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POLITICS, PREEMPTION, AND MINIMUM LABOR STANDARDS: THE UNION-LED EROSION OF THE NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

No one can accuse the Teamsters of lacking ambition. In 2021, the union announced plans to organize the world's then-largest employer, Amazon.[1] It said it would target Amazon's distribution centers, where thousands of potential members gathered each day under a single roof.[2] It also launched a division dedicated to that effort, appropriately dubbed the "Amazon Division."[3] And it launched a series of organizing drives and pressure campaigns, attacking the company's labor practices and calling for a nationwide strike.[4]

Yet for all that time, effort, and focus, the union found itself with few concrete returns. By late 2025, it had been recognized as the representative of not a single Amazon employee.[5] While it claimed to have organized nearly ten thousand workers,[6] half of those

1. *See Teamsters Union Steps Up Efforts to Organize Amazon Workers*, REUTERS (June 22, 2021, at 17:23 ET), https://www.reuters.com/technology/labor-union-teamsters-vote-towards-unionizing-amazon-workers-2021-06-22/ [https://perma.cc/T7JA-GWBP].

2. *See* Amazon Division, INT'L BHD. OF TEAMSTERS, https://teamster.org/divisions/amazon-division/ [https://perma.cc/F77S-L5NM] (explaining that Teamsters were aiming to organize "warehouse workers" and "drivers"); John Kingston, *Inside the Amazon-Teamsters Showdown: What's Next?*, FREIGHT WAVES (Dec. 2, 2025), https://www.freightwaves.com/news/inside-the-amazon-teamsters-showdown-whats-next [https://perma.cc/YVV9-MPK6] (describing union's organizing efforts at distribution centers); *see also Amazon Investment Boosts Job Numbers and Increases Household Income, Study Finds*, AMAZON (July 16, 2024), https://www.aboutamazon.com/news/community/household-income-and-job-numbers-go-up-when-amazon-invests-in-local-communities-a-new-study-says [https://perma.cc/D2ML-T6AT] (describing new distribution centers employing 3,600 and 4,000 people, respectively).

3. *See Teamsters Union Launches New Division for Amazon Employees*, REUTERS (Sep. 6, 2022), https://www.reuters.com/business/retail-consumer/teamsters-union-launches-new-division-amazon-employees-2022-09-06/ [https://perma.cc/NT27-UAP3].

4. *See Teamsters Take on Amazon*, TEAMSTERS FOR A DEMOCRATIC UNION (Oct. 11, 2024), https://www.tdu.org/teamsters_take_on_amazon_tv_314 [https://perma.cc/UE5E-RG5P] (calling for a nationwide strike among delivery service partner drivers); Press Release, Teamsters Launch Largest Strike Against Amazon in American History, Int'l Bhd. of Teamsters (Dec. 19, 2024), https://teamster.org/2024/12/teamsters-launch-largest-strike-against-amazon-in-american-history/ [https://perma.cc/W6B9-N2XJ].

5. *See* Ian Karbal, *"This Is the Beginning of a War:" Teamsters Leaders Urge Action Against Amazon at Pa. Conference*, PA. CAP.-STAR (Apr. 29, 2025, at 20:16 ET), https://penncapital-star.com/labor/this-is-the-beginning-of-a-war-teamsters-leaders-urge-action-against-amazon-at-pennsylvania-conference/ [https://perma.cc/CE77-SNQ5] (reporting that Amazon recognized no union at any facility in the United States).

6. *See* Press Release, Amazon Workers at DBK1 in Queens Become Latest to Join Teamsters, Int'l Bhd. of Teamsters (Dec. 9, 2025), https://teamster.org/2025/12/amazon-

workers came from a single facility in New York, which voted to combine with the Teamsters only after organizing on its own.[7] That unit itself was locked in a long-running dispute with the company, which contested the election and refused to recognize the union.[8] And the rest of the Teamsters' members evidently came from a network of "delivery service partner" (DSP) drivers, who actually worked for third-party companies.[9] So in four years, the Teamsters had won no Amazon elections and signed no Amazon contracts.[10] Its campaigning, organizing, and fighting had produced no tangible gains at the company.[11]

But the union was not deterred. Rather than giving up and turning to easier targets, it turned to its friends in city hall. It

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workers-at-dbk1-in-queens-become-latest-to-join-teamsters/ [https://perma.cc/28P4-RN9Y] (stating that "nearly 10,000 Amazon workers across five states" had organized with the Teamsters).

7. *See* Press Release, Amazon Labor Union Votes to Ratify Teamsters Affiliation, Int'l Bhd. of Teamsters (June 2024), https://teamster.org/2024/06/amazon-labor-union-votes-to-ratify-teamsters-affiliation/ [https://perma.cc/82FE-XPS9]; *see also* Karbal, *supra* note 5 (reporting on the affiliation).

8. *See* Press Release, Teamsters Tell Amazon: Agree to Bargaining Dates by Dec. 15, Int'l Bhd. of Teamsters (Dec. 9, 2024), https://teamster.org/2024/12/teamsters-tell-amazon-agree-to-bargaining-dates-by-dec-15/ [https://perma.cc/6764-8E5L] (acknowledging that company still had not agreed to bargain with the union); Amazon.com Servs. LLC v. NLRB, 151 F.4th 221, 224 (5th Cir. 2025) (describing company's legal challenge to election in both administrative and judicial forums).

9. *See* Karbal, *supra* note 5; *see also* Harper Freeman, *200 Amazon Workers in Queens Join Teamsters*, THE CHIEF (Dec. 12, 2025), https://thechiefleader.com/stories/200-amazon-workers-in-queens-join-teamsters,55507 [https://perma.cc/VH2B-XJ67] (reporting on decision by DSP drivers in New York to affiliate with Teamsters); Suhauna Hussain, *Amazon Must Negotiate with Teamsters at San Francisco Warehouse, NLRB Says*, L.A. TIMES (Apr. 22, 2025, at 15:05 PT), https://www.latimes.com/business/story/2025-04-22/amazon-must-negotiate-with-teamsters-at-san-francisco-warehouse-nlrb-says [https://perma.cc/5FRN-E4FH] (reporting on a complaint by NLRB General Counsel seeking to have Amazon considered a joint employer of DSP drivers).

10. *See* Karbal, *supra* note 5; *see also* Sean Higgins, *The Teamsters' Imaginary Strike Against Amazon*, NAT'L REV. (Jan. 1, 2025, at 06:30 ET), https://www.nationalreview.com/2025/01/the-teamsters-imaginary-strike-against-amazon/ [https://perma.cc/U7MZ-PC3D] ("The union doesn't represent any Amazon employees."); Glenn Spencer, *Teamsters Claim They Formed a Union at Amazon—Except They Didn't*, U.S. CHAMBER OF COM. (Apr. 27, 2023), https://www.uschamber.com/employment-law/unions/teamsters-claim-they-formed-a-union-at-amazon-except-they-didnt [https://perma.cc/QD4M-5XR7] (reporting that union of DSP employees organized by Teamsters worked for an independent company) ("Not only are those workers not employees of Amazon, but the company no longer provides any services to Amazon.").

11. *See* Spencer, *supra* note 10; Higgins, *supra* note 10.

launched the Delivery Protection Act, a New York City bill aimed at forcing Amazon to cut ties with DSPs.[12] The bill would forbid Amazon from outsourcing deliveries; instead, the company would have to employ the drivers itself.[13] It would also require the company to give these workers annual "rights" training.[14] And that training would be delivered by a certified, independent nonprofit organization (in other words, the Teamsters).[15]

In short, the bill read like a shortcut to organizing.[16] But that hardly made it unique. To the contrary, it joined a growing surge of state and local legislation aimed at boosting the fates of America's flagging labor unions[17]—laws that are increasingly sponsored by the unions themselves.[18] While unions once organized workers through

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12. *See* N.Y. City Council 1396 (N.Y.C. 2025); *see also* Press Release, Teamsters-Backed Delivery Protection Act Secures Supermajority in New York City Council, Int'l Bhd. of Teamsters (Nov. 13, 2025), https://teamster.org/2025/11/teamsters-backed-delivery-protection-act-secures-supermajority-in-new-york-city-council/ [https://perma.cc/7W7A-YMEL]; Press Release, Teamsters Call for Hearing on Delivery Protection Act Following Comptroller's Report, Int'l Bd. of Teamsters (Nov. 18, 2025), https://teamster.org/2025/11/teamsters-call-for-hearing-on-delivery-protection-act-following-comptrollers-report/ [https://perma.cc/C9QE-Z8M9] (describing the bill as a way to "fight back" by "banning the DSP model").

13. *See* Introduction No. 1396, N.Y. City Council 2 (N.Y.C. 2025) (proposing amendments to N.Y. CITY ADMIN. CODE § 20-566.3 (2025)).

14. *Id.*

15. *See id.*

16. *See id; see also Building Worker Power in Cities & States: Worker Boards*, CTR. FOR LAB. & A JUST ECON. 21 (Sep. 1, 2024), https://clje.law.harvard.edu/app/uploads/2024/08/2024.08.29_CLJE_Toolkit-DIGITAL_FINAL.pdf [https://perma.cc/2R6L-JTZ2] (describing mandatory rights training as a tool to enhance union organizing).

17. *See, e.g.*, Sharon Block & Benjamin Sachs, *The Truth About the Parties and Labor*, AM. PROSPECT (Oct. 16, 2024), https://prospect.org/2024/10/16/2024-10-16-truth-about-parties-and-labor/ [https://perma.cc/PS74-VV7A] ("In blue states ... [g]overnors and legislatures are enacting new policies to *expand* organizing rights.").

18. *See Resolution: Building Worker Power by Fighting for Pro-Worker and Pro-Union Laws in the States*, COMMC'NS WORKERS OF AM. (2023), https://cwa-union.org/79A-23-02?utm_ [https://perma.cc/8TGD-SK3L] [hereinafter *CWA Res. 79A-23-02*] ("Resolved: CWA commits to ... enact laws which would strengthen organizing and collective bargaining protections and build worker power for CWA members at the state and local level."); *see also* U.S. CHAMBER OF COM., CARTEL BARGAINING, BALLOT INITIATIVES, AND "INDUSTRIAL DEMOCRACY" 4 (2024), https://www.uschamber.com/assets/documents/USCC-White-Paper-Union-Tactics.pdf [https://perma.cc/29HY-63CR] ("[Unions] no longer pursue their goals at the bargaining table, but instead, lobby for their agendas at city hall. They write, sponsor, and implement laws to set standards for whole industries."); Dan Walters, *Few California Workers Belong to Unions, but They Scored Big in Legislature This Year*, CAL MATTERS (Sep. 19, 2023), https://calmatters.org/commentary/2023/09/california-workers-unions-scored-legislature/ [https://perma.cc/YVF9-GWVJ] (describing influence of the California Labor Federation on

organic, boots-on-the-ground campaigns, they now lobby for laws giving them free access to new members.[19] While they once bargained for higher wages and stronger job protections, they now push for regulations setting those standards by law.[20] And while they once negotiated workplace-by-workplace, they now promote laws establishing industry-level councils, where they can bargain for standards covering every workplace in a sector.[21]

Paradoxically, this push for new labor laws was born out of the labor movement's own weakness. Unions have always been vulnerable to so-called substitution effects: the risk that high union wages will raise costs and push consumers to nonunion firms.[22]

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state legislative agenda).

19. *See, e.g.*, Introduction No. 1396, N.Y. City Council (N.Y.C. 2025) (proposing amendments to N.Y. CITY ADMIN. CODE § 20-566.7 (2025)); *see also* MINN. STAT. § 181.214 (2025) (mandating rights training to be delivered by an independent worker organization in nursing-home industry); *Current List of Certified Worker Organizations*, MINN. DEP'T OF LAB. & INDUS. (February 2026), https://www.dli.mn.gov/sites/default/files/pdf/nhwsb_current_list_of_certified_worker_organizations_0226.pdf [https://perma.cc/9Y23-Z7KD] [hereinafter *List of Certified Worker Organizations*] (listing only labor unions as certified worker organizations).

20. *See, e.g.*, *Workers in the Fight for $15 and a Union Help Announce the 2021 Raise the Wage Act with Members of Congress*, SEIU (Jan. 28, 2021), https://www.seiu.org/blog/2021/1/workers-in-the-fight-for-15-and-a-union-help-announce-the-2021-raise-the-wage-act-with-members-of-congress [https://perma.cc/8Z6C-U64W]; William Samuel, Letter Supporting Legislation that Would Raise Wages, from William Samuel, AFL-CIO Gov't Affs. Dep't, to House Representatives (July 18, 2019), https://aflcio.org/about/advocacy/legislative-alerts/letter-supporting-legislation-would-raise-wages [https://perma.cc/6QNM-TT29].

21. *See, e.g.*, Press Release, MN Nursing Home Workers Celebrate Passage of Groundbreaking, First-in-the-Nation "Nursing Home Workforce Standards Board" with Authority to Set Standards like Pay and Benefits, SEIU Healthcare Minn. & Iowa (May 30, 2023), https://www.seiuhealthcaremn.org/news/mn-nursing-home-workers-celebrate-passage-of-groundbreaking-first-in-the-nation-'nursing-home-workforce-standards-board'-with-authority-to-set-standards-like-pay-and-benefits/ [https://perma.cc/96VV-WVK6]; Press Release, MN Nursing Home Workers Win Legal Fight to Protect Standards Board, AFSCME Council 65 (May 28, 2025), https://afscme65.org/news/mn-nursing-home-workers-win-legal [https://perma.cc/L4AA-F38F]; Max Nesterak, *Pay Raises for Nursing Home Workers Passes Minnesota House with Bipartisan Support*, MINN. REFORMER (May 6, 2025, at 19:53 ET), https://minnesotareformer.com/2025/05/06/pay-raises-for-nursing-home-workers-passes-minnesota-house-with-bipartisan-support/ [https://perma.cc/HPV8-EBZ5] ("[SEIU Healthcare Minnesota & Iowa] advocated for the [Nursing Home Workforce Standards Board]'s creation"). *See generally* CAL. LAB. CODE § 1475 (West 2026) (creating statewide Fast Food Council); MINN. STAT. §§ 181.211-181.217 (2025) (creating statewide Nursing Home Workforce Standards Board).

