-Hartley amendments, states were the testing grounds for new experimental anti-labor ideas that were later used in Taft-Hartley.⁹⁹

Protections: Why Aren't They Having Their Cake?, 36 BERKELEY J. EMP. & LAB. L. 331, 334–35, 338 (2015).

96. ALA. CODE § 25-7-1 (2026); COLO. REV. STAT. §§ 8-3-101 to -102 (2025); CONN. GEN. STAT. §§ 31-101 to -111b (2025); HAW. REV. STAT. §§ 377-1 to -18 (2025); KAN. STAT. ANN. §§ 44-801 to -831 (2025); MASS. GEN. LAWS ch. 150A, §§ 1–12 (2026); MICH. COMP. LAWS §§ 423.1–.30 (2026); MINN. STAT. §§ 179.01–.17 (2025); N.J. STAT. ANN. §§ 34:13A-1 to -2 (West 2025); N.Y. LAB. LAW, §§ 700–718 (Consol. 2026); N.D. CENT. CODE §§ 34-12-01 to -14 (2024–25); OR. REV. STAT. §§ 663.005–.295 (2025); 43 PA. STAT. AND CONS. STAT. ANN. §§ 211.1–.15 (West 2026); 28 R.I. GEN. LAWS §§ 28-7-1 to -50 (2026); UTAH CODE ANN. §§ 34-20-1 to -14 (LexisNexis 2026); VT. STAT. ANN. §§ 21-1501 to -1505 (2025–26); W. VA. CODE §§ 21-1A-1 to -8 (2026); WIS. STAT. §§ 111.02–.19 (2023–24). U.S. territories with a labor code include the Virgin Islands. *See* V.I. CODE ANN. tit. 24, §§ 61–79 (2025). One of the few legal sources fully collecting those state laws is a brief by state Attorneys General in *Epic Systems Corp. v. Lewis*. Brief for Maryland et al. as Amici Curiae Supporting Respondents in Nos. 16-285 and 16-300 and Petitioner in No. 16-307 at 13–14, *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307).

97. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 492 n.61 (1976) (stating that fifteen states passed NLRA-like statutes).

98. MILLIS & BROWN, *supra* note 95, at 317; Harry A. Millis & Harold A. Katz, *A Decade of State Labor Legislation 1937-1947*, 15 U. CHI. L. REV. 282, 282 (1948).

99. MILLIS & BROWN, *supra* note 95, at 317. According to some scholars, those relatively restrictive labor laws were also a response to the threat of the more aggressive Congress of Industrial Organizations tactics. *See* Anthony M. Daniel, *State-Level Origins*

Still, however Taft-Hartley-like as some of those state laws are, such laws can be distinguished from “right-to-work” laws, which focus only on prohibiting certain forms of unions’ financial security agreements without providing a statutory right and, in most cases, a regulatory framework for collective bargaining.¹⁰⁰

These laws offer a universal state catchall for all workers and are not unique to a particular sector or occupation. As a universal law, they pose an existing framework that states currently have for workers and unions in lieu of the NLRA. What follows is a review of some of those laws’ scope provisions, rights of workers, union certification processes, and administration.

Although these state laws differ in some significant aspects, most mirror the NLRA’s overall structure and substance.¹⁰¹ For covered employees and employers, the state encourages the resolution of labor disputes by the formation of unions and collective bargaining.¹⁰² As is true with the NLRA, workers are protected from employer retribution and, in some cases, from coercion and unfair representation by unions.¹⁰³ As is the case with the NLRA, the election of representation, the bargaining process, and the protection of concerted activities are highly regulated.¹⁰⁴ As with federal labor law, the mediation of disputes is available to the parties.¹⁰⁵ Finally, similar to the NLRA, labor peace and the equal bargaining power of workers and employers are the dual beacons that guide an NLRB-like state agency in resolving disputes.¹⁰⁶

B. Purpose

We know that the goals of state labor laws are similar to the NLRA’s because, like the NLRA, these catchall laws include a declaratory preamble recognizing workers’ organizing rights, collective bargaining, equality of bargaining power, and peaceful negotiation of labor disputes

of the United States Labor Relations Order 1, 5–6, 13 (Jul. 10, 2015) (Ph.D. dissertation, Columbia University) (on file with author).

100. Compare ARIZ. REV. STAT. ANN. §§ 23-1302 to -1305 (2025) (Arizona’s right to work law) (creating only legal prohibitions), with ALA. CODE § 25-7-4 (2026) (recognizing organizing and strike rights as well as a framework for dispute resolution).

101. The exception is Alabama’s statute which offers a skeletal version of rights and protections for workers’ union organizing and establishes a possibility for a mediation board. ALA. CODE § 25-7-4 (2026).

102. N.Y. LAB. LAW § 700 (Consol. 2026).

103. In the case of New York, see N.Y. LAB. LAW § 703 (Consol. 2026).

104. See, e.g., *Cosmo’s Drive Inn, Inc. v. Townsend*, 165 N.Y.S.2d 422, 425 (N.Y. App. Div. 1957) (describing the representation process under New York labor laws); N.Y. LAB. LAW §§ 702-a, 705 (Consol. 2026).

105. See N.Y. LAB. LAW §§ 702–702-a (Consol. 2026).

106. See *id.* § 706 (placing the state board as the agency enforcing the state labor law).

as a state priority and public policy.¹⁰⁷ The New York State Labor Relations Act declares that:

[T]he best interests of the people of the state are served by the prevention or prompt settlement of labor disputes and . . . the voluntary resolution of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state.¹⁰⁸

And from the Massachusetts code:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects industry and trade, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.¹⁰⁹

In some states, industrial strife in and of itself is considered detrimental. Michigan, for example, states:

[S]trikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected ¹¹⁰

C. Scope

State catchall laws are aimed at capturing private sector workers, and some include explicit language about coverage of workers excluded

107. See COLO. REV. STAT. § 8-3-102 (2025); MASS. GEN. LAWS ch. 150A, § 1 (2026); MICH. COMP. LAWS § 423.1 (2026); 43 PA. STAT. AND CONS. STAT. ANN. § 211.2 (West 2026); 28 R.I. GEN. LAWS § 28-7-2 (2026); UTAH CODE ANN. § 34-20-1 (LexisNexis 2025); VT. STAT. ANN. tit. 21, § 1501 (2025); W. VA. CODE § 21-1A-1 (2026); see also CAL. LAB. CODE § 923 (West 2026) (recognizing state policy without a comprehensive state labor law).

108. N.Y. LAB. LAW § 700 (Consol. 2026).

109. MASS. GEN. LAWS ch. 150A, § 1 (2026).

110. MICH. COMP. LAWS § 423.1 (2026); see also N.J. STAT. ANN. § 34:13A-2 (West 2025) (same).

from the NLRA and the Federal Labor Railway Act.¹¹¹ But like most work laws, these laws include scope conditions delineating which workers are included and which are excluded.¹¹²

Like the NLRA, those state laws still cover workers during work stoppages, notably workers on strike.¹¹³ Similar to other work laws, some states include a minimum threshold of workers to apply. For example, in West Virginia, the minimum number of employees necessary to apply the state labor law is fifteen.¹¹⁴ In Colorado, it is eight,¹¹⁵ and in Hawaii, it is two.¹¹⁶

However, like the notorious exclusions of the NLRA, agriculture, homecare, or domestic workers are often excluded from those state laws.¹¹⁷ Independent contractors¹¹⁸ and persons working in a rehabilitative or medical facility are also excluded.¹¹⁹

111. N.Y. LAB. LAW § 715 (Consol. 2026); COLO. REV. STAT. § 8-3-104(12)(b) (2025); CONN. GEN. STAT. § 31-101(7) (2025); HAW. REV. STAT. § 377-1 (2025); MASS. GEN. LAWS ch. 150A, §§ 2(2), 10(b) (2026); MICH. COMP. LAWS § 423.2(e) (2026); MINN. STAT. §§ 179.01(3)–(4) (2025); N.D. CENT. CODE § 34-12-01(2) (2024–25); OR. REV. STAT. § 663.005(3)(i) (2025); WIS. STAT. § 111.02(6)(c) (2023–24). New Jersey law applies both on the public and the private sector. *See* N.J. STAT. ANN. § 34:13A-3 (West 2025).

112. Racabi, *Excluded but Equal*, *supra* note 42, at 210–11, 214–15.

113. N.Y. LAB. LAW § 701(3)(a) (Consol. 2026) (“[A]ny individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment”); *see* COLO. REV. STAT. §§ 8-3-103, -104(11)(b)(IV) (2025).

114. W. VA. CODE § 21-1A-2(a)(2) (2026).

115. COLO. REV. STAT. § 8-3-104(12)(a)(I) (2025); *see, e.g., Associated Master Barbers v. Journeyman Barbers*, 285 P.2d 599, 601 (Colo. 1955).

116. HAW. REV. STAT. § 377-1 (2025).

117. N.Y. LAB. LAW § 701(3)(a) (Consol. 2026); COLO. REV. STAT. § 8-3-104(11)(b)(II) (2025); CONN. GEN. STAT. § 31-101(6) (2025); HAW. REV. STAT. § 377-1 (2025). *Compare* MASS. GEN. LAWS ch. 150A, § 2(3) (2026) (excluding domestic service from the definition of a covered employee), *with* MASS. GEN. LAWS ch. 150A, § 3A (2026) (covering some domestic workers for some functions of the law), *and* MICH. COMP. LAWS § 423.2(e) (2026) (excluding agriculture and domestic workers), *and* MINN. STAT. § 179.01(4) (2025) (same), *and* N.J. STAT. ANN. § 34:13A-3 (West 2024) (same), *and* N.D. CENT. CODE § 34-12-01 (2024–25), OR. REV. STAT. § 663.005(3)(a) (2025) (same), *and* 43 PA. STAT. AND CONS. STAT. ANN. § 211.3(d) (West 2026) (same), *and* 28 R.I. GEN. LAWS § 28-7-3(3)(ii) (2026) (same), *and* UTAH CODE ANN. § 34-20-2(4)(b) (LexisNexis 2026) (same), *and* VT. STAT. ANN. tit. 21, § 1502(6) (2026) (same), *and* W. VA. CODE § 21-1A-2(a)(3) (2026) (same), *and* WIS. STAT. § 111.02(6)(c) (2023–24) (same).