22. *See* Liya Palagashvili & Revana Sharfuddin, Do More Powerful Unions Generate Better Pro-Worker Outcomes? 13 (May 7, 2025) (unpublished working paper) (on file with Mercatus Ctr., Geo. Mason Univ.) ("A labor union's ability to extract monopolistic gains for

Unions used to guard against it by organizing a broad swath of the market and bargaining for uniform standards throughout.[23] But today, that strategy is nearly impossible, as unions represent a lower percentage of workers than at any time on record.[24] They represent only 5.9 percent of the private-sector workforce,[25] leaving them with no hope of negotiating broad, uniform standards. They cannot ward off competition simply by organizing more firms.[26] Instead, they have to block competition by raising every firm's costs. And their only realistic path to doing that is by regulation.[27]

That strategy, however, runs straight into the National Labor Relations Act (NLRA). The NLRA casts a broad preemptive shadow:

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its members is shaped by the degree of competition and constraints on substitution facing both the employer and labor union."); *cf.* Dennis R. Maki & Lindsay N. Meredith, *A Note on Unionization and the Elasticity of Substitution*, 20 CANADIAN J. ECON. 792, 793-95 (1987) (surveying literature showing that higher costs of unionization may lead firms to employ fewer workers and invest more in capital improvements—another form of substitution).

23. *See* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 799–800 (1945) (describing campaign by electrical workers union to organize local manufacturers and contractors to achieve uniform local standards); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940) ("[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization."); Sylvestro Petro, *Competition, Unions, and Antitrust*, FOUND. FOR ECON. EDUC. (July 1, 1964), https://fee.org/articles/competition-unions-and-antitrust/ [https://perma.cc/ZLV8-JXST] (describing union tactics such as picketing, organizing, and even collective bargaining as mechanisms for insulating union's members from competition by nonunion firms).

24. *See* Press Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Union Members—2025 (Feb. 18, 2026), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/7B5N-PBBG] (reporting that private-sector nonfarm union density had fallen to 5.9 percent); *see also* Doug Henwood, *Unions Lose Some More*, LBO NEWS (Jan. 28, 2025), https://lbo-news.com/2025/01/28/unions-lose-some-more/ [https://perma.cc/J6Y8-W63Q] ("Although one has to take stats from over a century ago skeptically, it looks like the private sector union share today is lower than it was in 1900.").

25. *See* Press Release, Bureau of Lab. Stats., *supra* note 24, at tbl. 3.

26. *See* Rich Yeselson, *Fortress Unionism*, DEMOCRACY (2013), https://democracyjournal.org/magazine/29/fortress-unionism/ [https://perma.cc/W6EV-YXSG] (describing the hurdles, both regulatory and economic, preventing unions from regaining prior levels of density).

27. *See* U.S. CHAMBER OF COM., *supra* note 18, at 10 (describing turn by labor unions toward regulatory strategy); Diane Katz, *The Decline of the American Labor Union*, GIS REPORTS (Apr. 28, 2023), https://www.gisreportsonline.com/r/decline-american-union/ [https://perma.cc/8BRP-X5GB] ("[L]abor's political activism in past decades led to extensive worker protections in statute, including health and safety standards, unemployment compensation and retirement benefits, and constraints on employers faced with union drives."); *see also* Cynthia Estlund, *Sectoral Solutions That Work: The Case for Sectoral Co-Regulation*, 98 U. CHI-KENT L. REV. 539, 540 (2023) (describing regulatory strategies as a response to declining union density).

It preempts not only laws that conflict with its explicit terms, but also laws that undermine its implicit design.[28] It envisions labor relations as a system of checks and balances—it gives employees a right to organize, but also requires them to channel that right through a deliberately balanced process.[29] If state or local laws tilt that balance, they interfere with the structure: They distort the parties' incentives, realign their strategies, and tilt the balance of power.[30] In effect, they turn labor relations into a system unrecognizable to the drafters of the NLRA.[31] And for that reason, they are preempted.[32]

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28. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959); Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 291 (1986); La Crosse Tel. Corp. v. Wis. Emp. Rels. Bd., 336 U.S. 18, 26 (1949); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955) ("Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces."); Cannon v. Edgar, 33 F.3d 880, 885 (7th Cir. 1994) (explaining that the NLRA reflects a careful balance struck by Congress); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989) (explaining that the NLRA preemption rule is "akin to a rule that denies either sovereign the authority to abridge a personal liberty"); S. REP. NO. 74-573, at 15 (1935) ("[The NLRA] establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters."). *See generally* U.S. CONST. art. VI, cl. 2 (stating that federal law is the "supreme Law of the Land").

29. *See* Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972) ("An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organizing, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.").

30. *See* Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485, 490 (1953) ("Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."); *see also* Beasley v. Food Fair of N. Carolina, Inc., 416 U.S. 653, 661–62 (1974) (holding that state could not apply wrongful-discharge law to supervisors who engaged in union activity because doing so would interfere with federal labor policy).

31. *See, e.g.*, Thunderbird Mining Co. v. Ventura, 138 F. Supp. 2d 1193, 1197-98 (D. Minn. 2001) ("[A]ny state attempt to interfere, directly or indirectly, with the bargaining parties' economic weapons is preempted by federal law."); United Steelworkers v. St. Gabriel's Hosp., 871 F. Supp. 335, 343 (D. Minn. 1994) (holding that state law requiring successor employer to assume predecessor's contract regulated bargaining process and was preempted); 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1134 (7th Cir. 2008) (holding that the NLRA preempted a state law providing mandatory rest days to hotel attendants because the state law was evidently designed to affect an ongoing contract dispute).

32. *See, e.g.*, Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 257-58 (1964) (unprotected secondary activities); *Weber*, 348 U.S. at 475, 477, 479-82 (unprotected picketing);

Until now, unions have mostly avoided that result by framing their new laws as "minimum labor standards."[33] Simply put, a minimum labor standard is a garden-variety employment law—it gives an employee a minimum right in the workplace.[34] By long-standing rule, those kinds of laws are not preempted.[35] They do not interfere with the NLRA's system; they merely set a backdrop for bargaining.[36] Unions say that these new laws do the same thing: They merely set minimum standards in the workplace.[37] They can

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see also Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 291 (1986) (holding that states may not supplement the NLRA's remedies, which are exclusive, deliberately limited, and part of Congress's overall design).

33. *See, e.g.*, CAL. LEG., SEN. JUDICIARY COMM., SB 399 (WAHAB) S. 2023, Reg. Sess., at 10 (2023) (quoting bill's cosponsor, the California Labor Federation, as arguing that captive-audience laws are not preempted because they are merely minimum labor standards); Letter from SEIU, Loc. 32BJ, to City Council of the City of New York, New York City's Legal Authority to Enact Just Cause Protections for Fast Food Workers [hereinafter SEIU Just Cause Letter] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860317&GUID=F97F44AA-CCC8-470B-998E-C3C35A5C0717&Options=ID%7CText%7C&Search=just+cause [https://perma.cc/R8WT-V4R2] (included in written hearing testimony) ("[T]he just cause bills establish a minimum labor standard, akin to minimum wage and successor employee retention laws."); *see also* Rest. L. Ctr. v. City of New York, 90 F.4th 101, 114-17 (2d Cir. 2024) (accepting argument that just-cause ordinance was only a minimum labor standard and therefore not preempted).

34. *See* Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1252-53 (E.D. Cal. 2025) (describing typical minimum labor standard), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025).

35. *See* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 754-55 (1985) (law mandating minimum healthcare benefits for general insurance policies not preempted because the law merely set a floor for bargaining); Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) (same result for a state law requiring severance pay in certain circumstances); *see also* Am. Hotel & Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 963 (9th Cir. 2016) ("Such minimum labor standards affect union and nonunion employees equally, neither encouraging nor discouraging the collective bargaining processes covered by the NLRA."); Beckwith v. United Parcel Serv., Inc., 889 F.2d 344, 347-48 (1st Cir. 1989) (explaining that state's establishment of minimum labor standards does not conflict with NLRA).

36. *See, e.g.*, Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 85–87 (2d Cir. 2015) (holding that "wage parity" law for home care aides was not preempted because it merely set a minimum labor standard, which itself set a floor for bargaining); *Beckwith*, 889 F.2d at 348 (holding that the NLRA did not preempt state law preventing employer from satisfying employee debts through payroll deduction even though it affected a subject of potential bargaining); Wash. Serv. Contractors Coal. v. District of Columbia, 54 F.3d 811, 817 (D.C. Cir. 1995) (rejecting preemption challenge to law requiring contractors to retain predecessor's employees for ninety days as a minimum labor standard that did not regulate bargaining process).

37. *See, e.g.*, SEIU Just Cause Letter, *supra* note 33; CAL. LEG., SEN. JUDICIARY COMM., *supra* note 33.

therefore sit comfortably alongside the NLRA.[38] But that argument understates the scope and effect of these laws. Many do not simply add minimum rights or privileges; they effectively cancel out the NLRA's system.[39] They add requirements, skip steps in the process, and make organizing under the NLRA's system unnecessary, if not redundant.[40] And in fact, that is their intent: Their proponents confess that the laws are meant to cover perceived gaps in the NLRA.[41]

Those "gaps," however, are as essential to the NLRA as the statute's explicit provisions.[42] They are part of the statute's scheme of overlapping rights, obligations, and zones of self-help.[43] They are

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38. *See, e.g.*, *Bonta*, 802 F. Supp. 3d at 1242-43 (reciting defendants' arguments that California Senate Bill 399 is sufficiently distinct from the NLRA),; CAL. LEG., ASSEMB. COMM. ON LAB. & EMP., REPORT ON SB 399 (WAHAB) Assemb. 2023, Reg. Sess., at 4 (2023) ("The Court has consistently ruled that the states have the authority to establish and regulate minimum working conditions. Here, the bill would establish a baseline protection for workers to be free from the threat of adverse action for declining to attend meetings on political or religious matters.").

39. *See* U.S. CHAMBER OF COM., *supra* note 18, at 4 (describing recent union-backed legislation, including labor standards boards and sectoral-wage laws, as workarounds to avoid the NLRA's safeguards).

40. *See id.*; *see also* CAL. LAB. CODE § 1475 (West 2024) (establishing sectoral council to set wages and working conditions for fast-food workers); N.Y.C., N.Y., ADMIN. CODE § 20-1282 (2026) (extending just-cause protections, a feature of union contracts, to nonunion firms); CAL. BUS. & PROF. CODE §§ 26001(ac), 26051.15(5)(A)-(D) (West 2026) (defining and requiring labor-peace agreements setting new terms and limitations for organizing campaigns).

41. *See, e.g.*, CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 4 (arguing for more vigorous intervention by states because the "system of federal labor laws has long failed to adequately protect workers' rights to organize and bargain collectively"); Jeanne Kuang, *A New California Law Bans Your Boss from Ordering You to Attend Anti-Union Meetings*, CAL MATTERS (Dec. 17, 2024), https://calmatters.org/economy/2024/12/california-labor-new-laws-2025/ [https://perma.cc/9SVA-5Q5G] (explaining that captive-audience laws and other state initiatives are part of an effort by legislators "to support a rising wave of unionization").

42. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111 (1989) (explaining that the NLRA carves out certain areas from regulation and "protects certain rights of labor and management against governmental interference"); *see also* Cannon v. Edgar, 33 F.3d 880, 885 (7th Cir. 1994) (noting that "Congress has been rather specific" that unregulated activities such as economic weapons are protected by the NLRA's preemptive reach).

43. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223-24 (1964) (Stewart, J., concurring) (explaining that Congress meant to leave in the hands of management major entrepreneurial decisions, including decisions like outsourcing and subcontracting that "may bear upon the security of the workers' jobs"); Otis Elevator Co., 269 NLRB 891, 893 (1984) (concluding that Congress meant to leave employers in control over "decisions which affect the scope, direction, or nature of the business," including decisions characterized as contracting or subcontracting out work), *overruled by*, Dubuque Packing Co.,

a large part of what has defined national labor law for nearly a century—an emphasis on private negotiation and the free play of market forces.[44] And if states can cover them over, the whole structure will be buried under a pile of state and local regulation.[45]

That result would be destabilizing. The NLRA's chief virtue is its uniformity: It ensures that labor relations are regulated the same way in Sacramento as they are in Syracuse.[46] That uniformity allows employees, employers, and unions to plan their relationships and knit together a truly national labor market.[47] And without a central, national standard, the market would splinter: It would no longer be possible to speak of "labor law"; there would be only "labor laws."[48]

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303 NLRB 386 (1991); *see also* Archibald Cox & Marshall J. Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 225 (1950) ("[T]the failure of Congress to deal with a specific course of conduct in an area over which a large measure of federal control has been exercised is as likely to indicate that Congress intended to leave such conduct free from regulation as that Congress intended to leave freedom of action to the states."); *Cannon*, 33 F.3d at 885 (finding law preempted because it required parties to agree on a pool of replacement workers during a strike and therefore overrode a right given to parties by the NLRA—the right to reject any specific term or proposal).

44. *See* Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 143-47 (1976).

45. *See* Cox & Seidman, *supra* note 43, at 230 ("Where the Federal Government has enacted what was intended to be a comprehensive program for dealing with such problems, it should be encouraged to retain the responsibility and the states should be excluded from the entire area except where Congress has explicitly authorized them to intervene.").

46. *See* NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) ("The purpose of the Act was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" (quoting Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485, 490 (1953))); *see also* Cox & Seidman, *supra* note 43, at 221 ("[T]he evident congressional concern for ensuring that employers and employees whose relations affect interstate commerce should be subject to regulations of the exact character imposed by the NLRA ... was expressed just after Congress had reviewed the whole field of labor-management relations.").

47. *See Garner*, 346 U.S. at 490-91 ("A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."); S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959) ("The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."); NLRB v. Comm. of Interns & Residents, 566 F.2d 810, 815-16 (2d Cir. 1977) (declining to find implicit authority for state agency to exercise jurisdiction because it would have the damaging effect of introducing "disparity in a labor policy designed to be national in scope").

48. *See* Alexander T. MacDonald, *Be Careful What You Wish for: The Risks of Competitive Labor Federalism for Pro-Union States*, FEDERALIST SOC'Y (June 2, 2025), https://fedsoc.