118. COLO. REV. STAT. § 8-3-104(11)(b)(I) (2025); N.D. CENT. CODE § 34-12-01(2) (2024–25); VT. STAT. ANN. tit. 21, § 1502(6)(D) (2026); W. VA. CODE § 21-1A-2(a)(3) (2026); WIS. STAT. § 111.02(6)(a) (2023–24).

119. N.Y. LAB. LAW § 701(3)(a) (Consol. 2026); *Loc. Union 1106, Int’l Bhd. of Elec. Workers v. Goodwill Indus. of Muskegon Cnty., Inc.*, 440 N.W.2d 635, 637 (Mich. Ct. App. 1989) (noting that Michigan state labor law applies on workers with disabilities occupied in integrative workshop on a case-by-case basis). Massachusetts

In New York, although the law recognizes farmworkers and agricultural employers as covered by the law,¹²⁰ the law sets a unique regulatory framework for organizing and administering contracts.¹²¹ New York also explicitly recognizes performing artists as covered employees¹²² but sets specific regulations on the financial arrangements of unions in the performing arts sector.¹²³ Similar recognition and limitation of rights in New York is true for workers in nonprofit hospitals and residential care centers.¹²⁴ Inclusion and specialized treatment are also available in Colorado in the case of mass transit systems,¹²⁵ in Connecticut in the case of employers licensed by the Connecticut Department of Public Health,¹²⁶ and in New Jersey in the case of police officers.¹²⁷

Membership and financial limitations, like the formation of a union shop, at times require a different form of union and membership authorization. In Colorado, for example, such arrangements (known as “all-union agreements”) require “affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater.”¹²⁸ The state director in Colorado, who administers the law, then has special authorities to revoke such agreements in cases of specific, enumerated abuses.¹²⁹

Decisions regarding the scope of these laws have also created delineations between these sets of laws and the NLRA. For example, courts recognized that in cases whereby the NLRB did not assert or was denied jurisdiction, like the case of religious schools¹³⁰ or nonprofit hospitals,¹³¹ state regulatory action is available.

explicitly includes state funded rehabilitative care. MASS. GEN. LAWS ch. 150A, § 2(2) (2026).

120. This was not always the case, see generally *Hernandez v. State*, 173 A.D.3d 105 (N.Y. App. Div. 2019).

121. N.Y. LAB. LAW § 701(2)(b), (3)(c) (Consol. 2026).

122. *Id.* § 701(3)(b).

123. *Id.* § 704-a.

124. *Id.* §§ 713, 716.

125. COLO. REV. STAT. § 8-3-111 (2025).

126. CONN. GEN. STAT. § 31-111a (2025).

127. N.J. STAT. ANN. § 34:13A-5.3 (West 2025).

128. COLO. REV. STAT. § 8-3-108(1)(c)(I) (2025).

129. *Id.* § 8-3-108(1)(c)(III).

130. *Christ the King Reg'l High Sch. v. Culvert*, 815 F.2d 219, 222–23 (2d Cir. 1987).

131. See generally *Comm. of Interns & Residents v. N.Y. State Lab. Rels. Bd.*, 388 N.Y.S.2d 509 (Sup. Ct. 1976) (describing NLRA jurisdiction over non-profit hospitals).

D. Rights

Most state laws include a statement of workers' rights under the law similar to section 7 of the NLRA.¹³² In New York, for example, the law states:

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers ¹³³

Again, similar to the NLRA, the right to strike has a special place in those state laws.¹³⁴ The Massachusetts law, for example, declares similar to section 13 of the NLRA: "Nothing in this chapter . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike."¹³⁵ Also in Rhode Island, the Labor Board is limited in attempting to solve labor disputes by a statutory prohibition against "requir[ing] as a condition of . . . issuing any order . . . that employees on strike or engaged in any other lawful, concerted activity shall discontinue that strike or that activity."¹³⁶

In a similar vein, employers are obligated to negotiate with representative unions.¹³⁷ Similarly, the exercise of the right to express opinions regarding the unionization process is not an unfair labor

132. COLO. REV. STAT. § 8-3-106 (2025); CONN. GEN. STAT. § 31-104 (2025); HAW. REV. STAT. § 377-4 (2025); KAN. STAT. ANN. § 44-803 (2025); MASS. GEN. LAWS ch. 150A, § 3 (2026); MICH. COMP. LAWS § 423.8 (2026); MINN. STAT. § 179.10 (2025); N.J. STAT. ANN. § 34:13A-5.3 (West 2025); N.D. CENT. CODE § 34-12-02 (2024-25); 43 PA. STAT. AND CONS. STAT. ANN. § 211.5 (West 2026); 28 R.I. GEN. LAWS § 28-7-12 (2026); UTAH CODE ANN. § 34-20-7 (LexisNexis 2026); VT. STAT. ANN. tit. 21, § 1503 (2025-26); W. VA. CODE § 21-1A-3 (2026); WIS. STAT. § 111.04 (2023-24). Washington has a public policy proclamation language similar to that of section 7 of the NLRA. *See* WASH. REV. CODE § 49.32.020 (2025).

133. N.Y. LAB. LAW § 703 (Consol. 2026).

134. COLO. REV. STAT. § 8-3-103 (2025) ("[N]othing in this article shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work."); *see* KAN. STAT. ANN. § 44-813 (2025); HAW. REV. STAT. § 377-16 (2025) (same); FLA. STAT. § 447.13 (2025) (same); 43 PA. STAT. AND CONS. STAT. ANN. § 211.3 (West 2026); 28 R.I. GEN. LAWS § 28-7-46 (2026); UTAH CODE ANN. § 34-20-13 (LexisNexis 2026); WIS. STAT. § 111.15 (2023-24).

135. MASS. GEN. LAWS ch. 150A, § 9 (2026).

136. 28 R.I. GEN. LAWS § 28-7-24 (2026).

137. *See generally Ass'n of Plumbing & Heating Contractors, Inc. v. Merten*, 26 N.Y.S.2d 72 (App. Div. 1941) (establishing a duty to bargain). *See* COLO. REV. STAT. § 8-3-108(1)(d) (2025); N.D. CENT. CODE § 34-12-03(1)(e) (2024-25).

practice.¹³⁸ In some states, workers have explicit opt-out rights based on religion.¹³⁹

Forms of concerted activities prohibited under the NLRA are sometimes recognized in those state laws. For example, although slowdowns and secondary strikes are considered unprotected activities under the NLRA,¹⁴⁰ the New York and Massachusetts laws at least implicitly recognize these as protected concerted activities.¹⁴¹ Other state laws, as in Colorado, explicitly declare these unfair labor practices.¹⁴²

Strikes, however, are limited in some cases. Notice requirements can be found in some laws.¹⁴³ In other examples, the New York law explicitly limits the rights of agriculture workers to strike by excluding such actions in the sector from the definition of “concerted activities” and makes strikes and lockdowns unfair labor practices for farmworkers and farms.¹⁴⁴ Hawaii mandates ten days’ notice before strikes on agricultural businesses.¹⁴⁵ Other state laws demand a majority vote before the initiation of a strike.¹⁴⁶

States also generally prohibit employers from interfering with workers’ concerted activities,¹⁴⁷ parallel to the NLRA’s section 8(a)(1),¹⁴⁸ and prohibit the domination of labor organizations.¹⁴⁹ State laws can be more specific than the NLRA in enumerating unlawful employment practices. The New York law states that it is prohibited “to spy upon or

138. COLO. REV. STAT. § 8-3-109(2) (2025); KAN. STAT. ANN. § 44-808 (2025).

139. *See, e.g.*, HAW. REV. STAT. § 377-4.5 (2025).

140. 29 U.S.C. §§ 142(2), 158(b)(4).

141. N.Y. LAB. LAW § 703 (Consol. 2026) (excluding strikes and slowdowns as “concerted activities” for farmworkers); MASS. GEN. LAWS ch. 150A, § 4A(2) (2026) (recognizing certain goals where those actions are unlawful).

142. *See, e.g.*, COLO. REV. STAT. §§ 8-3-108(2)(g), (3)(d)(I) (2025).

143. MICH. COMP. LAWS § 423.9(a) (2026); MINN. STAT. § 179.06(1)(a) (2025); WIS. STAT. § 111.115(3) (2023–24) (imposing a notice requirement for some agricultural businesses).

144. N.Y. LAB. LAW §§ 703, 704-b (Consol. 2026).

145. HAW. REV. STAT. § 377-12 (2025).

146. *See, e.g.*, MINN. STAT. § 179.11(a)(8) (2025).

147. N.Y. LAB. LAW § 704(10) (Consol. 2026) (making it an unfair labor practice to “interfere with, restrain or coerce employees in the exercise of the[ir] rights [under the state labor law]”); COLO. REV. STAT. § 8-3-108(1)(a) (2025) (similar); HAW. REV. STAT. § 377-6(1) (2025) (similar); MASS. GEN. LAWS ch. 150A, § 4(1) (2026); N.D. CENT. CODE § 34-12-03(1)(a) (2024–25); 43 PA. STAT. AND CONS. STAT. ANN. § 211.6(1)(a) (West 2026); 28 R.I. GEN. LAWS § 28-7-13(10) (2026); UTAH CODE ANN. § 34-20-8(1)(a) (LexisNexis 2026); W. VA. CODE § 21-1A-4(a)(1) (2026); WIS. STAT. § 111.06(1)(a) (2023–24).