To avoid that result, courts must apply the NLRA with more teeth. They should no longer ask simply whether a law is a "minimum labor standard." Instead, they should look to context: They should ask whether the law skips or overrides some important part of the NLRA's process.[49] They should also ask whether the law was enacted for that purpose—whether it was meant to address some perceived gap in federal labor policy.[50] If it was, they should look more closely. They should ask whether the law as applied contradicts Congress's vision, either by taking away one side's discretion or giving the other side new advantages.[51] And if it does, they should find the law preempted.[52]

Courts sometimes apply the NLRA this way.[53] They should do it more often. Otherwise, we may soon have no NLRA to speak of. Labor law will have been ceded to the states—and to the unions who know how to turn the levers of state policy.

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org/commentary/fedsoc-blog/be-careful-what-you-wish-for-the-risks-of-competitive-labor-federalism-for-pro-union-states [https://perma.cc/6AN2-BJ4C].

49. *See Cannon*, 33 F.3d at 885 (finding law preempted because it required parties to agree on a pool of replacement workers during a strike and therefore overrode a right given to parties by the NLRA—the right to reject any specific term or proposal).

50. *See* Amazon.com Servs. LLC v. N.Y. State Pub. Emp. Rels. Bd., No. 25-cv-05311, 2025 WL 3295071, at *3-5 (E.D.N.Y. Nov. 26, 2025) (finding New York law preempted when the law was intended to address perceived gaps in coverage created by the NLRB's temporary loss of a quorum).

51. *See Cannon*, 33 F.3d at 886 (finding law preempted because it "meddle[d] with" the bargaining process); Thunderbird Mining Co. v. Ventura, 138 F. Supp. 2d 1193, 1200 (D. Minn. 2001) (holding NLRA preempted law that permanently and substantially shifted the terms of bargaining in favor of the union); 520 S. Michigan Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1138 (7th Cir. 2008) (finding state law preempted when it intervened in ongoing contract negotiations to tilt balance to one side).

52. *See* Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1253-54 (E.D. Cal. 2025) (rejecting argument that captive-audience law was merely a minimum labor standard because the law indirectly distorted organizing process envisioned by the NLRA, which guarantees employers free speech), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025).

53. *See, e.g.*, Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964) ("[The] weapon of self-help, permitted by federal law, ... is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community."); *Cannon*, 33 F.3d at 885-86 (explaining that the NLRA preempts state law that "meddles with the collective bargaining process"); Bechtel Const., Inc. v. United Bhd. of Carpenters & Joiners, 812 F.2d 1220, 1225 (9th Cir. 1987) (finding that minimum-wage law for apprentices distorted bargaining process and was therefore preempted).

I. THE HIGH RISK OF LOW DENSITY

To understand labor's plight, you have to understand substitution effects. The basic idea is simple: When prices for something go up, people respond by buying less of that thing.[54] But they do not buy nothing. Instead, they buy something else that fits (basically) the same need. For example, when the price of apple juice rises, a family may buy more orange juice.[55] When tickets to Disneyland cost more, the family may rent a cabin instead. The family would have preferred apple juice and Mickey Mouse, but the alternatives scratch the same itch.[56]

That kind of product substitution can ripple into labor markets as well.[57] Suppose the price of apple juice goes up because the wages for apple-pickers rise. Or suppose tickets to Disneyland get more expensive because the actors are on strike. Consumers will react to those increases by substituting other goods. Those substitutions will reduce the demand for the labor that produces the goods—apple-pickers and actors.[58] And that process puts a natural cap on wage increases: The workers producing a product can demand only so much before undercutting the demand for their own services.[59]

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54. *See* Masao Ogaki, *The Indirect and Direct Substitution Effects*, 80 AM. ECON. REV. 1271, 1271–72 (1990) (describing the basic substitute effect theory).

55. *See* PHILIP COGGAN, ECONOMICS: THE ECONOMIST GUIDE loc. 178 (2025) (ebook) ("For instance, if beef rises sharply in price, people may switch to buying another type of meat, like chicken.").

56. *See Measuring the Substitution Effect in Producer Price Index Goods Data: 2002-16*, U.S. BUREAU OF LAB. STATS. (July 2020), https://www.bls.gov/opub/mlr/2020/article/measuring-the-substitution-effect-in-ppi-data.htm [https://perma.cc/52VV-PF5A] (describing general substitution effect in product markets); Kevin Corcoran, *Minimum Wages and the Substitution Effect*, ECONLIB: ECONLOG (Sep. 26, 2024), https://www.econlib.org/minimum-wages-and-the-substitution-effect/ [https://perma.cc/V59H-ZXS2] (illustrating the concept with a similar example).

57. *See* Alexander T. MacDonald, *Conservative Unionism and the Problem of Coercion*, PUB. DISCOURSE (Sep. 8, 2025), https://www.thepublicdiscourse.com/2025/09/98856/ [https://perma.cc/2JRM-T379] (setting out traditional critique of labor unions and collective bargaining under neoclassical economics).

58. *See* Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 18 (1963) (describing a similar response to supra-competitive union wage premiums); *cf.* Corcoran, *supra* note 56 ("As labor becomes more expensive, employers will tend to find substitutes for that labor.").

59. *See* Winter, *supra* note 58, at 18 ("[T]he employer's position in the product market sets a ceiling on union wage goals, since he cannot give what he hasn't got to begin with,

For that reason, substitution has long been a problem for labor unions. Labor unions exist to raise wages and benefits for their members.[60] These wages and benefits translate into higher labor costs for employers.[61] The costs have to go somewhere: The employer has to raise prices, cut quality, or both.[62] Consumers don't like either result. And if they have other options in the market, they will substitute those options.[63] They will effectively cap unions' ability to extract more for their members.[64]

Historically, unions tried to address that concern by bargaining for uniform standards. First, a union would try to organize a critical mass of firms within a local product market.[65] It would then negotiate uniform wages and benefits in all the organized firms.[66] If enough firms were covered, the substitution effects would be muted.[67] Every firm would have to pay the same (union) wages and

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regardless of how disciplined and loyal the union members are.").

60. Petro, *supra* note 23 ("The avowed objective of trade unions is to secure for their members higher labor prices in one form or another than they could achieve without unionization.").

61. *See* James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy*, HERITAGE FOUND. (May 21, 2009), https://www.heritage.org/jobs-and-labor/report/whatunions-do-how-labor-unions-affect-jobs-and-the-economy [https://perma.cc/DGR7-K7S8] (observing that unions raise labor costs and make organized firms vulnerable to competition); *see also* Huafeng Chen, Marcin Kacperczyk & Hernán Ortiz-Molina, *Labor Unions, Operating Flexibility, and the Costs of Equity*, 46 J. OF FIN. & QUANTITATIVE ANALYSIS 25, 26 (2011) (concluding that unionized firms have higher on average equity costs because of reduced operating flexibility).

62. *See* Corcoran, *supra* note 56 (describing typical employer responses to higher wage rates).

63. *See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 106–07 (13th ed. 2018) (describing how price sensitivity in product market can affect elasticity in labor market).

64. *See* Winter, *supra* note 58, at 19 ("[T]he union must either organize along product market lines or exclude, by one means or another, the non-union product from the market."); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 587 & n.11 (2007) (explaining how union wage premiums disadvantage union firms and how market competition checks union wage demands).

65. *See* Petro, *supra* note 23 ("[O]ne commonly hears that a union has sought to 'organize' a given employer mainly because some already 'organized' employer has complained of the *competition*.").

66. *See id.* (explaining that historically, unions would require organized firms to deal only with other organized firms); *see also* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 799–800 (1945) (describing a similar scheme).

67. *See* Winter, *supra* note 58, at 19 (explaining that unions aimed to organize as many employers as possible in a product market to minimize competitive disadvantages); Cynthia L. Estlund, *Are Unions Doomed to Being a "Niche Movement" in a Competitive Economy?*, 155

benefits, so all of them would have the same labor costs.[68] There would be no escape valve for price-conscious consumers.[69]

But that tactic works only when a large portion of the market is organized.[70] It is a losing proposition when only a small slice of the market is paying union rates.[71] And in recent years, the slice has been getting smaller and smaller. While unions once represented about a third of all nonfarm, private-sector workers, their share today is closer to 6 percent.[72] Labor's weakness has been especially dramatic in sectors like professional services (2.8 percent), finance (1.8 percent), and hospitality (3.4 percent), all of which have been areas of growth for the economy overall.[73] And because unions now represent such a low percentage of workers, their ability to negotiate uniform standards is basically nil.[74] Any wage gains they

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U. PA. L. REV. ONLINE 165, 168 (2007), https://pennlawreview.com/2007/02/01/are-unions-doomed-to-being-a-niche-movement-in-a-competitive-economy/ [https://perma.cc/55NP-9TJM] ("[U]nions can achieve sustainable wage and membership gains in other competitive sectors by organizing all or nearly all of the firms in markets that cater to necessarily local customers.").

68. *See* Petro, *supra* note 23 ("Their argument is that in the absence of such complete unionization the competition of nonunionized employers will make it impossible for the unionized employers to stay in business while paying union wages.").

69. *See id.* (comparing the practice to a business monopoly or cartel that seeks to corner a particular market to protect monopoly profits).

70. *See* Winter, *supra* note 58, at 18 (noting practical difficulty unions face in trying to control terms of competition outside the firms they have organized).

71. *See id.* ("Because unionism is directed at controlling the behavior of particular firms rather than labor markets, unions have little functional economic significance apart from those firms."); *cf. Labor's Structure Stands in the Way of Organizing*, LAB. NOTES (Dec. 2, 2002), https://labornotes.org/2002/12/labor%E2%80%99s-structure-stands-way-organizing [https://perma.cc/Q99C-YAC9] ("High density increases a union's ability to raise standards, if all unions in the industry or labor market are speaking with one voice.").

72. *See* PAUL D. ROMERO & JULIE M. WHITTAKER, CONG. RSCH. SERV., R47596, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 4 (2023) (charting historical union-density rates); Leo Troy, *Trade Union Membership, 1897–1962*, 47 REV. ECON. & STATS. 93, 93-103 (charting historical union densities in private-sector workforce); Press Release, Bureau of Lab. Stats., *supra* note 24 (reporting membership rates as of the end of 2024).

73. *See* Press Release, Bureau of Lab. Stats., *supra* note 24; *see also* Katz, *supra* note 27 (describing shift to service economy and challenges it presents for unions); Yeselson, *supra* note 26 (same); Katelynn Harris, *Forty Years of Falling Manufacturing Employment*, U.S. BUREAU OF LAB. STATS. (Nov. 20, 2020), https://www.bls.gov/opub/btn/volume-9/forty-years-of-falling-manufacturing-employment.htm [https://perma.cc/7FQC-DQZF].

74. *See* Estlund, *supra* note 67, at 169 (observing that outside of select industries, "unions face a steep uphill battle in securing wage gains" because of competitive pressures).

negotiate are immediately exposed to competition with nonunion competitors.[75]

II. POLITICS, MINIMUM STANDARDS, AND THE LABOR MOVEMENT

By and large, unions have reacted to this dilemma by turning to politics.[76] The shift has been well documented: Scholars have traced how, starting in the 1950s, major labor associations like the AFL-CIO developed sophisticated campaign and lobbying apparatuses.[77] Through organizations like the Committee on Political Education, they leveraged their financial resources to support candidates aligned with their political goals.[78] They spent steadily more from there, increasing the pace throughout the late 1990s and early 2000s.[79] By the mid-2010s, they were spending more than $4 billion per election cycle, or $1 billion every year.[80]

75. *See* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 4-5 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (noting that union wage premiums are not fully offset by gains in productivity or savings produced by lower turnover rates and so leave unionized firms at a disadvantage in competitive markets).

76. *See* U.S. CHAMBER OF COM., *supra* note 18, at 4, 10 (describing transition from bargaining focus to political focus); *see also* Alexei Koseff & Sameea Kamal, *How California Lawmakers Embraced Hot Labor Summer*, CAL MATTERS (Sep. 18, 2023), https://calmatters.org/politics/2023/09/california-labor-legislature/ [https://perma.cc/623C-6FLE] (describing push by labor unions in California to seize on favorable political moment to enact agenda by legislation).

77. *See* Alexander T. MacDonald, *Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment*, 22 GEO. J.L. & PUB. POL'Y 229, 251–71 (2024) (tracing evolution of labor movement's relationship with politics over course of twentieth century); Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 418 (2010) ("We are now, however, beginning to see a qualitative change in labor's relationship to the state: trade unionism as a supplement to politics.").

78. *See* Estreicher, *supra* note 77, at 423-24 (discussing the steps unions have taken "to attempt to reverse their fortunes in the private sector"); *Committee on Political Education*, UNIV. OF MD. LIBRS., https://exhibitions.lib.umd.edu/get-out-the-vote/cope [https://perma.cc/2F24-WQN2] (describing founding and history of the Committee on Public Education (COPE)); *COPE: Our Political Muscle*, AFT WASH., AFL-CIO, https://aftwa.org/take-action/cope-our-political-muscle [https://perma.cc/5JA4-3L3P] (describing modern role of COPE).

79. MacDonald, *supra* note 77, at 262.

80. *Id.*

While that money has produced little change at the federal level,[81] it has led to measurable gains in the states. States have passed waves of pro-union laws, ranging from bans on "captive-audience" meetings to mandatory "labor-peace" agreements.[82] And some states have been even more adventurous, enacting entirely new systems for regulating labor relations.[83] So while labor law remains nominally a federal subject, the recent story of labor law has been written mostly by state and local governments.[84]

Unions have found success in the states for several reasons, the most obvious being political alignment. While Congress remains closely divided, many states are dominated by a single party.[85] And when one party controls all the important levers of government, it's easier to pass new laws—especially controversial laws like labor reforms.[86] Another cause may be differences in union density. While

81. *See, e.g.*, Ian Sherwood, *Remembering the Employee Free Choice Act*, ARIZ. STATE UNIV. CTR. FOR WORK & DEMOCRACY (Mar. 31, 2024), https://cwd.asu.edu/breakroom/blog/remembering-employee-free-choice-act-0 [https://perma.cc/9A3M-QUNW] (describing failure of the EFCA in Congress). *See generally* Protect the Right to Organize (PRO) Act, H.R. 842, 117th Cong. (2021) (as passed by House, March, 9, 2021) (proposing amendments to the NLRA); Employee Free Choice Act (EEFCA), H.R. 1409, 111th Cong. (2009) (same).