148. 29 U.S.C. § 158(a)(1).

149. COLO. REV. STAT. § 8-3-108(1)(b) (2025); CONN. GEN. STAT. § 31-105(3) (2025); KAN. STAT. ANN. § 44-808(2) (2025); HAW. REV. STAT. § 377-6(2) (2025); MASS. GEN. LAWS ch. 150A, § 4(2) (2026).

keep under surveillance” workers’ covered activities,¹⁵⁰ to “blacklist” employees for joining unions,¹⁵¹ and to use state funds to train managers to engage in violation of workers’ labor rights.¹⁵² In other states, violating a collective bargaining agreement is considered an unfair labor practice under state law.¹⁵³ For example, in Minnesota, striking contrary to a no-strike clause in a collective bargaining agreement is an unfair labor practice.¹⁵⁴

Another specific item reappearing in those state laws are harms to an employee’s family. For example, in North Dakota, it shall be an unfair labor practice for a person to “intimidate the employee’s family or any member thereof, picket the employee’s domicile, or injure the person or property of the employee, the employee’s family, or any member thereof.”¹⁵⁵

Unlike the NLRA, after the Taft-Hartley amendment, some states explicitly recognize workers as the primary bearers of rights under state law. Employers do not enjoy a set of rights parallel to those of employees.¹⁵⁶ However, others are similar to (or precede) the Taft-Hartley structure and recognize some actions by employees as unfair labor practices.¹⁵⁷

Property and its possession are of particular interest to the states.¹⁵⁸ In Kansas, for example, the law states that it is prohibited “to seize or occupy property unlawfully during the existence of a labor dispute.”¹⁵⁹ And under Hawaii state law, it is prohibited “[t]o take unauthorized possession of property of the employer or to engage in any concerted

150. N.Y. LAB. LAW § 704(1) (Consol. 2026); *accord* COLO. REV. STAT. § 8-3-108(1)(j) (2025); CONN. GEN. STAT. § 31-105(1) (2025); KAN. STAT. ANN. § 44-808(6) (2025); MINN. STAT. § 179.12(a)(5) (2025); WIS. STAT. § 111.06(1)(j) (2023-24).

151. N.Y. LAB. LAW § 704(2) (Consol. 2026); *accord* COLO. REV. STAT. § 8-3-108(1)(k) (2025); CONN. GEN. STAT. § 31-105(2) (2025); HAW. REV. STAT. § 377-6(11) (2025); MINN. STAT. § 179.12(a)(6) (2025); WIS. STAT. § 111.06(1)(k) (2023-24).

152. N.Y. LAB. LAW § 704(10) (Consol. 2026). This state’s commitment to enforcing the state labor law is also manifested in an explicit commitment of other agencies to cooperate with the labor board’s enforcement efforts and the actualization of its policy goals. *See also* N.Y. LAB. LAW § 711 (Consol. 2026) (mandating state agency cooperation and assistance with the State’s labor board).

153. HAW. REV. STAT. § 377-6(6) (2025); KAN. STAT. ANN. § 44-809(15) (2025); WIS. STAT. § 111.06(f) (2023-24).

154. MINN. STAT. § 179(a)(1) (2025). Locking out employees contrary to a no lock-out clause is unfair labor practice as well. MINN. STAT. § 179.12(a)(1) (2025).

155. N.D. CENT. CODE § 34-12-03(2)(i) (2024-25).

156. *See generally Triboro Coach Corp. v. N.Y. State Lab. Rels. Bd.*, 27 N.Y.S.2d 83 (App. Div. 1941) (affirming a New York State Labor Relations Board order in an appeal brought by the employer).

157. COLO. REV. STAT. § 8-3-108(2) (2025); HAW. REV. STAT. § 377-7 (2025).

158. *See* MASS. GEN. LAWS ch. 150, § 4A(1) (2026); MINN. STAT. § 179.11(3) (2025).

159. KAN. STAT. ANN. § 44-809(10) (2025).

effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.”¹⁶⁰

E. Union Certification Process

In a majority of state labor codes, exclusive representation by a union is the form of representation.¹⁶¹ Some states require union registration and certification, along with due diligence obligations.¹⁶²

A point of significant difference from the NLRA is that the explicit establishment of bargaining units is not limited to a single plant or even a single employer. In New York, for example,

[t]he board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit ¹⁶³

A majority vote by a secret ballot election still exists as the primary mechanism in which exclusive representation is established.¹⁶⁴ However, unlike the NLRA, different approaches explicitly exist. For example, a showing of signed dues authorization cards is preferred in New York and in employers with a gross revenue of more than five million dollars according to Hawaii law.¹⁶⁵ And some boards, like the Massachusetts one, are authorized to determine majority status by “any other suitable measure.”¹⁶⁶

160. HAW. REV. STAT. § 377-7(8) (2025).

161. *See, e.g.*, 28 R.I. GEN. LAWS § 28-7-14 (2026); UTAH CODE ANN. § 34-20-9 (LexisNexis 2026); W. VA. CODE § 21-1A-5(a) (2026); WIS. STAT. § 111.05(1) (2023–24).

162. ALA. CODE § 25-7-5(7) (2026).

163. N.Y. LAB. LAW § 705(2) (Consol. 2026). Courts have limited the list of appropriate units to those like the ones enumerated and not as an open list. *See generally Metro. Life Ins. Co. v. N.Y. State Lab. Rels. Bd.*, 20 N.E.2d 390 (N.Y. 1939) (discussing the powers of the New York State Labor Relations Board to protect employees’ right to choose representatives).

164. *See, e.g.*, COLO. REV. STAT. § 8-3-107(2) (2025); CONN. GEN. STAT. § 31-106(b) (2025); HAW. REV. STAT. § 377-5(c) (2025); MICH. COMP. LAWS. § 423.9a (2026); N.D. CENT. CODE. § 34-12-07(3) (2024–25); 43 PA. STAT. AND CONS. STAT. § 211.7(c) (West 2026); 28 R.I. GEN. LAWS. § 28-7-16(c) (2026); W. VA. CODE § 21-1A-5(d) (2026); WIS. STAT. § 111.05(2) (2023–24).

165. N.Y. LAB. LAW § 705(1) (Consol. 2026); HAW. REV. STAT. § 377-4.6(c) (2025).

166. MASS. GEN. LAWS ch. 150A, § 5(c) (2026).

F. Administration

As with the NLRA, most state laws use a state labor board to administer the law.¹⁶⁷ In other states, a director administering the law is appointed.¹⁶⁸ Some boards can form committees of employers and employees to assist the state in its functions.¹⁶⁹

However, those boards can differ from the NLRB and from each other in some crucial ways. Some labor authorities, such as the New York Board, are authorized to arbitrate disputes or assign arbitrators to solve specific substantive disputes brought before them.¹⁷⁰ Some laws explicitly form a private right of action to enforce the rights guaranteed in those state laws.¹⁷¹ Yet, and like the NLRB, those state boards' legal authority is backed by appeals to courts.¹⁷²

In some cases, the state boards hold notable roles concerning dispute resolution. In Hawaii, the labor board can ask the governor to assign a conciliator to work with the parties involved in a labor dispute.¹⁷³ In Minnesota, such mediation is done in cases of labor disputes that “endanger the life, safety, health, or well-being of a substantial number of people of any community.”¹⁷⁴ In Wisconsin, the labor agency can be used voluntarily as the arbitrator.¹⁷⁵

In the case of agricultural workers' bargaining impasse, the New York Board may even impose an arbitrated solution.¹⁷⁶ A similar option of mandatory arbitration that the state board ordered applies to health-

167. N.Y. LAB. LAW § 701(9) (Consol. 2026); *Hogan v. 50 Sutton Place S. Owners, Inc.*, 919 F. Supp. 738, 744 (S.D.N.Y. 1996) (recognizing the state board, not courts, as holding jurisdiction over violations of the state labor law); CONN. GEN. STAT. § 31-102 (2025); HAW. REV. STAT. § 377-2 (2025); MASS. GEN. LAWS ch. 150A, § 6 (2026); MICH. COMP. LAWS § 423.3 (2026); N.J. STAT. ANN. § 34:13A-4 (West. 2025); 43 PA. STAT. AND CONS. STAT. ANN. § 211.4 (West 2026); 28 R.I. GEN. LAWS § 28-7-4 (2026); W. VA. CODE § 21-1A-6 (2026); WIS. STAT. § 111.07 (2023–24). On May 1, 2024, Utah repealed its labor board as part of an overhaul in state agencies. *See* H.B. 534, 65th Leg., 2024 Gen. Sess. (Utah 2024), 2024 Utah Laws 507.

168. COLO. REV. STAT. § 8-3-105 (2025).

169. *Id.* § 8-3-115.

170. N.Y. LAB. LAW § 702-a(2) (Consol. 2026) (“The board shall have the power at the request of the parties to a collective bargaining agreement between an employer and its employees to arbitrate such grievances and differences as may arise thereunder and to establish panels of qualified persons to be available to serve as arbitrators of such grievances and differences.”); COLO. REV. STAT. § 8-3-112 (2025).

171. COLO. REV. STAT. § 8-3-110(1) (2025).

172. CONN. GEN. STAT. § 31-109 (2025); N.Y. LAB. LAW § 707 (Consol. 2026).

173. HAW. REV. STAT. § 377-3 (2025).

174. MINN. STAT. § 179.07 (2025); *see also* MINN. STAT. § 179.08 (2025) (setting a special procedure for those cases).

175. WIS. STAT. § 111.10 (2023–24).

176. N.Y. LAB. LAW § 702-b (Consol. 2026).

care-related facilities in Connecticut.¹⁷⁷ In Hawaii, an impasse on a first contract can lead to a scheduled dispute resolution process ending with binding arbitration regarding the substance of the first contract.¹⁷⁸

* * *

Current state legislation offers a labor rights' benchmark in lieu of federal retreat. It is better than nothing but not an absolute substantive good. The Wagner model has distinct drawbacks: the reliance on state enforcement capacity, the focus on the firm-based bargaining unit (and not broader sectoral, or now-value-chain models), the reliance on majority vote and exclusive representation, and the suspicion of management-labor cooperation.

Instead, states can establish and protect a robust right to strike and other concerted activities like seat-down strikes, slow-downs, and the right to engage in concerted legal claim-making. States can also expand bargaining units and subjects like wages or safety from firm-based to sectoral or value-chain-based, bringing a whole host of stakeholders to the table—including creating common-good bargaining mandates. States can criminalize certain employers' unfair labor practices and create a private rights of action (with treble damages), perhaps insisting on jury trials for other specific harms.

Pushing hard on the substance of state labor laws and aggressively pursuing employers can work to first manifest workers' rights and can even work for mere strategic purposes—placing a high price tag on tearing down the NLRA.

III. WORKING AGAINST A “NO-MAN’S-LAND” PREEMPTION

For years, the NLRA and the NLRB have been attacked from the outside with constitutional arguments and from within administrative and congressional limitations.¹⁷⁹ As those attacks kill the ancient regime, NLRA preemption prevents local initiatives from being born. Employers' strategy of destroying the NLRA with the one hand, while using its preemption regime to suffocate local regulations with the other hand, is explicit and effective.¹⁸⁰

177. CONN. GEN. STAT. § 31-111b(c)–(d) (2025).

178. HAW. REV. STAT. § 377-4.7 (2025).

179. Utilizing congressional and administrative obstacles to hinder the Act are not new strategies and have been deployed from day one of the enactment of the NLRA. *See generally* JAMES A. GROSS, *THE MAKING OF THE NATIONAL RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* (1974) (describing how personnel, budgeting, and other “administrative” levers were used to control the NLRB).

180. Andrias, *supra* note 2, at 1015, 1043.

So far, courts welcome those double-sided attacks. They should not. In a series of recent litigation outcomes, courts blocked states' attempts to enforce workers' state labor rights while the NLRB was dysfunctional.¹⁸¹ Those decisions relied on the premise that Congress intended that a dysfunctional NLRB will leave workers in a no-man's-land where no federal or state labor remedy can be found.¹⁸² This premise is false: The preemption doctrine was never constructed by Congress (if statutorily designed at all) to leave workers and states helpless for as long as the president wills them to be helpless.

In this Part, I review three possible claims and strategies that can aid workers' advocates to shift the jurisdictional arena of labor contestation. My goal in making these suggestions is not to exhaust all possible alternatives but to inspire workers' advocates to push the envelope of what can be imagined and what can be done to poke holes in the default rule of federal preemption.

Underlying these proposals and strategies is a common thread anchored in board, court, and congressional orders prohibiting the use of preemption claims for the creation of regulatory no-man's-lands¹⁸³—areas of the labor market that Congress was set on regulating but that federal law would not reach and that states are prohibited from touching.

The Board, courts, and scholars identified this guiding principle with the addition of section 14(c) to the Act in 1959. Section 14(c) sorts jurisdictional disputes between federal and state law, recognizing that ambiguity about coverage exists and solving it by preferring coverage. Section 14(c)(2) of the Act states:

Nothing in this [Act] shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.¹⁸⁴

181. *Amazon.com Servs. LLC v. N.Y. State Pub. Emp. Rels. Bd.*, No. 25-CV-5311, 2025 WL 3295071, at *6 (E.D.N.Y. Nov. 26, 2025) (preliminary injunction order); *NLRB v. State*, No. 25-cv-02979, slip op. at 18 (E.D. Cal. Dec. 26, 2025).

182. *NLRB v. California*, slip op. at 13 (“The quorum requirement, and its consequences, is by design. In some respect, the Board’s inability to fully function due to the lack of quorum shows the NLRA is operating as intended.”).

183. The term was used by legislatures from the 1959 House and Congress to describe their agreement on the language of section 14(c)(2), clarifying that when the Board declines jurisdiction over an employer or a group thereof, states have authority to regulate. *See, e.g., Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328, 1341 (11th Cir. 1986) (citing the document); *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1258 (9th Cir. 1984) (Choy, J., dissenting) (same).

184. 29 U.S.C. § 164(c)(2).

With the addition of section 14(c), Congress directly resolved some aspects of labor law jurisdictional ambiguity by way of preferring some coverage, even state coverage, over non-coverage.¹⁸⁵

Such a principle can be found in the Board's reading of section 14(c) of the Act, which was expressed multiple times in cases whereby a different agency or state might decline to assert jurisdiction over a contested group of workers.¹⁸⁶ Other than section 14(c) itself, the drafters of the 14(c) clause cited the Equal Protection Clause as a source against leaving workers with no remedy, and the Board itself mentioned international obligations of freedom of association.¹⁸⁷ We can see current iterations of that principle pushing back against employers' arguments suggesting that without an NLRB quorum, no labor law ought to apply to their organizing workers.¹⁸⁸ Such attempts by employers and their proxies at using one hand to destroy the federal authority while with the other hand prohibiting states and localities from regulating ought to be rejected.

A. Preemption Depends on Federal Capacity to Enforce the NLRA

The cautionary no-man's-land principle suggests that without the capacity to enforce federal labor law, federal preemption arguments are weakened. States cannot compete with the federal government in regulating private sector labor relations,¹⁸⁹ but without federal capacity, no such competition exists. Put differently, not recognizing states' right to step into a regulatory realm that the federal government effectively has withdrawn from, despite clear congressional authorization, is to place workers in a regulatory no-man's-land.¹⁹⁰ Refusal to step in in lieu of the defunct NLRA would undermine states' own statutory and constitutional

185. TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 206 (2009).

186. *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56, 60 (4th Cir. 1997) (recognizing such argument as a valid Board consideration); *Oxford Elecs., Inc.*, 369 NLRB No. 6, slip op. at 13 (Jan. 6, 2020) (refusing to decline jurisdiction where the National Mediation Board under the Railway Labor Act would not assert jurisdiction); *Pa. Virtual Charter Sch.*, 364 NLRB 1118, 1129 (2016) (Member Miscimarra, dissenting and mentioning the lack of both state and federal jurisdiction as a significant consideration in Board decision-making); *Airway Cleaners LLC*, 363 NLRB 1575, 1576 n.4 (2016) (describing the congressional background of section 14(c)). See generally *Howard Univ.*, 224 NLRB 385 (1976) (describing jurisdiction shedding under section 14(c)).

187. *Firstline Transp. Sec., Inc.*, 344 NLRB 1007, 1008 (2005).

188. Matt Bruenig, *03/13/2025: Regional Director Rejects Argument About Lack of Quorum*, NLRB EDGE (Mar. 13, 2025), <https://www.nlrbedge.com/p/03132025-regional-director-rejects> [<https://perma.cc/APC4-TNBB>].

189. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 620–21 (1986) (Rehnquist, J., dissenting) (identifying preemption logic as excluding competing or duplicative processes).

190. *Howard Univ.*, 224 NLRB at 386 n.9.

commitments to collective bargaining as a tool for labor peace and for the equality of bargaining power.

As part of the blitz of terminations and chaotic reorganization of the second Trump presidency, a novel situation was created in federal labor law. The NLRB, the only federal forum in the country with direct authority to regulate general private sector labor relations, was left without a legal quorum. As President Trump terminated the democratically appointed board member, the Board was left without the three-member minimum quorum that the law requires, thus leaving the Board, for the first time, nearly without legal authority.¹⁹¹

According to Professor Benjamin Sachs of Harvard, when the NLRB lacks a quorum, it cannot protect or prohibit any conduct and, therefore, states are free to regulate such actions as they please until the Board once again has a quorum.¹⁹² The rationale is that without a functioning board, no concerns of collisions and contested regulations of private sector labor law can exist, thus removing the animating principle behind federal preemption. Some state labor boards and legislatures have begun recognizing such authorities.¹⁹³

“[F]ederal authority is solitary and exclusive in situations where both state and federal laws forbid certain conduct and provide machinery for enforcement”¹⁹⁴ As federal labor law is left with no formal regulatory powers, Congress did not intend to leave all private sector labor law with no remedy. State advocates can now use that gap.

Additionally, chaotic reorganization and administrative mess can make the Board effectively dysfunctional. The rationale of federal preemption is to prevent competition between two regulatory systems while not excluding groups of workers or actions that Congress did not intend to leave outside of labor regulations. Significant and pervasive dysfunction in Board operations ought to weigh against preempting state coverage of workers or actions which would be regulated during normal operations.

Take the case of the closing down of board regional offices. Recently, and as part of the chaos and uncertainty in the federal workforce, it was rumored that the Department of Government

191. Matt Bruenig, *How the NLRB Works Without a Quorum*, NLRB EDGE (Jan. 29, 2025), <https://www.nlrbedge.com/p/how-the-nlrb-works-without-a-quorum> [<https://perma.cc/U2C5-LWHU>].