82. *See, e.g.*, *State L&E Laws: Employer Captive Audience Meetings*, BLOOMBERG L., https://www.bloomberglaw.com/document/X5CQTML8000000 [https://perma.cc/243U-FVXV] (surveying captive-audience laws); U.S. CHAMBER OF COM., *supra* note 18, at 4, 27–28 (describing expansion of labor-peace agreement laws at union insistence).

83. *See, e.g.*, CAL. LAB. CODE § 1475 (West 2026) (creating tripartite Fast Food Council); MINN. STAT. § 181.212 (2025) (creating tripartite Minnesota Nursing Home Workforce Standards Board); *see also Can Labor Unions Recover? Two Experts Square Off*, WALL ST. J. (Dec. 15, 2025, at 13:04 ET), https://www.wsj.com/economy/jobs/labor-unions-experts-fdd21be5?mod=Searchresults&pos=1&page=1 [https://perma.cc/M3FU-L9BT] ("Unions ... have been experimenting with new models of negotiating that bring union, business and government representatives together to the bargaining table to set wages and other labor standards for an industry.").

84. *See, e.g.*, WALL ST. J., *supra* note 83 (describing efforts by states to intervene in perceived gap in federal protections); CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 4, 8 (noting that despite federal preemption, "creative approaches continue to emerge at the sub-federal level" and "[i]n recent years, strategic efforts to bolster and protect a range of individual rights—including ... workers' rights—have focused on state courts and constitutions"); *cf.* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1172-94 (2011) (describing efforts by states and cities to regulate labor relations indirectly through negotiated "tripartite" legislation).

85. *See State Partisan Composition*, NAT'L CONF. STATE LEGISLATURES (Aug. 29, 2025), https://www.ncsl.org/about-state-legislatures/state-partisan-composition [https://perma.cc/6Y9V-6MHY] (reporting that Republicans control both legislative chambers and the governorship in twenty-three states, Democrats do so in sixteen states).

86. *See, e.g.*, Act of Sep. 30, 2025, ch. 139, 2025 Cal. Legis. Serv. 139 (West) (enacting

unions have declined nationally, they've held up better in a handful of states.[87] In California, they still represent 16.3 percent of workers, and in New York, they still represent 21.9 percent.[88] Alone, those two states are home to nearly a third of all remaining union members.[89] So it is probably no coincidence that those two states have been the most active in passing new labor laws.[90]

In general, the new laws have aimed to cover gaps left by the disappearance of widespread union standards.[91] The laws all aim, in one way or another, to harmonize standards across an industry or sector.[92] But they differ in their approaches to that goal, ranging from narrow interventions to multifaceted regulatory systems.

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broad labor-law reform in state where legislature and governorship are controlled by one party); Act of Sep. 5, 2025, 2025 N.Y. Sess. Laws ch. 365 (McKinney); *see also* Lawrence Ukenye, *Blue States Look to Fill in for NLRB*, POLITICOPRO (Sep. 15, 2025, at 05:45 ET), https://www.politico.com/newsletters/weekly-shift/2025/09/15/blue-states-look-to-fill-in-for-nlrb-00563502 [https://perma.cc/S4U3-SJZD]; James Baratta, *Organized Labor Pushes Blue States to Protect Private University Student Workers*, AM. PROSPECT (Sep. 1, 2025), https://prospect.org/2025/09/01/2025-09-01-organized-labor-pushes-blue-states-to-protect-private-universities/ [https://perma.cc/JN9Q-P5D9] ("[P]rivate-sector workers explicitly not covered by the NLRA ... have been able to win bargaining rights in various blue states without the NLRB ever going to court to oppose those state laws.").

87. *See* Press Release, Bureau of Lab. Stats., *supra* note 24.

88. *Id.*

89. *Id.*; *see also* Hayley Brown & Emma Curchin, *States of the Union: The "Where" of the US Labor Movement*, CTR. FOR ECON. & POL'Y RSCH. (May 1, 2024), https://cepr.net/publications/states-of-the-unions-the-where-of-the-us-labor-movement/ [https://perma.cc/8DQ4-M9WT] (surveying geographic distribution of union membership); Erich Dirnbach, *State of the U.S. Unions 2025*, MEDIUM (Feb. 20, 2025), https://ericdirnbach.medium.com/state-of-the-u-s-unions-2025-34ad1e2974da [https://perma.cc/5Q2G-V5BY] ("Almost half of all union members are in just six states (CA, NY, IL, NJ, PA, OH).").

90. *See* Mark A. Konkel, Barbara E. Hoey & Benjamin Gilman, *Legal Updates for New York and California Employers in 2025*, KELLEY DRYE: LAB. DAYS (Jan. 10, 2025), https://www.kelleydrye.com/viewpoints/blogs/labor-days/legal-updates-for-new-york-and-california-employers-in-2025 [https://perma.cc/YQ3L-3B3U] (calling New York and California "two of the most progressive and legislatively active jurisdictions" in the field of labor and employment lawmaking).

91. *See* Alexander T. MacDonald, *Fast Food, Minimum Wages, and the Pervasive Myth of Benevolent Unions: Why the Labor Movement Pushes for Stricter Labor Laws*, FEDERALIST SOC'Y (Apr. 9, 2024), https://fedsoc.org/commentary/fedsoc-blog/fast-food-minimum-wages-and-the-pervasive-myth-of-benevolent-unions-why-the-labor-movement-pushes-for-stricter-labor-laws [https://perma.cc/4J4V-NJJA] (explaining economics behind labor movement's strategy of pushing for higher labor standards).

92. *See id.*; *see also* WALL ST. J., *supra* note 83 (observing that by setting uniform standards, union-backed state and local laws prevent price competition among employers).

A. Sectoral Wages

The most straightforward form of gap-filling legislation is sectoral-wage laws.[93] These laws often target industries in which unions have had an especially hard time organizing workers.[94] Examples include food service,[95] rideshare,[96] and home care.[97] New York has been an especially fertile ground for this kind of law, enacting targeted increases in the fast-food,[98] home care,[99] and food-delivery industries,[100] among others.

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93. *See* Jim Parreti, Shannon Meade, Alex MacDonald, Maury Baskin, Brad Kelley, Jorge Lopez, George Michael Thompson & Felicia Watson, *Littler's Workplace Policy Institute Presents: Labor Day Report—2025*, LITTLER MENDELSON (Sep. 1, 2025), https://www.littler.com/news-analysis/littler-report/littlers-workplace-policy-institute-presents-labor-day-report-2025 [https://perma.cc/JRH3-HG7W] (discussing various sectoral-wage proposals across the country).

94. *See* Sharon Block, Seema Nanda, Rajesh Nayak & Benjamin Sachs, *Building Worker Power in a Precarious Federal Landscape: Sectoral Strategies and Worker Democracy*, ONLABOR (Dec. 22, 2025), https://onlabor.org/building-worker-power-in-a-precarious-federal-landscape-sectoral-strategies-and-worker-democracy/ [https://perma.cc/A7SU-HVZS] ("Sectoral models can also be strategic tools for organizing in [sic] building power where traditional unionization is difficult."); *cf.* David Madland, *Sectoral Bargaining Can Support High Union Membership*, CTR. FOR AM. PROGRESS (May 30, 2024), https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership/ [https://perma.cc/RS82-BPYX] ("[S]ectoral bargaining has a 'significant, positive and robust impact on union growth.' This is especially true for workers in jobs that are 'inherently hard to organize,' such as those with many small employers or heavily contracted, fissured industries." (footnotes omitted)). *See generally* Press Release, Bureau of Lab. Stats., *supra* note 24, at tbl. 3 (observing lower-than-average union densities in food preparation and service (3.9 percent), leisure and hospitality (3 percent), and personal care (4.3 percent)).

95. *See, e.g.*, CAL. LAB. CODE § 1475(d)(2)(A) (West 2026) (setting a minimum wage for fast-food workers); *see also* Josh Eidelson, *The SEIU's Odd Recipe for Unionizing Fast Food*, BLOOMBERG (July 2, 2015, at 15:20 ET), https://www.bloomberg.com/news/articles/2015-07-02/for-fast-food-labor-unions-seiu-has-odd-recipe?embedded-checkout=true [https://perma.cc/9W6S-BR8F] (describing the Service Employee International Union's (SEIU) efforts to organize fast-food workers through atypical organizing tactics); Michael Saltsman, *The SEIU's Fake Fast Food Union*, EMP. POL'Y INST. (Feb. 9, 2024), https://epionline.org/oped/ the-seius-fake-fast-food-union/ [https://perma.cc/DD69-4DEE] (describing continued efforts, with little success, nearly a decade later) ("Struggling at the national level, the union turned to its legislative allies in California.").

96. SEATTLE, WASH., MUN. CODE § 14.33.050.

97. *See, e.g.*, N.Y. PUB. HEALTH LAW § 3614-f (McKinney 2026) (increasing minimum wage for home care workers).

98. N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.2(2) (2026) (setting higher minimum hourly rate for fast-food employees).

99. N.Y. PUB. HEALTH LAW § 3614-f (home care workers).

100. N.Y.C., N.Y., R. & REGS. tit. 6, § 7-810 (2026) (setting minimum wage for app-based

In other cases, sectoral-wage laws target industries in which organized firms face stiff competition. Examples include construction[101] and hospitality,[102] in which margins are tight and high labor costs can be a competitive anchor.[103] Firms in these industries face pressure to keep overall costs in bounds, which limits unions' ability to extract higher wages.[104] Unions respond by using sectoral-wage laws to set a higher, industry-wide floor.[105] In one especially dramatic example, unions pushed the Los Angeles City Council to adopt a thirty-dollar-per-hour wage for hospitality employees[106]—almost double the statewide minimum.[107]

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food-delivery workers).

101. *See, e.g.*, N.Y. DEP'T OF LAB., ARTICLE 8 PREVAILING WAGE SCHEDULES/UPDATES FOR 07/01/2025 - 06/30/2026 (2025), https://apps.labor.ny.gov/wpp/publicViewPWChanges.do?method=showit [https://perma.cc/KKH6-CHWU] (setting out prevailing wage rates for covered construction work).

102. *See, e.g.*, L.A., CAL., MUN. CODE ch. 17, art. 6, § 186.02(A) (2026) (setting minimum wages for hotel workers).

103. *See, e.g.*, *US Hotels Face Profit Pressure as Labor Costs Outpace Recovery*, HFTP (Dec. 11, 2025), https://www.hftp.org/news/4130146/us-hotels-face-profit-pressure-as-labor-costs-outpace-recovery [https://perma.cc/5ANQ-DYTJ] (reporting that payroll per room in U.S. hotels continues to grow around 4 to 5 percent per year); *Bottom Line Impact of Rising Costs for Restaurants*, NAT'L RESTAURANT ASS'N (Aug. 24, 2022), https://restaurant.org/research-and-media/research/restaurant-economic-insights/analysis-commentary/bottom-line-impact-of-rising-costs-for-restaurants/ [https://perma.cc/NBQ4-6XJK] (reporting that restaurant after-tax margins are 5 percent, with labor accounting for about 33 percent of operating expenses); Joe Bousquin, *Rising Labor Costs Eat Away at Construction Firms' Profits*, CONSTR. DIVE (June 23, 2022), https://www.constructiondive.com/news/rising-labor-costs-eat-contractors-construction-firm-profits/625978/ [https://perma.cc/X6T6-ZMR8] (reporting that wages in construction industry had risen 6.4 percent year over year without a corresponding increase in labor productivity, eating into firms' profit margins).

104. *See US Hotels Face Profit Pressure*, *supra* note 103 (observing that hotel operators maintained margins through "cost discipline," but that union hotels had labor costs 9.5 percentage points higher than nonunion hotels (43 percent versus 33.5 percent)).

105. *See* MacDonald, *supra* note 91 (explaining strategy behind pushing for higher wages by law).

106. *See* Kurtis Lee, *Minimum Wage in L.A. Could Rise to $30 an Hour. Just Enough or Too Much?*, N.Y. TIMES (AUG. 10, 2025), https://www.nytimes.com/2025/08/04/business/minimum-wage-olympics-losangeles.html [https://perma.cc/Z7LH-GT22]; Press Release, UNITE HERE Local 11, Hospitality Union Files Initiative Petitions to Raise LA Minimum Wage to $30/Hour for All Workers and Require Voter Approval of Hotel and Event Center Subsidies, (June 17, 2025), https://www.unitehere11.org/hospitality-union-files-initiative-petitions-to-raise-la-minimum-wage-to-30-hour-for-all-workers-and-require-voter-approval-of-hotel-and-event-center-subsidies/ [https://perma.cc/AMB7-BTEP].

107. David Zahniser, *California Minimum Wage Set to Rise in 2026*, KTLA 5 (Dec. 19, 2025, at 14:00 PT), https://ktla.com/news/california/california-minimum-wage-to-rise-to-16-90-in-2026-some-cities-higher/ [https://perma.cc/23PK-H36T] (showing statewide minimum wage

Rhetorically, these laws are often framed in terms of fairness: They guarantee all workers a "living wage."[108] But in brute economic terms, their effect is more equivocal. Many economists think that firms react to a higher minimum wage by hiring fewer workers.[109] Economists also think that sectoral-wage laws may indirectly reduce wages in other industries.[110] As job growth slows in the covered industry, workers seek jobs in other industries, driving down wages as they compete for scarce positions.[111] So it is far from clear that these laws help workers in the aggregate; they may even harm workers overall.[112]

From the unions' perspective, the laws have essentially the same effect as negotiated union standards. They raise wages at a wide swath of firms, protecting unionized firms from wage competition.[113]

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is $16.90 per hour).

108. *See, e.g.*, L.A., CAL., MUN. CODE ch. 17, art. 6, § 186.00 (stating that despite influx of tourism, hotel workers had been "left languishing behind" without a living wage); NAT'L EMP. L. PROJ., FACT SHEET: NEW YORK DEPARTMENT OF LABOR WAGE BOARD FOR FAST-FOOD WORKERS 2 (2015) (claiming that sectoral wage rate for fast-food workers was needed to address "unconscionably low wages").