192. Benjamin Sachs, *Did Trump Just Suspend Garmon Preemption?*, ONLABOR (Jan. 31, 2025), <https://onlabor.org/did-trump-just-suspend-garmon-preemption> [<https://perma.cc/9D7K-7STE>].

193. For legislatures, see Section III.C. For state labor boards, see *Siena Farms*, No. WMAP-23-10280, at 2 (Mass. Dep’t of Lab. Rels. May 19, 2025) (ruling on motion by e-mail) (on file with author).

194. *Bldg. Constr. Trades Council v. Am. Builders, Inc.*, 337 P.2d 953, 958 (1959).

Efficiency (DOGE) was in the midst of shutting down the physical office building of the Buffalo and Milwaukee regional offices of the NLRB.¹⁹⁵ Board regions are in charge of receiving, investigating, and administering procedures emanating from the NLRA; most common are representation elections and unfair labor practices.¹⁹⁶ Board regions are assigned to a specific geographic region, whose borders are determined using the traditional notice and comment administrative procedure.¹⁹⁷

Regional offices' borders can and have been changed. However, such border and office changes were reasoned by an appeal to board functions, done with a procedure that addresses the need to be locally responsive to workers' and public representatives' comments while considering how the change would impact on the effectiveness of enforcement of the NLRA in a particular region. In the first case described that follows, an intervention by board members was also noted.

In December of 2004, the NLRB decided to shift the status of the agency's Milwaukee office from a regional office to a subregion of the Minneapolis Regional Office and to transfer supervision of the Des Moines Resident Office from the Minneapolis Regional Office to the Kansas City Regional Office.¹⁹⁸ According to the Board, these changes were prompted by a decline in unfair labor practice and representation case filings in the Minneapolis and Milwaukee offices and a desire to equalize caseload and case management responsibilities in the three contiguous NLRB regions.¹⁹⁹ Twenty-four comments were received by the Board critiquing the merger of the Minneapolis and Milwaukee offices, suggesting that the move was only being made because the Milwaukee regional office was vacant and that the merger would impede Wisconsinites' access to the regional office head.²⁰⁰

195. National Labor Relations Board Union (@TheNLRBU), X, *Yesterday, the NLRB's Buffalo office (Region 3) received word from its landlord that GSA—acting on behalf of DOGE—had unilaterally cancelled the Region's five-year lease, without any prior notice to the Agency. The Region has been given 90 days to vacate the building.* (Feb. 20, 2025, at 11:50 CT), <https://x.com/TheNLRBU/status/1892633027882225893> [<https://perma.cc/8TPD-34XW>]; National Labor Relations Board Union (@TheNLRBU), X, *Yesterday, the NLRBU learned that DOGE has unilaterally cancelled the Milwaukee office's lease a year early, without notice. The lease will now expire in August 2025. DOGE has not provided the NLRB with any alternative for Milwaukee agents to perform their work.* (Mar. 19, 2025, at 04:51 CT), <https://x.com/TheNLRBU/status/1902477946327101862> [<https://perma.cc/65SJ-8VVA>].

196. *National Labor Relations Act*, NLRB, <https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act> [<https://perma.cc/A7Z8-B6F4>] (last visited Mar. 4, 2026).

197. 29 U.S.C. § 156.

198. Merger of Regional Offices Notice, 69 Fed. Reg. 74541 (Dec. 14, 2004).

199. *Id.*

200. *Id.*

Two board members ultimately dissented from the decision to merge the Milwaukee office into the Minneapolis region, but the three-member majority prevailed, leading the Milwaukee region to become a subregion headed by an officer-in-charge subordinate to the Minneapolis region.²⁰¹

In January 2018, the NLRB announced that it had closed its Anchorage office because serving the area with only resident agents would result in significant cost savings.²⁰² The NLRB stated that the change was “prompted by an examination of the staffing, caseloads, and rental and operating costs for the Anchorage office.”²⁰³ The Board expected no adverse effect on the quality of case handling due to the office closure.²⁰⁴

Such routine changes via a multi-stakeholder process for allocating and reallocating board regions and offices indicate regions’ significance in regulating labor relations. The *Machinists* preemption principle states that workers and actions Congress did not intend to be up for the “free play of economic forces” and that are unregulated by the Board are up for grabs by state law.²⁰⁵ In making the Board effectively dysfunctional by avoiding such procedures, the administration risks committing a legal foul on administrative law grounds and undermines preemption arguments of workers affected by those changes.

As the Board along with many parts of the federal government are being effectively hollowed out from the inside, workers have a claim against being sucked into a legal no-man’s-land with no effective labor rights and no state power to regulate labor relations.

B. “Catch-22” Preemption Arguments

An employer arguing that the state should regulate conduct arguably protected or prohibited under the *Garmon* preemption must “put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.”²⁰⁶ This means that an employer resisting a state labor board’s authority with *Garmon* preemption arguments must present “enough evidence” for the Board to decide that the NLRA and the Board itself have the authority to regulate their labor relations disputes and their employees’ claims. Presenting

201. *Id.*

202. Amendment of Statement of Organization and Functions; Restructuring of National Labor Relations Board’s Field Organization Notice, 83 Fed. Reg. 4519 (Jan. 31, 2018).

203. *Id.*

204. *Id.*

205. *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 141 (1976).

206. *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 395 (1986).

such evidence entails recognizing the constitutional authority of the Board and the coverage of the NLRA over their labor disputes.

In other words, employers cannot claim NLRA preemption while simultaneously arguing the NLRA lacks authority over their operations. For example, employers rushed to argue that a lack of quorum at the Board means their workers no longer can exercise their NLRA rights to choose an exclusive representative.²⁰⁷ According to some employers, after President Trump terminated the Board's third member,

[t]he operation of the entire representation proceeding apparatus of the NLRB is rendered an unlawful *ultra vires* exercise of executive authority and substantial and important executive powers in the absence of an NLRB Member quorum. The Regional Director may not lawfully exercise any of the substantial and important executive powers granted by Congress to the Board's Members The NLRB lacks the statutory authority to resolve representation issues considering the defunct status of the two-member Board.²⁰⁸

Such employers' attacks on the Board offer yet another opportunity for workers to empower state labor laws. This strategy makes employers choose whether to recognize their workers as employees covered by the legitimate authority of the NLRA or consent to state regulations of their workers. I call this strategy the catch-22 preemption argument.²⁰⁹

This argument contains two variants. NLRA preemption is not available or, at least, significantly weakened for (1) employers arguing that their employees are not covered employees under section 2(a) of the NLRA, and (2), employers arguing that the authorities of the Board, or the NLRA as a whole, are unconstitutional. In both cases, employers' claims against their workers can be used against the employers in the sense that by not recognizing the NLRA control, employers waive their claim for NLRA preemption.

Those catch-22 arguments are modeled on one aspect from litigation of a local labor relations ordinance in Seattle aiming to cover Uber drivers, who as independent contractors are excluded from the NLRA. In attacking the initiative, one claim by the Chamber of Commerce was that the ordinance was preempted by the NLRA because Uber drivers

207. Robert Iafolla, *Companies Dispute NLRB Officials' Power When Board Lacks Quorum*, BLOOMBERG L. (June 17, 2025, at 04:10 CT), <https://news.bloomberglaw.com/daily-labor-report/companies-dispute-nlr-Officials-power-when-board-lacks-quorum>.

208. *See Transdev Servs., Inc.*, No. 01-RC-358638 (Decision and Direction of Election May 16, 2025), <https://www.nlr.gov/case/01-RC-358638> (on file with the Wisconsin Law Review).

209. I thank Ben Sachs for coining this term.

were “arguably” covered by NLRA.²¹⁰ However, Uber and its proxy refused to fully endorse that claim because it would concede that their drivers are arguably employees under the NLRA, a claim their adversaries have been pushing against Uber’s business for years.²¹¹ Thus, Uber and the Chambers of Commerce faced a catch-22—by arguing that the drivers are covered by the NLRA, Uber was exposed to NLRA-based petitions and claims.

Such a claim used in the defense of innovative local and state labor law in Seattle can be extrapolated and used against employers that deny the authority of the NLRA over their workers. A successful use of this argument can also serve as a standing risk for employers aiming to dismantle federal institutions. Employers can recognize the authority of federal labor institutions or, alternatively, accept state sovereignty over labor relations.

1. Employers Who Claim Exclusion from the NLRA: The Example of College Athletes

One common strategy that employers use to flout the law is misclassification. The struggles over employee classification have been a “forever war” because employee status holds the key to unlocking all of work law’s protections.²¹² Thus, employers classify their workers as independent contractors, partners, or, most recently, student athletes.

The issue of student athletes’ unionization is complex and involves multiple social and political questions. A new frontier in this debate has recently arisen as student athletes have begun organizing and submitting petitions to the NLRB. In their struggle against student unionization, universities have argued that their students are not covered under section 2(3) of the NLRA. Although the NLRB has not given a final say (nor can it), the employers’ own arguments empower state labor boards to decide the matter of classification, and if those boards decide student athletes are covered workers, these athletes would have access to the whole host of rights and processes under state labor law.

Take Dartmouth, for example. In a proceeding regarding the status of its student athletes, Dartmouth argued that “Student-Athletes are not ‘employees’ under Section 2(3) of the Act and that the Board should

210. *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 795 (9th Cir. 2018).

211. Racabi, *Effects of City-State Relations on Labor Relations*, *supra* note 94, at 1168; see also John Fry, *A Pathway Toward Union Density in the Cannabis Industry*, ONLABOR (Mar. 18, 2025), <https://onlabor.org/a-pathway-toward-union-density-in-the-cannabis-industry> [<https://perma.cc/EW3C-EWGG>] (identifying state-federal labor jurisdiction challenge in the cannabis sector).