109. *See, e.g.*, Jacob Mincer, *Unemployment Effects of Minimum Wages*, 84 J. POL. ECON. S87, S88 (1976) (explaining that higher minimum wages in a sector forces labor out of the covered sector and into uncovered sectors, driving down wages in the uncovered sector, even while reducing employment levels in the covered sector); Charles Brown, Curtis Gilroy & Andrew Kohen, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487, 505 (1982) (noting that while studies disagree over the quantum, "the research is consistent in finding some employment reduction associated with minimum wage increases"); Michael L. Wachter, *Neoclassical Labor Economics: Its Implications for Labor and Employment Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 75, at 20, 23, 28–29 (observing that wage levels have an inverse relationship to employment levels, requiring tradeoffs between high wages and low unemployment rates).

110. *See* Mincer, *supra* note 109, at S88.

111. *See id.*

112. *See id.; see also* Terry Gregory & Ulrich Zierahn, *When the Minimum Wage Bites Hard: The Negative Spillover Effect on Highly Skilled Workers*, J. OF PUB. ECON., Feb. 2022, at 2, (finding that spillover effects harm even workers higher up the skill ladder than workers who typically receive the minimum wage).

113. *See* Estlund, *supra* note 27, at 541, 559 (explaining that sector-specific minimum wages tend to suppress competition over wages); Malkie Wall, David Madland & Karla Walter, *Prevailing Wages: Frequently Asked Questions*, CTR. FOR AM. PROGRESS (Dec. 22, 2020), https://www.americanprogress.org/article/prevailing-wages-frequently-asked-questions/ [https://perma.cc/S7YV-QTCY] ("Strong prevailing wage laws prevent low-road contractors from undermining higher standards that workers attain through collective bargaining."); *cf.* WALL ST. J., *supra* note 83 ("By removing wages from the competition equation the bargaining model prevents employers from blaming unions for their decisions to close businesses or relocate to low-wage locations.").

B. "Just Cause" Requirements

Another tactic has been to extend traditional union rules to nonunion firms. For example, in 2021, the Service Employees International Union (SEIU) persuaded[114] the New York City Council to pass a "just cause" law for fast-food workers.[115] "Just cause" basically means that an employee can be fired only for a good reason.[116] Though it is common in unionized firms,[117] it is rarely seen in unorganized workplaces, where employment is usually "at will."[118]

The SEIU's law changed that. It extended the just-cause standard to cover every fast-food workplace in the city,[119] the vast majority of which were unorganized.[120] The effect was to elevate a concept found in private agreements to a principle embodied in public law.[121] And

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114. *See, e.g.*, Eliza Bates, *In Historic Victory, New York City Fast Food Workers Become First in the Nation to Win Just Cause Protections*, SEIU 32BJ (Dec. 17, 2020, at 15:07 ET), https://www.seiu32bj.org/press-release/in-historic-victory-new-york-city-fast-food-workers-become-first-in-the-nation-to-win-just-cause-protections/ [https://perma.cc/4BFF-FSGJ] (touting union's role in organizing workers to support the law); Transcript of the Minutes at 13, N.Y.C. City Council, Committee on Civil Service and Labor (Feb. 13, 2020), https://legistar.council.nyc.gov/View.ashx?M=F&ID=8185607&GUID=D9E87A07-A91A-4579-8C5D-4992682E19A1 [https://perma.cc/25F8-DUEN] (statement of Council Member Brad Lander) (congratulating SEIU 32BJ on organizing support for the bill).

115. *See* N.Y.C., N.Y., Loc. L. No. 1 (2021) (codified at N.Y.C, N.Y., ADMIN. CODE §§ 20-1741, 20-1271 to -1274).

116. *See* RESTATEMENT OF EMP. L. § 2.04 reporter's note to cmts. b and c (A.L.I. 2015).

117. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS ch. 15, § 2.A.I.ii (Elizabeth J. Fabrizio ed., 2021) (ebook) ("Most collective bargaining agreements do, in fact, require cause or just cause for discharge or discipline."); *see also* Barnes v. Stone Container Corp., 942 F.2d 689, 693 (9th Cir. 1991) ("Issues of hiring and firing are often central to [central bargaining agreement] negotiations.").

118. *See* JOSEPH PICKENS & AARON SOJOURNER, W.E. UPJOHN INST. FOR EMP. RSCH., NYC'S "JUST CAUSE" LAW AIMS TO MAKE IT HARDER TO FIRE FAST FOOD WORKERS. DOES IT? 1 (2025) ("Though labor unions may negotiate just cause policies, broader protections against firing are rare."); *At-Will Employment—Overview*, NAT'L CONF. OF STATE LEGIS. (Apr. 15, 2008), https://www.ncsl.org/labor-and-employment/at-will-employment-overview [https://perma.cc/376A-K3UA] (observing that all states but Montana recognize employment at will as the default rule).

119. *See* N.Y.C. Loc. L. No. 2 (2021) (codified at N.Y.C, N.Y., ADMIN. CODE §§ 20-1271 to 20-1274).

120. *See* Rest. L. Ctr. v. City of New York, 90 F.4th 101, 117 (2d Cir. 2024) (observing that when the law was passed, the "fast-food industry [was] largely nonunionized").

121. *See* N.Y.C., N.Y., ADMIN. CODE § 20-1272 (requiring just cause to terminate certain employees and establishing arbitration procedures to test whether termination was supported by just cause).

for unions, the effect was to extend a typical contract rule without needing to negotiate a single contract. Just cause became something unions no longer had to bargain for; they no longer had to trade off other demands for just-cause job protections.[122] Instead, they would start any negotiations with just cause as the baseline.[123]

C. Captive-Audience Meeting Bans

Unions have taken a similar strategy toward "captive-audience" meetings. Scary name aside, captive-audience meetings are simply meetings where employers talk about unions.[124] Employers use them to deliver campaign messages during organizing drives.[125] Though the meetings are (usually) mandatory, they occur on paid time.[126] Unions have long opposed them,[127] in part because they are

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122. *See id.*

123. *See Rest. L. Ctr.*, 90 F.4th at 116–18 (considering but rejecting argument that law was preempted because it gave unions a substantive term they would otherwise have had to negotiate for in collective bargaining); *see also* PICKENS & SOJOURNER, *supra* note 118, at 1 (analyzing the impact of just-cause laws on workplace terminations).

124. *See* Michael Pavclick, *What Happens if NLRB Cuts Captive Audience Meetings*, BLOOMBERG L. (Oct. 4, 2022), https://news.bloomberglaw.com/us-law-week/what-happens-if-nlrb-cuts-captive-audience-meetings [https://perma.cc/A9Z7-RH5W] ("Captive audience meetings are compulsory meetings conducted by the company. Employees are paid for their time attending the meeting and are required to attend or face discipline.").

125. *See id.*

126. *See id.*; *see also* Amazon Servs. LLC, 373 NLRB No. 136, slip op. at 19-20 (Nov. 13, 2024) (stating that a meeting may be a captive-audience meeting even without "[a]n express order from a supervisor, manager, or other agent of the employer to attend the meeting").

127. *See Captive Audience Law: Beginning July 1, 2022, Connecticut Workers Can Leave Captive Audience Meetings*, CONN. AFL-CIO, https://ctaflcio.org/captive-audience [https://perma.cc/G3HX-UJ2Y] (arguing that captive-audience laws "make it difficult for workers to act in their own best interests" and supporting statutory ban); Press Release, Cal. Gov. Gavin Newsom, Newsom Signs Legislation Protecting Workers from Forced Political and Religious Messaging (Sep. 27, 2024), https://www.gov.ca.gov/2024/09/27/governor-newsom-signs-legislation-protecting-workers-from-forced-political-and-religious-messaging/ [https://perma.cc/Q594-5YP4] (quoting Tia Orr, Executive Director of SEIU California, and Amber Paris, Executive Director of UFCW Western States Council, criticizing the meetings and supporting a statutory ban); *see also* Andrea Hsu, *Illinois Bans Companies from Forcing Workers to Listen to Their Anti-Union Talk*, NPR (July 31, 2024), https://www.npr.org/2024/07/30/nx-s1-5040451/captive-audience-anti-union-religious-meetings-afl-cio [https://perma.cc/Q594-L27Z] ("These bills have been cheered by labor organizers who welcome the added protections for workers.").

effective: They are sometimes an employer's best chance to counter a union's campaign message.[128]

It is no surprise, then, that unions have tried to ban them. As of late 2025, they had pushed through bans in more than a dozen states.[129] And even more states were considering bans, either by statute or ballot initiative.[130] Employers have naturally objected to the bans, largely on statutory or constitutional grounds.[131] Employers have even sued to block the bans in a few states.[132] But so far, many of these lawsuits have been caught up on procedural hurdles, and the laws have stayed on the books.[133]

128. *See, e.g.*, *Banning Captive Audience Meetings*, CWA DIST. 1, https://cwad1.org/banning-captive-audience-meetings [https://perma.cc/8XQ3-AUH3] (arguing that "many union organizing campaigns fail" because of "intense union-busting by employers" and that captive-audience meetings "are one of the key weapons for union-busting consultants and employers"); Daniel Perez & Jennifer Sherer, *Tackling the Problem of "Captive Audience Meetings"*, ECON. POL'Y INST.: WORKING ECON. BLOG (Oct. 24, 2023, at 16:30 ET), https://www.epi.org/blog/captive-audience-meetings/ [https://perma.cc/TQ47-3TTP] (reporting that union win rate in elections fell by 26 percentage points when employers used captive-audience meetings (73 percent to 47 percent).

129. *See* ALASKA STAT. § 23.10.450(a), (e)(1) (2025); CAL. LAB. CODE § 1137(b)(3), (c) (West 2026); CONN. GEN. STAT. § 31-51q(a)-(b) (2026); HAW. REV. STAT. § 377-6(14) (2026); 820 ILL. COMP. STAT. 57/5 (2026); ME. STAT. tit. 26, § 600-B (2026); MINN. STAT. § 181.531 (2026); N.J. STAT. ANN. §§ 34:19-9, 34:19-10(a) (West 2025); N.Y. LABOR LAW § 201-d (McKinney 2026); OR. REV. STAT. §§ 659.780, 659.785(1)(a) (2026); 28 R.I. GEN. LAWS § 28-7-50 (2025); VT. STAT. ANN. tit. 21, § 495o (2026); WASH. REV. CODE § 49.44.250 (2026); WIS. STAT. §§ 111.32, 111.321, 111.365 (2026).

130. *See The State of Captive Audience Meetings Bans in the States*, LABORLAB (Dec. 31, 2024), https://laborlab.us/the-state-of-captive-audience-meetings-bans-in-the-states/ [https://perma.cc/H9V5-Y9RQ] (surveying enacted and proposed captive-audience legislation).

131. *See, e.g.*, Ill. Pol'y Inst. v. Flanagan, 802 F. Supp. 3d 1071, 1074 (N.D. Ill. 2025) (describing arguments that captive-audience ban violated freedom of speech); Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1241 (E.D. Cal. 2025), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025); *see also* Hsu, *supra* note 127 ("These [bans] have been ... derided by business groups who call them employer gag orders.").

132. *See, e.g.*, *Bonta*, 802 F. Supp. 3d at 1241-1244 (describing procedural posture of challenge by business association to California captive-audience ban); *Flanagan*, 802 F. Supp. 3d at 1071, 1073.

133. *See Flanagan*, 802 F. Supp. 3d at 1071, 1073 (dismissing challenge to captive-audience ban on standing grounds); Minn. Chapter of Assoc. Builders & Contractors v. Ellison, 153 F.4th 695, 697-98, 702 (8th Cir. 2025) (rejecting challenge on sovereign-immunity grounds). *But see Bonta*, 802 F. Supp. 3d at 1242 (concluding that California captive-audience law was preempted by the NLRA and inconsistent with the First Amendment).

D. Labor-Peace Agreements

Similarly popular have been mandatory labor-peace agreements. A labor-peace agreement is basically an agreement setting the rules of the road for an organizing campaign.[134] The agreements usually commit employers and unions to forgo certain tactics, such as picketing (by unions) or campaign speeches (by employers).[135] They also often give the union a right to come into the workplace and talk directly with the employees about signing up.[136]

For obvious reasons, employers rarely sign these agreements voluntarily.[137] But under state labor-peace laws, they have no choice.[138] The laws often attach labor-peace requirements to some public benefit, like a license or a lease on public land.[139] To get the license, lease, or other benefit, a firm must sign, maintain, and abide by the agreement.[140] In effect, it has only the classic Hobson's

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134. *See* U.S. CHAMBER OF COM., *supra* note 18, at 27.

135. *See id*; *see also* CAL. BUS. & PROF. CODE § 26001(ag) (West 2026) (defining "labor peace agreement" as an agreement requiring, among other things, an agreement requiring a union to refrain from disrupting employer's business); Mulhall v. Unite Here Loc. 355, 667 F.3d 1211, 1213 (11th Cir. 2012) (describing private labor-peace agreement requiring, among other things, access to property and neutrality in organizing campaign).

136. *See, e.g.*, CAL. BUS. & PROF. CODE § 26001(ag) (defining a labor-peace agreement as an agreement that "provide[s] a bona fide labor organization access at reasonable times to areas in which the applicant's employees work, for the purpose of meeting with employees to discuss their right to representation"); *see also* Labor Peace Agreement, UFCW–Kushmart Jersey LLC (Apr. 19, 2022) [hereinafter Kushmart Labor Peace Agreement] (on file with author) (setting out terms of a labor-peace agreement between a union and employer, including neutrality and access).

137. *See* U.S. CHAMBER OF COM., *supra* note 18, at 28.

138. *See id.* (describing labor-peace agreement laws as an effort to coerce employers into signing agreements).

139. *See, e.g.*, N.J. STAT. ANN. § 24:6I-7.2(e) (West 2025); N.Y. PUB. HEALTH LAW § 3365(1)(D)(iii) (McKinney 2026); N.Y. PUB. AUTH. LAW § 2879-b(1)(c); N.Y. COMP. CODES R. & REGS. tit. 9 §§ 116.3(14), § 120.11(2) (2026); 410 ILL. COMP. STAT. 705/15-30; MINN. STAT. § 342.01 (2026); MD. CODE ANN., STATE GOV'T § 9-1A-07 (LexisNexis 2026); S.F., CAL., ADMIN. CODE § 23.51(10) (2026); PITTSBURG, PA., CODE OF ORDINANCES art. VI, § 161.30.1 (2026); L.A., CAL., MUN. CODE § 104.10 (2026).