212. Racabi, *Effects of City-State Relations on Labor Relations*, *supra* note 94, at 1158; Zhang, *supra* note 66, at 5.

decline to assert jurisdiction over Dartmouth's Student-Athletes."²¹³ Such explicit claims of exclusion of its athletes from the scope of the NLRA are shared by multiple universities, including Brown University, Columbia University, Cornell University, Harvard University, the University of Pennsylvania, Princeton University, and Yale University,²¹⁴ along with the National Collegiate Athletic Association (NCAA), representing "over 1,100 colleges, universities, and athletic conferences."²¹⁵

All of those colleges and universities argue that their student athletes are excluded from the NLRA. However, by arguing that those higher-education institutions implicitly waive *Garmon* preemption claims against the application of existing state labor laws and against new catchall or sectorial ones and by arguing against the application of the unified federal labor regime, those institutions are arguing for state-by-state regulations of their labor relations. Worker advocates should press those who seek to dismantle federal labor relations by using state laws to organize, bargain collectively, strike, and win collective bargaining agreements outside of the NLRA.

2. Employers Arguing the NLRA Is Unconstitutional Cannot Enjoy NLRA Preemption

The Board and the NLRA on which it is based are undergoing a series of foundational constitutional attacks.²¹⁶ Those attacks are devastating the foundations of NLRB actions. As a result, employers are creating opportunities for state involvement. This has two variants, namely, a geographical one and an individualized one.

Geographically, employers operating in circuits more conducive to employers' injunctions against the Board on constitutional grounds are more susceptible to state regulation. Without an effective board remedy, state remedies ought to be readily available. The alternative, which has its advantages for workers, is effectively halting all work regulations until the constitutional challenges are sorted out, which can take years. Additionally, as employers use constitutional attacks against the Board, these same employers become vulnerable to state intervention. In other

213. Trustees of Dartmouth College's Motion to Reopen the Record at 3, *Trs. of Dartmouth Coll.*, 373 NLRB 24 (2024).

214. Amicus Curiae Brief of the Ivy League in Support of the Trustees of Dartmouth College at 9, *Trs. of Dartmouth Coll.*, 373 NLRB 24 (2024).

215. Brief of Amicus Curiae National Collegiate Athletic Association in Support of the Trustees of Dartmouth College at 1, *Trs. of Dartmouth Coll.*, 373 NLRB 24 (2024).

216. Velazquez, *supra* note 31, at 198 (reviewing and assessing those challenges).

words, employers claiming the NLRA has no constitutionally valid authority over their business cannot claim NLRA preemption.

Take the example of the Audubon Society. In pushing back against its organizing employees, the Audubon Society argued that the NLRB's enforcement of the NLRA on its organization is unconstitutional because of nondelegation claims, lack of a jury trial in the NLRA procedures, violations of First Amendment free speech rights, and more.²¹⁷ Having claimed that the NLRA's allocation of power and the NLRB application of power on its actions is unconstitutional, the Audubon Society would be hard-pressed to argue that the application of state law on its actions is preempted because of the NLRA.

As constitutional arguments against Board and Board doctrines spread, preemption arguments are weakened. This is true for Amazon,²¹⁸ Starbucks,²¹⁹ Macy's,²²⁰ SpaceX,²²¹ and, of course, the American Civil Liberties Union.²²²

Dismantling the constitutional structure to shake down your workers should come with a high price tag; being left without preemption arguments that use the same legal regime you attempt to dismantle is a basic consequence of those legal actions. But, some courts chose otherwise. In a litigation about New York's novel state authority statute brought about by Amazon, judges have ignored Amazon's claims about the unconstitutionality of the Act, allowing it to enjoy its preemptive cover because of the separate nature of unconstitutionality and preemption claims.²²³

217. Matt Bruenig, *Audubon Society Argues NLRB Is Unconstitutional*, NLRB EDGE (Sep. 24, 2024), <https://www.nlrbedge.com/p/audubon-society-argues-nlr-is-unconstitutional> [https://perma.cc/N67G-NQD4].

218. John Fry, *Tracking Attacks on the NLRB: Fifth Circuit Continues to Stand Alone*, ONLABOR (Oct. 7, 2024), <https://onlabor.org/tracking-attacks-on-the-nlr-fifth-circuit-continues-to-stand-alone> [https://perma.cc/9JEJ-9TGJ].

219. *See generally NLRB v. Starbucks Corp.*, 159 F.4th 455 (6th Cir. 2025) (describing Starbucks' constitutional arguments against some of the Board's remedies); *NLRB v. Starbucks Corp.*, 125 F.4th 78 (3d Cir. 2024) (same).

220. John Fry, *Tracking Attacks on the NLRB: Mixed Result in DC, Agency Wins Elsewhere*, ONLABOR (Jan. 24, 2025) [hereinafter Fry, *Mixed Result in DC*], <https://onlabor.org/tracking-attacks-on-the-nlr-mixed-result-in-dc-agency-wins-elsewhere> [https://perma.cc/9QGH-E4XQ].

221. John Fry, *Tracking Attacks on the NLRB: Texas Judge Endorses Constitutional Challenge*, ONLABOR (July 25, 2024), <https://onlabor.org/tracking-attacks-on-the-nlr-texas-judge-endorses-constitutional-challenge/> [https://perma.cc/QBV7-F267].

222. Matt Bruenig, *The ACLU Is Trying to Destroy the Biden NLRB*, NLRB EDGE (Mar. 8, 2024), <https://www.nlrbedge.com/p/the-acu-is-trying-to-destroy-the> [https://perma.cc/UT6N-DGA3].

223. *See generally Amazon.com Servs. LLC v. NY State Pub. Emp. Rels. Bd.*, No. 25-cv-05311 (E.D.N.Y. Nov. 26, 2025) (ordering a preliminary injunction).

Treating preemptions and constitutionality claims separately allows the biggest corporations of the world multiple bites of the union-busting apple: first by evading national labor law with constitutionality arguments, and second by evading local regulations with preemption ones. For Amazon, it is a clear example of a plaintiff gaming the court for leverage by providing legally inconsistent claims, albeit in different forums; for the court, it is a clear example of catering to the strongest corporations in the world.

C. New State Laws—Innovations, Triggers, and Challenges

Responding to a quickly deteriorating state of federal labor law, states are not standing idle. Labor and progressive policy advocates are organizing to fund and expand the capacities of state labor boards.²²⁴ Advocates also push to create trigger language expanding state labor protection to workers that the NLRA covers.²²⁵ This state-level policy entrepreneurship and innovation sits comfortably at labor advocates' strong suits, promoting workplace protection policies in blue states, a political landscape that labor advocates have been successfully building during the past three decades.²²⁶ Novel state labor laws are contested, and as of the writing of this Article, temporary injunctions have been issued against the operations of the New York and California laws.²²⁷

Of those, California Assembly Bill 288, which extends the authority of California's public sector labor relations board to private sector workers given some triggering conditions;²²⁸ New York Bill Senate Bill 7992, inserting explicit coverage of the empire-state labor code to labor

224. See generally Karla Walter & David Madland, *State and Local Policymakers Can Raise Standards and Build Power for Workers*, CAP (Dec. 10, 2025), <https://www.americanprogress.org/article/state-and-local-policymakers-can-raise-standards-and-build-power-for-workers/> (describing how labor advocates mobilize in states and localities).

225. JENNIFER SHERER, *HOLDING THE LINE: RIGHTS TO UNIONIZE AND COLLECTIVELY BARGAIN* 11–12 (2026), <https://www.epi.org/publication/rights-to-unionize-and-collectively-bargain-state-solutions-to-the-u-s-worker-rights-crisis/> [<https://perma.cc/J5N2-VEF4>].

226. See generally Galvin, *supra* note 35 (giving many examples of state-based work law legislation); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016) (providing examples of state-based social-movement-style labor organizing); Janice Fine & Michael Piore, *Introduction to a Special Issue on the New Labor Federalism*, 74 ILR REV. 1085 (2021) (describing the changing landscape of state-based labor action and reaction).

227. For examples of temporary injunctions being granted, see generally *Amazon.com Servs. LLC v. N.Y. State Pub. Emp. Rels. Bd.*, No. 25-cv-05311 (E.D.N.Y. Nov. 26, 2025) (order granting preliminary injunction); *NLRB v. California*, 25-cv-02979 (E.D. Cal. Dec. 26, 2025) (order granting injunction in part).

228. *NLRB v. California*, 25-cv-02979 (E.D. Cal. 2025) (order granting injunction in part).

cases the Board previously covered;²²⁹ and Massachusetts Senate Bill 1327, explicitly expanding the scope of the state's current private sector labor relations board authorities.²³⁰ The strategic change of labor-policy advocates from setting individual employment rights and standards to state labor law is not obvious, and the field is quickly evolving as advocates navigate the risks and benefits of acting at the state level.

When modifying their state labor laws, states can rely on their own policy proclamations recognizing the freedom of workers to unionize and collectively bargain. In a recent California bill, the drafters placed such recognized state public policy, as well as the First Amendment and a recognition of the state's authority over the population's safety and health, in the bill's preamble.²³¹

Substantively, labor advocates seem to stay within the Wagner model type of labor relations, focusing on firm, majority-based, exclusive bargaining models. Contemporary state law and its reformists skew discussions about substantive overhauls of the U.S. labor model for a more centralized sectoral model or for court-based private-rights-of-action models.²³² Sticking with the known models of doing labor law is not in fact a legal dictate and reflects, perhaps, a preference by labor advocates and policy entrepreneurs for the known unknowns of the model they became used to with the NLRA. Such stickiness of the NLRA model was also reflected in the structure and substance of existing state private sector labor laws, again without a mandating legal source. Although some improvements on the NLRA model can be found, they are relatively minor ones on the broadly canonical existing labor relations model.

One significant deviation might exist in the cases of specific hard-to-organize sectors. For example, Massachusetts recently amended its labor relations state law providing for a laxer model of representation and bargaining for platform drivers.²³³ New York also recently adopted a provision with specific organizing and bargaining regulations for farmworkers.²³⁴ Both platform drivers and farmworkers have been largely excluded from traditional labor laws but are also notoriously difficult to organize using the regular NLRA model. Those departures from the model, already in place in some states, could serve as a

229. *Amazon.com Servs. LLC v. N.Y. State Pub. Emp. Rel. Bd.*, No. 25-cv-05311 (E.D.N.Y. Nov. 26, 2025) (order granting preliminary injunction).

230. S.B. 1327, 194 Gen. Ct. (Mass. 2025).

231. A.B. 288, 2025 Assemb., Reg. Sess. (Cal. 2025).

232. See *generally* Block & Sachs, *supra* note 14 (arguing for both of these positions).

233. MASS. GEN. LAWS ch. 150F, § 1 (2026).

234. Farm Laborers Fair Labor Practices Act, A.B. 8419, 2019–20 Assemb., Reg. Sess. (N.Y. 2019).

paradigm for future adaptation and flexibility to move away from the Wagner model where it now fails.

In terms of coverage, some of those state laws explicitly exclude workers and employers that the NLRA covers;²³⁵ others are silent on the question. State policy advocates are striving to address the jurisdictional ambiguity that the federal collapse has caused, explicitly naming the conditions under which state authority over private sector labor relations will be recognized.

Trigger mechanisms and language differ. Trigger language is an explicit statutory language designed to activate a statutory provision upon a certain event.²³⁶ Such provisions were a common legal tactic deployed by conservatives in red states in anticipation of the Supreme Court's overturning of *Roe v. Wade*.²³⁷ In those cases, what was triggered were statutory provisions establishing abortion mandates prohibited by (then) Supreme Court doctrine.²³⁸ In regard to triggers, I found three existing types: court-dependent, board-dependent, and state-dependent.

In court-dependent triggers, the triggering event is a court decision about the NLRA. These include, for example, a declaration that the NLRA is unconstitutional, or a reversal of *Garmon* or *Machinist* preemption, or a judicial finding that an exception to the preemption rule applies. For example, the California bill recognizes a covered worker who is “subject to the National Labor Relations Act . . . [and who] . . . lose[s] coverage under the National Labor Relations Act because the National Labor Relations Act is repealed [or] narrowed”²³⁹

In the Massachusetts bill, the language speaks explicitly about the preemption doctrine, declaring that

should Federal law cease to preempt the regulation of private sector labor-management relations in the Commonwealth, as a whole or any portion thereof, with regard to any employer, employees [or workers], trade or industry, [the state's private sector labor law] shall hereby apply in full force and effect.²⁴⁰

235. See *supra* Section II.C.

236. Megan Thorsfeldt & Gali Racabi, *What Are Trigger Laws?*, ILR CAROW (Mar. 12, 2025), <https://www.ilr.cornell.edu/carow/carow-policy/what-are-trigger-laws> [<https://perma.cc/3PSU-8N4J>].

237. See, e.g., S.B. 1385, 65th Leg., 2d Reg. Sess. (Id. 2020).

238. Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html>.

239. A.B. 288, 2025–26 Assemb., Reg. Sess. (Cal. 2025).

240. S.B. 1327, 194th Gen. Ct. (Mass. 2025).

And in section 16 of the bill, the Massachusetts drafters order that

in the event that the Commonwealth is no longer preempted from regulating the labor-management relations of any private sector employer, bargaining unit, industry or trade operating in the Commonwealth under Federal law, [the state's private sector labor law] shall apply upon the effective date of this legislation or the date NLRA preemption no longer applies, whichever is later. The Department shall, upon application, promptly certify the exclusive bargaining representative of any bargaining unit who previously certified the unit with the National Labor Relations Board and whose certification remained in effect until federal preemption was no longer effective.²⁴¹

In board-dependent triggers, the triggering event is a board decision (or inaction). California's A.B. 288 outlines a timetable of petitions and corresponding board actions that after a specific timeframe passes, in A.B. 288 six months of board inaction,²⁴² the state board then has authority over the case. Such an approach was also used recently by the Massachusetts board in the face of lacking a final decision about authority from the invalid no-quorum board.²⁴³ In those cases, the Board can pick authority back up either by explicitly recognizing or denouncing state authority or by sticking to the set timelines the state law outlines.

In region-dependent triggers, the triggering event is the passing of private sector labor law in a specific number of states. For example, as Desirée LeClerc documents, states have been passing such laws in regard to multiple other policy arenas.²⁴⁴

Of note here is that in those board-dependent triggers is a subtle, yet important, legal distinction of defaults. Requiring a board action to deny state authority effectively flips the current default preemption rule of total-preemption-unless-excepted. Of further note is that the lack of explicit trigger language in contemporary state laws can indicate at least a semblance of recognition of joint authority over private sector labor relations, a starkly different legal perception of the legal landscape from the one commonplace today. Such small and novel challenges and approaches to federalized labor governance can signal a shift in federal governance of labor. Those can take a constructive or destructive turn.

241. *Id.*

242. A.B. 288, 2025–26 Assemb., Reg. Sess. (Cal. 2025).

243. *Siena Farms*, No. WMAP-23-10280, at 2 (Mass. Dep't of Lab. Rels. May 19, 2025) (ruling on motion by e-mail) (on file with author).

244. Desirée LeClerc, *Resisting Federal Preemption*, 77 ALA. L. REV. 209, 233–34 (2025).

In the next part, I survey two paths for progressive federalized labor law after the NLRA: regional labor regulations and a worker-oriented federal floor.

IV. LABOR FEDERALISM AFTER PREEMPTION—DEFAULTS, REGIONS, AND FLOORS

The federalized nature of labor relations created a semblance of uniformity in actual labor relations practices. But New Deal federal institutions never had a uniform effect across regions and demographics. Formally, the NLRA excluded significant portions of the labor market—agriculture, for example—in what is canonically recognized as a pro-South race-based exclusion.²⁴⁵ Regional distribution of the Board, as well as different circuit court interpretations of the Act, created a different institutional landscape for organizing.²⁴⁶ Informally, organizing in the South has proven a nearly insurmountable challenge for the U.S. labor movement.²⁴⁷ Weakening NLRA preemption will not solve the policy problems that Cox thought made preemption inevitable. But it will make those problems much more visible and politicized in a way that the NLRA and the Board have kept hidden.

The issues of coordinating state policies and labor markets in a way that would balance capital and labor interests and maintain industrial peace would not disappear. The differing geographic distribution of partisan preferences, approaches to unionization, and labor market makeups were not done away with in the current preemption regime and will not be gone after its dissipation. But small-scale forms of state cooperation and an emphasis on increasing access to collective bargaining can serve as the basis for a rebuilding of a hybrid state-federal framework of worker-oriented private sector labor federalism.

This challenge for labor scholars and activists challenge is, thus, while recognizing the weakening of the national framework, to work to identify paths of expanding collective solutions to collective problems. However, unlike Cox, contemporary solutions ought to be more

245. See generally IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013) (describing the formation of the New Deal coalition which facilitated race-based exclusions from early work law legislation). For some of the challenges to this exclusionary regime, see Racabi, *Excluded but Equal*, *supra* note 42, at 236–39.

246. See Fry, *Mixed Result in DC*, *supra* note 220.

247. Michael K. Honey, *Operation Dixie, the Red Scare, and the Defeat of Southern Labor Organizing*, in *AMERICAN LABOR AND THE COLD WAR: GRASSROOTS POLITICS AND POSTWAR POLITICAL CULTURE* 216, 220–25, 238–39 (Robert W. Cherny, William Issel & Kieran Walsh Taylor eds., 2004). But see Saurav Sarkar, *Starbucks Workers Take in the South*, *DISSENT MAG.* (Sep. 12, 2022), https://www.dissentmagazine.org/online_articles/starbucks-workers-take-on-the-south [<https://perma.cc/GHG3-LYSC>].

expansive than relying on the expertise of five rotating labor lawyers in D.C.²⁴⁸ This is the challenge of labor law in our time. Although complete drafting of a novel federal regime is beyond the scope of this Article,²⁴⁹ some lessons from existing and emerging state laws, as well as our current federal structure, can be drawn.

A. Flipping the Default—Toward a Bottom-up Labor Federalism

Contemporary NLRA preemption regime places the default governance authority with the Board and federal law.²⁵⁰ Exceptions to this preemption default exist, but they are narrow and present states and localities with an uphill battle. One component a future preemption hybrid regime can offer is flipping the default—placing default authority over private sector labor relations with a state board, with a specific list of exceptions. One example of such an approach is being used in New York, where there is a bill reforming the state’s labor code to cover private sector labor disputes unless the Board actively asserts jurisdiction over those disputes.²⁵¹ Here, a passive board will not enjoy default exclusive jurisdiction.

Once we loosen the inevitability of the preemption default, novel opportunities open up. In other areas of work law, federal law provides for an explicit floor. For example, the Fair Labor Standards Act sets the federal hourly minimum wage at \$7.25.²⁵² But as embarrassing as that might be or sound, states and localities can and often do set higher minimum wages—such is a floor preemption rule. But labor law offers a more complicated institutional arrangement than just a comparable number. For example, how can you set a floor with an institution that includes both union and employer rights? How can you create a floor if some rights, remedies, or procedures are adjudicated differently, say by agency, administrative law judges, or courts? A Cox approach would be to, perhaps, try to evaluate those through expert agencies.²⁵³ Instead, I would offer the structure of default rules and exceptions.