140. *See, e.g.*, N.J. STAT. ANN. § 24-6I-36(c) (requiring covered businesses to sign, maintain, and abide by labor-peace agreements); CAL. BUS. & PROF. CODE § 26051.5(a)(5)(A)-(B) (same); *see also* CAL. BUS. & PROF. CODE § 26001 (requiring employer to agree "not to disrupt efforts by the bona fide labor organization to communicate with, and attempt to organize and represent" the employer's workers). *But see* Chamber of Com. v. Brown, 554 U.S. 60, 68 (2008) (explaining that the NLRA protects employer's right to speak about labor issues during union campaign); Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964) (explaining that the

choice: consent to a labor-peace agreement—and thus new organizing rules—or give up access to a particular line of business.[141]

E. Rights Training

Another common standard is "rights" training. Rights training laws require an employer to give workers training about state and local laws.[142] The training, however, is not delivered by the employer; it is delivered by a third party.[143] This third party is usually certified by the government, and it is almost always a union.[144]

Though it might seem like a burden, training responsibilities give the union a lot of benefits. For one, the union gets an official imprimatur: It is designated an official training organization by the government, which gives it a halo of credibility.[145] It also gets regular access to workers, each of whom is a potential new member. It may even get the workers' contact information, which it can use to "follow up" on a regular cadence. The result is a powerful new tool for organizing—one not available to a union under the standard NLRA process.

NLRA intentionally preserves parties' right to use "self-help" to resolve labor disputes); Metro. Milwaukee Ass'n of Com. v. Milwaukee County, 431 F.3d 277, 279 (7th Cir. 2005) (concluding that requirement that city contractors sign labor-peace agreements was preempted because of effect on balance of labor relations established by the NLRA).

141. *See, e.g.*, *Labor Peace Agreements for Cannabis Businesses*, DEP'T OF CANNABIS CONTROL, https://www.cannabis.ca.gov/labor-peace-agreements-for-cannabis-businesses/ [https://perma.cc/F9KV-5475] ("Compliance with the terms of a labor peace agreement is a condition of state cannabis licensure. A licensee that fails to maintain compliance with a labor peace agreement risks losing its state license."); N.J. ADMIN. CODE § 17:30-9.4(g) (2025) (stating that maintaining a labor-peace agreement is "an ongoing material condition of the cannabis business's license").

142. *See, e.g.*, MINN. STAT. § 181.214.

143. *See, e.g.*, MINN. STAT. § 181.211(3) (defining "certified worker organization").

144. *See* MINN. STAT. § 181.211(a)(1) (providing for certification by Minnesota Nursing Home Workforce Standards Board); *see also Current List of Certified Worker Organizations*, *supra* note 19 (listing three labor unions as only organizations certified to provide training).

145. *See* Estlund, *supra* note 27, at 568 (describing how unions can benefit from being associated with official or quasi-official processes, including a potential boost to organizing).

F. Industry Councils

Most dramatically, unions have experimented with creating industry councils.[146] These councils—also called "labor standards boards" or "worker standards boards"—create an entirely new forum for bargaining.[147] They bring together representatives of labor, management, and sometimes the government,[148] to develop new labor standards.[149] These standards are sent to some public official, such as a labor commissioner, who makes sure they meet certain high-level criteria, such as "clarity," "authority," and "non-duplication."[150] And if they meet those criteria, they are enacted as regulations.[151] The result is a mix of bargaining and lawmaking: A handful of representatives negotiate standards for the whole local industry.[152]

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146. *See, e.g.*, CAL. LAB. CODE § 1475(a)(1) (establishing California Fast Food Council); COLO. REV. STAT. § 8-13.5-205 (tripartite agricultural work standards board); NEV. REV. STAT. § 608.610 (tripartite home-care standards board); N.Y. LAB. LAW § 674-a (tripartite board for farmworkers); MINN. STAT. § 181.212(1) (tripartite board for nursing-home workers); SEATTLE, WASH., MUN. CODE ch. 14.23 (tripartite board for domestic workers); *see also* Wall et al., *supra* note 113 (describing recent burst of standard board laws at state and local levels).

147. *See, e.g.*, CAL. LAB. CODE § 1475(b) (directing board to develop standards for wages, hours, and other working conditions for fast-food workers); MINN. STAT. § 181.213(1)(a) (empowering board to establish standards "reasonably necessary and appropriate to protect the health and welfare of nursing home workers).

148. *See, e.g.*, CAL. LAB. CODE § 1475(a)(2)-(3); MINN. STAT. § 181.212; *see also* MASS. GEN. LAWS ch. 150F, § 4 (2026) (establishing similar procedure for rideshare drivers).

149. *See, e.g.*, CAL. LAB. CODE § 1475(b); MINN. STAT. § 181.213(1)(a); *see also* David Madland & Sachin Shiva, *Industry Standards Boards Are Delivering Results for Workers, Employers, and Their Communities*, CTR. FOR AM. PROGRESS (Nov. 21, 2024), https://www.americanprogress.org/article/industry-standards-boards-are-delivering-results-for-workers-employers-and-their-communities/ [https://perma.cc/B8LZ-LEJE] (describing general structure and function of these entities).

150. *See* CAL. LAB. CODE §1475(d)(1)(C)(iii); CAL. GOV'T CODE § 11339.1(a) (West 2026); *see also* MASS. GEN. LAWS ch. 150F, § 6(f) (providing for review by state labor commissioner for consistency with statutory policies, including whether wages established are adequate and how the companies will be affected financially). *But see* MINN. STAT. § 181.213(1)(a) (allowing nursing-home board to adopt nonfiscal standards without prior review or approval); MINN. R. §§ 5200.2000-.2090 (2026) (promulgating rules adopted by the Nursing Home Workforce Standards Board regulating minimum pay, holiday pay, and training).

151. *See, e.g.*, CAL. LAB. CODE § 1475(d)(1)(C)(iii); Order of Commissioner of Labor Roberta Reardon on the Report and Recommendations of the 2022 Farm Laborers Wage Board (Sep. 30, 2022), https://dol.ny.gov/system/files/documents/2022/09/fwwb_signed_order_093022.pdf [https://perma.cc/CR58-TTV2] (approving board's "recommendations" without change).

152. *See* CAL. GOV'T CODE § 3541.3; CAL. BUS. & PROF. CODE § 7470.4 (West 2026) (creating duties for quasi-industry-council system for collective bargaining by rideshare drivers); MASS.

III. THE NLRA AS A SYSTEM

The NLRA differs from most labor and employment laws. At a high level, it gives employees the right to bargain collectively through a representative of their choice.[153] But while other laws often announce a minimum standard, or "floor," for rights in the workplace, the NLRA does something fundamentally different.[154] It does not simply bestow rights or impose obligations on an employee; it instead balances the rights and responsibilities of multiple parties, including employees, employers, and unions.[155] For example, while it gives employees the right to strike,[156] it also leaves employers free to hire strike replacements.[157] While it requires both sides to bargain in good faith,[158] it leaves them free to reject any specific proposal.[159] And while it gives employees a right to act collectively,[160] it requires them to devote working time to work.[161]

GEN. LAWS ch. 150F §§ 1-12 (same).

153. *See* 29 U.S.C. § 157.

154. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 326-29 (2005) (describing the NLRA as creating a "'constitution' of the private sector workplace" and New Deal employment laws as "establishing a floor on some basic economic terms of employment").

155. *See* Cox, *supra* note 29, at 1352 ("An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organizing, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."); Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964) (describing the NLRA as reflecting "the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community").

156. *See* 29 U.S.C. § 163.

157. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938) (holding that employer did not violate the Act by hiring permanent replacements for workers on an economically motivated strike).

158. 29 U.S.C. § 158(a)(5), (b)(3).

159. *Id.* § 158(d); *see also* H.K. Porter Co. v. NLRB, 397 U.S. 99, 107–08 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.").

160. 29 U.S.C. § 157.

161. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct on employees on company time. Working time is for work." (quoting Peyton

These rights and responsibilities are interlocking and self-reinforcing, balancing against one another in a deliberately calibrated equilibrium.[162] They are, in short, a system.[163]

This system informs the NLRA's preemption doctrines. While the NLRA does not mention preemption explicitly, it casts a wide preemptive net.[164] It displaces state laws covering the same subjects—or even "arguably" covering them.[165] It also displaces state laws regulating zones that Congress meant to leave unregulated (for example, lockouts and strikes).[166] In setting the appropriate balance, Congress decided that certain decisions were best left to private

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Packing Co., 49 NLRB 828, 843–44 (1943))).

162. *See* Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955) ("Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces."); *see also* Cannon v. Edgar, 33 F.3d 880, 885 (7th Cir. 1994) (explaining that the NLRA reflects a careful balance struck by Congress); Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 28 (2d Cir. 1988) (explaining that the NLRA preempts state law when it would interfere with the NLRA's "delicate machinery").

163. *See* Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 238 (1967) ("The [NLRA] is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce."); NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (explaining that Congress enacted the NLRA as a comprehensive system of substantive rules and procedures for enforcing those rules); *see also Weber*, 348 U.S. at 480–81 (explaining that the NLRA creates a "penumbral" area free of federal or state regulation for private forces to act); Cox, *supra* note 29, at 1352 (describing national labor law and policy as a balancing of interests).

164. *See* Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485, 490 (1953) ("Congress evidently considered that centralized administration of specifically designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."); NLRB v. North Dakota, 504 F. Supp. 2d 750, 758 (D.N.D. 2007) ("The purpose of the [NLRA] was to obtain a uniform application of its substantive rules and avoid conflicts likely to result from a variety of local procedures and attitudes toward labor disputes."); Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 291 (1986) (holding that states may not supplement the NLRA's remedies, which are exclusive, deliberately limited, and part of Congress's overall design).

165. *See* S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

166. *See, e.g.*, Int'l Union of United Auto. Workers v. O'Brien, 339 U.S. 454, 458–59 (1950) (invalidating state "strike vote" legislation); Emps. Ass'n v. United Steelworkers, 32 F.3d 1297, 1301 (8th Cir. 1994) (invalidating law restricting employer's ability to hire replacements during strike).

actors.[167] If a state tried to regulate those decisions, it would disrupt the intended balance.[168]

But that is not to say that the NLRA preempts all state employment regulation.[169] In general, states have broad authority to regulate for the public health, welfare, and protection.[170] That authority includes the power to regulate the employment relationship.[171] States can and do regulate how much people are paid, when they can work, and why they can be fired.[172] These regulations are a problem only when they threaten the NLRA's system.[173]

That distinction, of course, is not self-defining. It is not always clear whether a law interferes with the NLRA's balance. So, to draw the line, courts often ask whether a law regulates the bargaining process as such.[174] Process is central to the NLRA: The statute

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167. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678–79 (1981) (explaining that Congress deliberately subjected some decisions affecting labor relations to bargaining while leaving others in the hands of private managers).

168. *See, e.g.*, Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964) (explaining that "self-help" permitted by federal law (even if not affirmatively protected) is "part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community"); Cannon v. Edgar, 33 F.3d 880, 886 (7th Cir. 1994) (explaining that the NLRA preempts any state law that "meddles with" bargaining process); Bechtel Const., Inc. v. United Bhd. of Carpenters & Joiners, 812 F.2d 1220, 1225 (9th Cir. 1987) (finding that minimum-wage law for apprentices distorted bargaining process and was therefore preempted).

169. *See* Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) (observing that the NLRA was passed against a diverse backdrop of existing state employment laws, and there was no indication that Congress meant to displace those laws).

170. *See, e.g.*, Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting Slaughter-House Cases, 83 U.S. 36, 62 (1872))); Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1252 (E.D. Cal. 2025) (citing *Metro. Life Ins.*, 471 U.S. at 756), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025).

171. *See Bonta*, 802 F. Supp. 3d at 1251 ("Within their police powers, states have the ability to protect workers in the employment relationship.").

172. *See* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 37 (1st Cir. 2011) (observing that "states can, and do, regulate numerous subjects that the NLRB has held to be mandatory subjects of bargaining").

173. *See, e.g.*, *Ft. Halifax Packing Co.*,482 U.S. at 21 ("[T]he mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption."); Bldg. Owners & Managers Ass'n of Chi. v. City of Chicago, 513 F. Supp. 3d 1017, 1023 (N.D. Ill. 2021) (explaining that courts do not assume the NLRA displaces state authority to regulate employment in general).

174. *See, e.g.*, Assoc. Builders & Contractors of Cal. Coop. Comm., Inc. v. Becerra*,* 231 F. Supp. 3d 810, 820 (S.D. Cal. 2017) ("Minimum labor standards ... are not preempted, because

specifies when, why, and how employers and employees bargain collectively.[175] But of course, the bargaining process always plays out against a backdrop of state law. So, laws that merely change the backdrop do not change the process itself; they merely set a new floor.[176]

This is where courts get the idea of minimum labor standards. Courts reason that minimum labor standards are consistent with the NLRA because they leave the bargaining process intact.[177] For example, while a general minimum-wage law sets a floor on pay, it also leaves the parties free to negotiate above the minimum rate.[178] Their negotiations follow the same NLRA-prescribed process.[179] And

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they do not 'regulate the mechanics of labor dispute resolution.'" (quoting Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 86 (2d Cir. 2015))); *Bldg. Owners & Managers Ass'n of Chi.*, 513 F. Supp. 3d at 1023 (holding that fair workweek law was not preempted because it did not interfere with bargaining process); Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884, 889-94 (W.D. Wash. 2021) (same result for grocery hazard pay law), *appeal dismissed*, No. 21-35205, 2021 WL 4206416 (9th Cir. Sep. 7, 2021).

175. *See, e.g.*, Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 239-40 (1967) (finding preempted state law denying unemployment compensation to a person who filed an unfair labor practice charge); Div. 1287, Amalgamated Ass'n of St. Emps. v. Missouri, 374 U.S. 74, 81-82 (1963) (striking down state statute prohibiting peaceful strikes against public utilities); Amalgamated Ass'n of St. Emps., Div. 998 v. Wis. Emp. Rels. Bd., 340 U.S. 383, 394 (1951) (holding that the NLRA preempted the Wisconsin Public Utility Anti-Strike Law); Cannon v. Edgar, 33 F.3d 880, 885 (7th Cir. 1994) (finding state law preempted when it purported to require employers and unions to bargain over reserve workforce to perform certain religious burials during work stoppages); NLRB Gen. Couns. Adv. Mem. 10-CA-26718 (Sep. 21, 1993) (concluding that Tennessee law requiring employers to create safety committees was preempted because it required employers to deal with an employer-created employee group—a practice regulated (and forbidden) by the NLRA).

176. *See* St. Thomas–St. John Hotel & Tourism Ass'n. v. Gov't of U.S. Virgin Islands, 218 F.3d 232, 246 (3d Cir. 2000) (explaining that the NLRA's preemption power does not extend into the "realm of establishment of minimum employment standards"); *Bldg. Owners & Managers Ass'n*, 513 F. Supp. 3d at 1023 (holding that fair workweek ordinance not preempted because it merely established a background rule of employment law and did not regulate the bargaining process).

177. *See* Babler Bros. v. Roberts, 995 F.2d 911, 914 (9th Cir. 1993) (laws setting minimum standards and not intended to interfere with the bargaining process permitted).

178. *See, e.g.*, 29 U.S.C. § 206 (setting federal minimum hourly wage); N.Y. LAB. LAW § 652 (McKinney 2026) (setting state minimum hourly wages); *see also* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 37 (1st Cir. 2011) (illustrating the point using a minimum wage as an example); ConcernedHome Care Providers, Inc. v. Cuomo, 783 F.3d 77, 86 (2d Cir. 2015) (concluding that minimum wage law for home care workers was not preempted simply because it regulated a term of bargaining; by setting a minimum wage, it only set a floor for bargaining).

179. *See* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 757 (1985) (explaining that true minimum labor standards merely set a "backdrop" for bargaining); Beckwith v. United Parcel

since the NLRA is concerned mostly with process,[180] general minimum wages, along with many other minimum standards, are consistent with the NLRA's system.[181]

But that does not mean all minimum labor standards are okay.[182] Courts have sometimes found that they distort bargaining too much or too directly.[183] For example, in *Chamber of Commerce v. Bragdon*, the Ninth Circuit struck down a law setting wage rates based on agreements negotiated by other employers and unions.[184] In *520 South Michigan Avenue Associates v. Shannon*, the Seventh Circuit struck down a law mandating minimum-rest periods for a small subset of workers who were then pushing for the same benefit in bargaining.[185] And in *Association of Car Wash Owners Inc. v. City of New York*, the Southern District of New York struck down a law allowing car-wash businesses to post a smaller bond with the city when they signed a collective-bargaining agreement.[186] While none

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Serv., Inc., 889 F.2d 344, 348 (1st Cir. 1989) (state law preventing certain payroll deductions not preempted simply because it allowed "employees [to] come to the negotiating table with one protection for which they otherwise might have had to bargain"); *Concerned Home Care Providers*, 783 F.3d at 87 (holding NLRA did not preempt state wage law simply because it regulated a substantive term that could also be the subject of bargaining).

180. *See Metro. Life Ins.*, 471 U.S. at 753 ("The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment."); Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (explaining that the NLRA is concerned with bargaining process more than the terms produced by bargaining); 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1127-28 (7th Cir. 2008) (explaining that minimum-labor-standards approach is informed by the NLRA's focus on process rather than substance).

181. *See* Am. Hotel & Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 963 (9th Cir. 2016) (holding that minimum-wage ordinance for airport workers was not preempted); Nat'l Broad. Co. v. Bradshaw, 70 F.3d 69, 71 (9th Cir. 1995) (holding that law mandating premium overtime wage rates for broadcast industry employees was not preempted); *Babler Bros.*, 995 F.2d at 915 (holding that NLRA did not preempt state law mandating premium overtime for nonunion employees working on public construction projects).

182. *See R.I. Hosp. Ass'n*, 667 F.3d at 32 (recognizing that there may be an outer boundary to the "minimum labor standard" concept at which the law interferes too much with the NLRA).

183. *See, e.g.*, Bechtel Const., Inc. v. United Bhd. of Carpenters, 812 F.2d 1220, 1226 (9th Cir. 1987) (finding minimum-wage law for construction apprentices preempted when its enforcement process threatened to have a "distorting effect" on the bargaining process); NLRB Gen. Couns. Mem. 10-CA-26718 (Sep. 21, 1993) (finding law preempted when it conflicted not only with NLRA's express provisions, but also with the "policies supporting" those provisions).

184. 64 F.3d 497, 502–03 (9th Cir. 1995).

185. 549 F.3d at 1122, 1132, 1139.

186. No. 15 Civ. 8157, 2017 WL 4508489, at *3 (S.D.N.Y. June 20, 2017), *vacated and remanded*, 911 F.3d 74 (2d Cir. 2018).

of these laws directly regulated bargaining, all of them distorted the bargaining process.[187] They changed the parties' basic incentives and shifted the balance of power.[188] They were all, therefore, preempted by the NLRA.[189]

IV. ERODING THE SYSTEM

But increasingly, that basic model fails to describe labor law on the ground. At labor's insistence, state and local laws have pushed into the NLRA's territory.[190] Though many of these laws could be (and have been) described as minimum labor standards, they could also be described as distortions of the NLRA's system.[191] They strip tools from employers, hand weapons to unions, and go around steps in the standard organizing and bargaining process.[192] Whatever

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187. *See Ass'n of Car Wash Owners*, 2017 WL 4508489, at *3 (finding licensing scheme preempted because it "explicitly encourages unionization, and therefore impermissibly intrudes on the labor-management bargaining process"); *Bragdon*, 64 F.3d at 502 (holding that the NLRA preempted a prevailing-wage law because it "affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*"); *520 S. Michigan Ave. Assocs.*, 549 F.3d 1119, 1129 (7th Cir. 2008) (striking down law even though it did not regulate the bargaining process per se because it appeared to be an indirect effort to do so); *see also* Cannon v. Edgar, 33 F.3d 880, 885 (7th Cir. 1994) (finding that burial rights act "intrudes on the collective bargaining process in a variety of ways" and so was preempted).

188. *See Ass'n of Car Wash Owners*, 2017 WL 4508489, at *3 (finding state law preempted because it improperly incentivized unionization, a choice the NLRA meant to leave unmolested by external pressure); *see also* Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 29 (2d Cir. 1988) (finding implied contract claim preempted because it distorted the parties' incentives and tactics in negotiation).

189. *See 520 S. Mich. Ave. Assocs.*, 549 F.3d at 1134 (finding that the NLRA preempted a mandatory rest law for hotel attendants when the state intervened in ongoing negotiations involving attendants to shift balance of power); Emps. Ass'n v. United Steelworkers, 32 F.3d 1297, 1301 (8th Cir. 1994) (holding that the NLRA preempted a state law barring management from hiring permanent strike replacements because it shifted the balance of power established by Congress).

190. *See, e.g.*, Block et al., *supra* note 94; CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 4, 8.

191. *See, e.g.*, Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1245 (E.D. Cal. 2025) (describing defendants' position that captive-audience ban was exempt from preemption as a minimum labor standard), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025); CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 24 (defending other state-level labor laws on similar grounds); U.S. CHAMBER OF COM., *supra* note 18, at 4–5 (describing how many of these same laws circumvent federal limits).

192. *See, e.g.*, CAL. LAB. CODE § 1475(a)(1) (West 2026) (appointing industry-council members to represent workers without election or even selection by workers); MINN. STAT. §

their label, they are, in the aggregate, creating a system that would be unrecognizable to the NLRA's drafters.[193]

For example, consider the captive-audience laws. The laws could be seen as minimum standards: They give employees a right in background law not to attend mandatory meetings about labor unions.[194] They do not regulate the bargaining process as such.[195] They do, however, eliminate a tool employers commonly use in organizing campaigns. So, "minimum standard" or not, they change how campaigns play out.[196] Similarly, labor-peace agreement laws could be considered minimum standards.[197] They create a baseline requirement that unions and employers respect certain limits on speech and property access.[198] But at the same time, they limit the use of economic pressure, give unions new access rights, and transform the normal organizing process.[199]

181.213(1)(a) (2025) (same); CAL. LAB. CODE § 1137(C) (forbidding employers from holding captive-audience meetings).

193. *See* Loc. 20, Teamsters Union v. Morton, 377 U.S. 252, 259-60 (1964) (explaining that if state law could regulate conduct Congress meant to leave to private action, "the inevitable result would be to frustrate the congressional determination").

194. *See* CAL. LEG., *supra* note 33, at 10 (describing California captive-audience ban in those terms).

195. *See id.* (defending California law on similar grounds); *cf.* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 753 (1985) (explaining that the NLRA is concerned principally with establishing an equitable bargaining process).

196. *See Bonta*, 802 F. Supp. 3d at 1252 (concluding that California captive-audience ban was preempted by NLRA because it interfered with employers' ability to speak about unions and labor issues, which Congress had deliberately left open to free play of market forces and private decisionmaking); *cf.* 29 U.S.C. § 158(c) (stating that no statement of opinion, absent promises or threats, can be treated as an unfair labor practice under the NLRA).

197. *See* CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 34 (citing labor-peace agreements as potential options for states to regulate outside federal preemption); Reply Br. of Defs., Curaleaf Holdings, Inc. v. N.J. Cannabis Reg. Comm'n, No. 25-cv-16397, at 24 (D.N.J. Dec. 19, 2025), ECF No. 43 (arguing that labor-peace agreement requirement under New Jersey law was exempt under standards articulated by *Metro. Life Ins.* and *Ft. Halifax* for minimum labor standards).

198. *See, e.g.*, CAL. BUS. & PROF. CODE § 26001(ag); Measure 119 (Or. 2024) (requiring labor-peace-agreement signatory to remain neutral during organizing drive).

199. *See, e.g.*, CAL. BUS. & PROF. CODE § 26001(ag) (requiring neutrality and access); Kushmart Labor Peace Agreement, *supra* note 136 (requiring neutrality, access, and recognition by card check); *see also* Casala, LLC v. Kotek, 789 F. Supp. 3d 1025, 1041 (D. Or. 2025) concluding that LPA requirement for cannabis businesses was preempted); *cf.* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989) ("[T]he interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure on one another' is a right specifically conferred on employers and employees by the NLRA." (citation omitted) (quoting Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis.

Less directly, sectoral-wage laws and just-cause requirements have similarly distorting effects. Both kinds of laws can be seen as minimum standards: Sectoral-wage laws set pay floors for certain industries and just-cause laws give baseline protections to workers facing discharge.[200] But in effect, both kinds of laws circumvent the standard NLRA process. They allow unions to extend union standards by regulation,[201] thereby insulating themselves from nonunion competition.[202] Unions used to have to do that by organizing a critical mass of firms. But now, they can skip that step—a kind of organizing without organizing.[203]

Industry-council laws are only more of the same. In one sense, these councils only enact minimum standards: They promulgate new minimum wages and benefits by regulation.[204] But in another

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Emp. Rels. Comm'n, 427 U.S. 132, 154 (1976))); Garner v. Loc. 776, Teamsters Union, 346 U.S. 485, 500 (1953) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by means which the federal Act prohibits."); 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1130 (7th Cir. 2008) (concluding that state law was not a genuine minimum labor standard because it was so limited in scope that it appeared to put its thumb on the scale for one side in a labor dispute).

200. *See* Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884, 892-93 (W.D. Wash. 2021) (upholding hazard pay ordinance for only grocery workers as a minimum labor standard); ConcernedHome Care Providers, Inc. v. Cuomo, 783 F.3d 77, 85–86 (2d Cir. 2015) (same result for "Wage Parity" law affecting only certain home care aides).

201. *See* Barnes v. Stone Container Corp., 942 F.2d 689, 693 (9th Cir. 1991) (finding wrongful-discharge claim under state statute preempted because of centrality of termination issues to collective negotiations) ("Issues of hiring and firing are often central to CBA negotiations and the NLRA, as interpreted in *Machinists,* intended to allow the parties to resolve these matters without the unsettling effect of state regulation."). *But see* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 24, 29, 38 (1st Cir. 2011) (rejecting preemption challenge to law requiring successor firms to retain predecessor's employees in part because "the NLRA does not itself protect an employer's ability to hire or fire").

202. *See* MacDonald, *supra* note 91.

203. *See also 520 S. Mich. Ave. Assocs.*, 549 F.3d at 1137 (concluding that law was an obstacle to the NLRA's policy because it frustrated attempts to funnel disputes through private methods of resolution (such as bargaining and tests of economic strength)); Cox & Seidman, *supra* note 43, at 230, 234 (observing that structure of the NLRA reveals that Congress saw any requirement to reach specific substantive terms as inconsistent with federal labor policy); *cf.* Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (stating that minimum standards are not preempted when they neither encourage nor discourage unionization).

204. *See, e.g.*, CAL. LAB. CODE § 1475(d)(1) (West 2026) (authorizing council to enact minimum standards through indirect regulatory process); MINN. STAT. § 181.213(1)(a) (2025) (empowering council to enact standards through direct regulation); MINN. R. §§ 5200.2000-.2090 (2026) (adopting standards on minimum wages, training, and holiday pay).

sense, they are alternative forums for bargaining. They convene representatives of management and labor[205] to negotiate about wages, hours, and working conditions.[206] And they do so in a way that skips many of the NLRA's procedures. For example, industry councils select representatives with no input from the people represented.[207] They also eliminate any real connection to private consent.[208] They offer employers and employees no way to insist on their own positions; they allow no equivalent to bargaining to impasse. Instead, they impose standards according to regulatory standards by operation of law.[209]

These differences are not accidental. To the contrary, unions pursue industry councils precisely because they depart from the NLRA's system.[210] The councils' proponents openly lament the NLRA's procedural checks and remedial limits.[211] They call its processes "slow" and its remedies "weak."[212] They even blame these

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205. *See, e.g.*, CAL. LAB. CODE § 1475(a)(1); MINN. STAT. § 181.212(1); *see also* Alexander T. MacDonald, *Predistribution, Labor Standards, and Ideological Drift: Why Some Conservatives Are Embracing Labor Unions (And Why They Shouldn't)*, 25 FEDERALIST SOC'Y REV. 333, 341-43 (2024) (describing industry councils' functions).

206. *See, e.g.*, MINN. STAT. § 181.213(1).