Some proposal for a federal floor did emerge. For example, one can isolate those rights that are protected by the NLRA and prohibit infringing on those and those alone.²⁵⁴ Professor Cindy Estlund suggests distinguishing between core rights—such as the right to organize—which

248. For a different view, see Jacob & Lofaso, *supra* note 57, at 83.

249. See, e.g., Block & Sachs, *supra* note 14.

250. See *supra* Part I.

251. S.B. 7992, 2025–26 Reg. Sess. (N.Y. 2025).

252. 29 U.S.C. § 206.

253. See, e.g., N.Y. CIV. SERV. LAW § 212 (Consol. 2026) (creating a floor model for New York public sector labor law).

254. Gottesman, *supra* note 35, at 358–61.

cannot be infringed, and peripheral “tactics” of self-help that can be intervened by state law.²⁵⁵ However, relaxing the federal default can open up new alternatives.

For example, we can imagine a system where the default is that workers or their representatives choose a bargaining regime (for example, state, regional, or federal) unless agreed otherwise by employers and employees. Here, the floor element of the preemption regime would give preference not to a number but to a constituent—an agentic actor considered weaker and more vulnerable. This process will encourage direct coordination and agreement, mobilizing around institutional frames and bargaining initial recognition agreements. Those direct incentives to negotiate and agree early in the process of union formation—in the part of choosing the applicable law—run counter to the current incentive structure of litigation and reliance on external expert bodies for sources of empowerment.

A practical option to utilize this flip of authority can come from the Board itself. Section 14(c) of the Act allows the Board to explicitly displace authority over areas of regulated activity. This authority can be utilized to promote state capacity over labor relations. For example, the Board can condition the activation of 14(c) over a particular sector or over entire branches of an economy with the existence of a suitable labor relations framework.²⁵⁶ Such a Board can repurpose itself as the arena of novel social bargaining between states, employers, and employees, instead of a top-down labor law expert.

B. From States to Regions

Building on the benchmark authority of states to regulate labor relations, regional cooperation of states and between states can be pursued. A regional labor law can be a set of sister laws of similar substantive and procedural character providing comparable forms of access to unions and collective bargaining, along with substantive rights, for workers across multiple states in geographical proximity. Such rights and procedures can reduce capital flight concerns in state policy makers and assist in reducing a race to the bottom process.²⁵⁷ Such regional pacts can be accompanied by regional trigger laws, actualizing those laws only

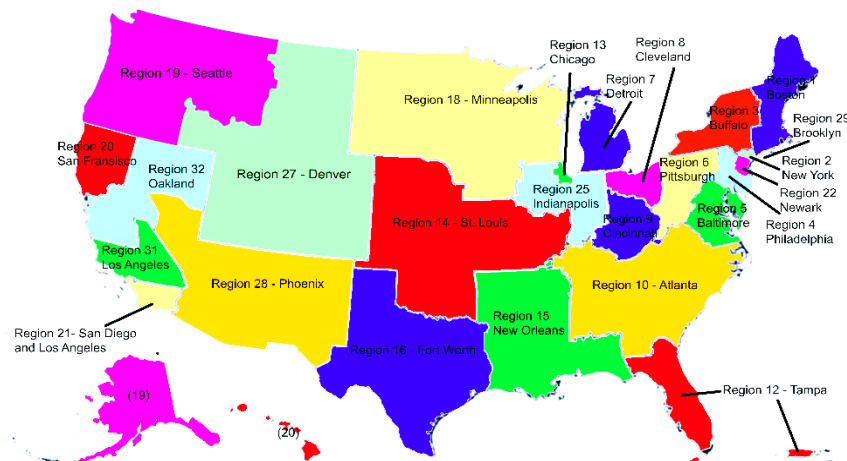
255. Estlund, *supra* note 13, at 1577–78.

256. Benjamin Sachs, *Unpreemption: The Nlrb’s Untapped Power to Authorize State Experimentation*, ONLABOR (Dec. 24, 2022), <https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation/> [https://perma.cc/VNZ5-CPQ2].

257. Racabi, *Abolish the Employer Prerogative*, *supra* note 28, at 116–19, 126–27.

if a certain number of states in a particular region have enacted such laws.

One possibility for a structured way of drafting such regional models could be predicated on recent voluntarist state cooperation formed under the duress of COVID-19. There, states formed regional regulatory pacts deciding core public health issues regarding regulation of their internal markets under the stress of the virus.²⁵⁸ Such regional cooperation can also be mapped on the borders of contemporary federal board regions, spread across the country in a (very) rough approximation of existing case numbers. Revamping federal regions as a way to build bottom-up federal policy is an under-explored governance method containing some underlying forgotten history.²⁵⁹



Map 2. Contemporary National Labor Relations Board Regions

Labor federalism can exist without an expert-outsider-jurist choosing bargaining regimes for workers and employers. Workers and employers themselves can in fact choose their own set of institutions. Bottom-up coordination can open up new venues of federalism in search of empowering collectives of workers seeking to solve their collective problems.

258. Anthony Flint, *The Coronavirus Pandemic Makes a Case for Megaregions*, BLOOMBERG (Apr. 22, 2020, at 14:23 CT), <https://www.bloomberg.com/news/articles/2020-04-22/covid-19-pandemic-makes-a-case-for-megaregions>.

259. See, e.g., Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1920–22 (2018) (uncovering the institutional history of federal regional governance and discussing its potential for future governance).

CONCLUSION

NLRA jurisdiction was never universal. Exclusions in the NLRA itself, notably agriculture, public sector and domestic work, created nearly by definition a plural legal landscape. NLRA coverage debates regarding independent contractors,²⁶⁰ quasi-public employers,²⁶¹ non-solely economic employers,²⁶² and more have pervaded U.S. labor law since its inception.²⁶³ To that was added the diminishing labor movement in the U.S. and its retraction from collective bargaining as its major distributive strategy. However, despite its exclusionary nature and multiple failure points, federal labor law remained at the labor movement institutional heart, and, for employers, a lightning rod.

NLRA failures create an opportunity for states to use existing private sector labor relations frameworks and for organizers and advocates to imagine, lobby, and implement new policies for workers' collective power and voice in the workplace.

Eighteen states currently have NLRA-like rights, procedures, and (in most) agencies. These laws are readily available for workers cast outside of the NLRA and for workers whose employers challenge the NLRA's availability and authority. Such challenges can produce distributive gains for workers on the ground and provide some counterbalance to employers' sense of cost-free attacks on federal institutional structures. Long term, pursuing state venues can help shake off the default federal regime for a state-based labor governance model.

Theoretically, this Article adds to two critical discussions in labor law. The first is about the detrimental effects of preemption on labor relations, and the other concerns labor relations while the NLRA's constitutionality is relitigated.

Arguably, the most important article written in labor law in the past thirty years is *The Ossification of American Labor Law* by New York University School of Law Professor Cindy Estlund.²⁶⁴ In the article, Estlund describes how the NLRA's preemption regime, among other restrictions, ossified the labor movement's policy initiatives and organizing strategies.²⁶⁵ Here, this Article adds to the discussion by demonstrating the complexities of the ossification thesis. States and localities had and still do have significant opportunities for innovation in regulating labor relations. However, such legal and institutional

260. Racabi, *Despite the Binary*, *supra* note 92, at 1180–84.

261. Kyle Bigley, *Between Public and Private: Care Workers, Fissuring, and Labor Law*, 132 YALE L.J. 250, 253–54 (2022).

262. Zhang, *supra* note 66 (manuscript at 32–35).

263. Racabi, *Excluded but Equal*, *supra* note 42, at 210–12.

264. Estlund, *supra* note 13, at 1527.

265. *Id.* at 1529–31.

flexibility did not translate, thus far, to significant organizing and policy strategy by the labor movement. It was not the law that ossified the labor movement local strategy.

This Article also contributes to another area of labor law theory, namely, the timely debate about labor relations in an age at which the institutional basis for labor relations is undermined, a process of deinstitutionalization.²⁶⁶ It is an area ripe with speculation, but one assertion employers effectively make is that by “relitigating the New Deal,”²⁶⁷ society and labor markets will somehow time-travel to the 1930s lack of institutional basis for workers’ power.²⁶⁸ However, before the federal New Deal, states began experimenting with workplace policy initiatives.²⁶⁹ This Article thus demonstrates that outside of the federal institutions for labor relations, states right now have on their books institutional frameworks that can augment and be relied on in lieu of the NLRA. Future challenges to state initiatives are to be expected.

Additionally, this Article identifies a crucial need to connect the weakening of the NLRA to a weakening of its preemption regime. This Article suggests doing that by finding arguments connecting actual capacity to enforce labor law to labor law’s preemption. States, policy makers, lawyers, and workers’ advocates ought to penalize employers’ arguments of excepting themselves from the baseline economic obligations of the NLRA by placing a price tag of state private sector labor law authority. Finally, the Article suggests that perhaps the best thing a future progressive Board can do is not creating doctrinal innovation, but instead relinquish authority over labor relations.

The only viable path towards institutional worker power and private sector labor governance passes through state law—this was the crucial, inevitable, lesson Cox missed. We should not repeat his mistake.

266. Racabi, *Despite the Binary*, *supra* note 92, at 1228–30.

267. Reddy, *supra* note 2, at 24–26.

268. Velazquez, *supra* note 31, at 186–87.

269. Racabi, *Excluded but Equal*, *supra* note 42, at 217–18 (surveying some of the equal protection challenges to those local laws).

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