207. *See* CAL. LAB. CODE § 1475(a)(1) (providing for appointment rather than election of members); MINN. STAT. § 181.212(1) (providing for appointment rather than election of members).

208. *See* MacDonald, *supra* note 205, at 347.

209. *See id.* at 341–43.

210. *See* U.S. CHAMBER OF COM., *supra* note 18, at 4, 10 (describing union strategy of using state laws to circumvent the NLRA's rules and limitations); Estlund, *supra* note 27, at 543 (describing industry councils ("co-regulation") as a way to boost organizing in light of low union densities produced under the NLRA); *see also* Metro. Milwaukee Ass'n of Com. v. Milwaukee County, 431 F.3d 277, 279 (7th Cir. 2005) (characterizing a City ordinance requiring that contractors sign labor-peace agreements as a "pretext" for regulating labor relations under the guise of exercising the City's spending powers).

211. *See, e.g.*, Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 103-04 (2009) (citing the NLRA as an obstacle to state legislation requiring union recognition by card check); Alvin Velazquez, *The Case for Letting Labor Law Collapse*, POWER AT WORK (May 4, 2025), https://poweratwork.us/the-case-for-letting-labor-law-collapse [https://perma.cc/DV59-26L6] (arguing that the NLRA's "restrictions," including leaving substantive contract terms to parties and limiting remedies, are reasons for labor unions' low densities).

212. *See* Lauren McFerran, *How to Save Labor Law from Slaughter*, CENTURY FOUND. (Dec. 11, 2025), https://tcf.org/content/commentary/how-to-save-labor-law-from-slaughter/ [https://perma.cc/V6GP-Y42Z].

features for labor's long-term decline.[213] They have openly sought alternatives at the state and local level—alternatives that can avoid the NLRA's preemptive reach.[214] And the model they have settled on is minimum labor standards.[215]

But "minimum labor standards" are not and should not be magic words.[216] The preemption doctrine is meant to protect the NLRA's integrity as a system.[217] The doctrine recognizes that the NLRA balances rights and responsibilities, regulated zones and unregulated ones.[218] It leaves captive-audience meetings unregulated because Congress thought employers should be able to hold them.[219]

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213. *See* Velazquez, *supra* note 211; *see also* McFerran, *supra* note 212; CWA DIST. 1, *supra* note 128 (citing low union density as a reason to ban captive-audience meetings under state law and calling for more bans); *CWA Res. 79A-23-02*, *supra* note 18 (arguing that state laws are needed to fill the gap left by the "ineffectual" NLRA).

214. *See* Estlund, *supra* note 27, at 555 (describing coregulatory schemes like industry councils as a solution to preemption "problem"); *see also* Matthew Blake, *A New Deal Revival: Why Labor Unions Love the Minnesota Nursing Home Workforce Standards Board*, MINNPOST (Oct. 16, 2025), https://www.eplocalnews.org/2025/10/20/a-new-deal-revival-why-labor-unions-love-the-minnesota-nursing-home-workforce-standards-board/ [https://perma.cc/6X3E-NB2Q] (quoting sponsor of Minnesota Nursing Home Workforce Standard Board, Rep. Esther Agbaje, admitting that one purpose of the Board is to increase unionization); CTR. FOR LAB. & A JUST ECON., *supra* note 16 (describing Board in similar terms); McFerran, *supra* note 212 (arguing that because of the NLRB's ineffectiveness and lack of independence, "workers should turn elsewhere to try to rebuild their power," including by enacting "laws that create industry-wide standards through sectoral labor boards such as the California Fast Food Council").

215. *See* Estlund, *supra* note 27, at 562 (describing sectoral boards as a replacement for "declin[ing]" collective bargaining under the NLRA); CTR. FOR LAB. & A JUST ECON., *supra* note 16, at 26 (suggesting that the "preemption risk" is low for laws such as coenforcement schemes that can be framed as "minimum labor standards"); *see also* Block et al., *supra* note 94 (positioning industry councils and similar entities as an alternative to the NLRA).

216. R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 32 (1st Cir. 2011) (observing that the phrase "minimum labor standards" does not answer on its own which laws are preempted and which are not).

217. *See* Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 146 (1976); Cox & Seidman, *supra* note 43, at 222.

218. *See, e.g.*, Emps. Ass'n v. United Steelworkers, 32 F.3d 1297, 1301 (8th Cir. 1994) (holding that state law barring management from hiring permanent strike replacements was preempted because it shifted the balance of power established by Congress).

219. *Accord* H.R. REP. NO. 80-510, at 45 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 549 (1948); *see* Cal. Chamber of Com. v. Bonta, 802 F. Supp. 3d 1227, 1252 (E.D. Cal. 2025) (concluding that captive-audience ban was preempted because it regulated a zone Congress meant to leave unregulated), *appeal filed*, No. 25-6874 (9th Cir. Oct. 30, 2025); *see also* S. REP. NO. 80-105, at 23–24 (1947) (rejecting the NLRB's position in Clark Bros. Co., 70 NLRB 802, 804–05 (1946), that captive-audience meetings were improper interference with employee rights under sections §§ 7 and 8 of the NLRA)); *cf.* Derek C. Bok, *The Regulation of Campaign*

It requires unions to bargain for union standards because Congress thought private bargaining would produce better results.[220] And it requires workplace-by-workplace elections because Congress thought they were the best way to respect employees' choices.[221] These "limits" are not bugs in the system; they are the system.[222] And when states try to fix the system, they upset the intended balance.[223]

Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 46, 67 (1964) (explaining that the purpose of regulating campaign speech is to facilitate free and informed choice).

220. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."); H.K. Porter Co. v. NLRB, 397 U.S. 99, 103–04 (1970) ("The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement."); *see also* Alexander T. MacDonald, *The Accidental Success of the NLRA: How a Law About Unions Achieved Its Goals by Giving Us Fewer Unions*, FEDSOC: BLOG (Aug. 28, 2024), https://fedsoc.org/commentary/fedsoc-blog/the-accidental-success-of-the-nlra-how-a-law-about-unions-achieved-its-goals-by-giving-us-fewer-unions [https://perma.cc/5Y7H-9562] (explaining that policy of the NLRA was to "funnel disputes into more peaceful channels" such as private bargaining).

221. *See* 29 U.S.C. § 159(a) (directing the NLRB to certify a representative in an "appropriate" bargaining unit); NLRB v. Catherine McAuley Health Ctr., 885 F.2d 341, 346 (6th Cir. 1989) (observing that Board presumes only a single facility within a single enterprise is an appropriate unit); *see also* H.R. REP. NO. 80-245, at 9 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 300 (1948) (expressing concern over multiemployer units and industry-wide bargaining, which could lead to monopolistic practices by unions and abuse of employee rights); Alexander T. MacDonald, *Competition Non Sequitur: The NLRB's Foray into Antitrust Law*, FEDSOC: BLOG (Sep. 17, 2024), https://fedsoc.org/commentary/fedsoc-blog/competition-non-sequitur-the-nlrb-s-foray-into-antitrust-law [https://perma.cc/P5BH-S7G7] (observing that today, multiemployer bargaining units can be established only with consent of parties).

222. *See Lodge 76, Int'l Ass'n of Machinists*, 427 U.S. at 146; *see also* Cox & Seidman, *supra* note 43, at 222 (observing that by imposing certain bargaining obligations on employers and unions, Congress implicitly judged that other obligations were inappropriate).

223. *See, e.g.*, Casala, LLC v. Kotek, 789 F. Supp. 3d 1025, 1035, 1039 (D. Or. 2025) (finding state labor-peace agreement requirement preempted because it interfered with federal scheme for regulating union organizing); *Bonta*, 802 F. Supp. 3d at 1248, 1250-52 (finding the same for captive-audience statute); Amazon.com Servs. LLC v. N.Y. State Publ. Emp. Rel. Bd., No. 25-CV-5311, 2025 WL 3295071, at *3-5 (E.D.N.Y. Nov. 26, 2025) (finding the same for state law transferring jurisdiction to supervise elections and unfair labor practices to a state board); *cf.* N.Y. Tel. Co. v. N.Y. State Dep't of Lab., 440 U.S. 519, 532-33 (1979) (finding state unemployment benefits for strike workers not preempted in part because it did not "purport" to tilt balance between management and unions in labor disputes).

V. A CLOSER LOOK FOR SUSPECT LAWS

If the system is to survive, then, courts must tweak their approach to preemption doctrine. They should no longer treat "minimum labor standards" as a get-out-of-preemption-free card.[224] They should instead examine the circumstances before deciding whether a law threatens federal labor policy.[225] They should proceed in two steps: First, they should ask whether a law's effect and intent are to rebalance organizing, campaigning, or bargaining.[226] If yes, they should ask whether the law will skip, minimize, or make redundant any part of the NLRA's system.[227] And if so, they should find the law preempted, even if it could be described as a minimum labor standard.[228]

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224. *Cf.* Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884, 892-93 (W.D. Wash. 2021) (interpreting *Ft. Halifax* and *Metro. Life* to mean that when a law merely sets a minimum labor standard, it is not preempted); Nat'l Broad. Co. v. Bradshaw, 70 F.3d 69, 71 (9th Cir. 1995) (taking the same approach to law setting pay requirements for impasse period during bargaining between a successor employer and union); Cal. Grocers Ass'n v. City of Long Beach, 521 F. Supp. 3d 902, 911 (C.D. Cal. 2021) (taking the same approach to law requiring additional "hazard" pay for certain grocery workers).

225. *See* Livadas v. Bradshaw, 512 U.S. 107, 120 (1994) (explaining that in preemption cases, the question is whether a state law interferes with "the accomplishment and execution of the full purposes and objectives of the federal law"); *cf.* NLRB v. Cal. Horse Racing Bd., 940 F.2d 536, 541 (9th Cir. 1991) (explaining that the purpose of the NLRA was "to protect Congress's system of national regulation of labor relations").

226. *See* 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1138 (7th Cir. 2008) (pointing to legislative history to show that intent of the state law at issue was to intervene in a labor dispute on behalf of one side). *But see* Barnes v. Stone Container Corp., 942 F.2d 689, 693 (9th Cir. 1991) (finding application of wrongful-discharge statute to employee fired during contract negotiations for misconduct was preempted even though state had not intended to intervene in labor disputes or affect the bargaining process).

227. *See* Garner v. Loc. 776, Teamsters Union, 346 U.S. 485, 500 (1953) (explaining that allowing states to regulate the NLRA's unregulated zones would frustrate federal labor policy); *see also* Hill v. State of Florida *ex rel.* Watson, 325 U.S. 538, 543 (1945) (finding that the NLRA preempted a state law that would have restricted universe of unions eligible to represent employees because restriction was inconsistent with unequivocal right of employees to choose representative for themselves).

228. *See 520 S. Mich. Ave. Assocs.*, 549 F.3d at 1129, 1138 (finding state law preempted even though it could be characterized as a minimum labor standard when it was enacted to tilt balance in ongoing contract negotiations); *see also* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 754-55 (1985) (explaining that state minimum labor standards are not preempted "at least so long as the purpose of the state legislation is not incompatible with the[] general goals of the NLRA").

At step one, courts would effectively decide whether to apply a heightened form of review. Their goal would be to separate laws that merely affect background law from those that undermine federal labor policy. Importantly, "undermine" here would mean more than simply regulating the bargaining process. It would mean altering the intended balance of power between management and labor.[229] For example, laws targeting a small group of workplaces may be suspect, especially if those same workplaces are also the subject of ongoing disputes between management and labor.[230] Those circumstances may suggest that regulators are trying to put their thumbs on the scale for one side.[231] Also suspect may be laws extending traditional union benefits to nonunion workplaces.[232] Those kinds of laws may reflect an effort by labor to extend union standards without going through the organizing process.[233] And perhaps most suspect would be laws that skip key steps in the NLRA process and allow bargaining in another forum. These laws are perhaps the most threatening to the NLRA's system because

229. *Cf. Livadas*, 512 U.S. at 117-18 (finding state law preempted when it disadvantaged union members by denying right to immediate pay of all wages owed to terminated employees who are covered by a collective bargaining agreement).

230. *See 520 S. Michigan Ave. Assocs.*, 549 F.3d at 1139 ("This limited scope of the Attendant Amendment discourages collective bargaining by encouraging lobbying for targeted legislation applicable to the equivalent of a bargaining unit."); Bechtel Const., Inc. v. United Bhd. of Carpenters & Joiners, 812 F.2d 1220, 1226 (9th Cir. 1987) (finding that prevailing wage law was not a true minimum standard because it did "not affect all workers equally, but concern[ed] only apprentices"); *see also Barnes*, 942 F.2d at 692 (emphasizing that exception for minimum labor standards applies only to "statutes of *general applicability*"); Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 86–87 (2d Cir. 2015) ("[T]here may be labor standards that are so finely targeted that they impermissibly intrude on the collective-bargaining process.").

231. *See also 520 S. Mich. Ave. Assocs.*, 549 F.3d at 1137–38 (examining legislative history and finding the state law suspect because it was designed to alter the existing negotiated structure between hotels and unions representing certain hotel employees).

232. *See Barnes*, 942 F.2d at 693 (finding wrongful-discharge statute preempted as applied when collective-bargaining agreement with just-cause provision had expired and parties were negotiating over new agreement).

233. *See also* Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 28 (2d Cir. 1988) (holding that the NLRA preempted an implied-contract claim that would have created a just-cause termination requirement because such an implied state claim would have created "substantial potential for friction" with the "delicate machinery of the NLRA"); *520 S. Mich. Ave. Assocs.*, 549 F.3d at 1134 (explaining that laws preventing parties from reaching a private agreement are preempted even when they do not regulate bargaining as such because they still supersede the bargaining process).

they draw negotiations out of the system and into a different regime—a regime that may offer none of the NLRA's safeguards.[234]

At step two, courts would apply heightened review. They would ask whether the law, in practice, distorts some part of the NLRA's policy or procedures. Does the law take rights from management or labor?[235] Does it give new advantages to either?[236] When applied, will it distort bargaining outcomes, change bargaining incentives, or make unionization more or less likely?[237] If the answer to any of these questions is yes, the law would contradict federal labor policy and distort the NLRA's system.[238] And it would be preempted.[239]

We have already seen how this could work. For example, in *520 South Michigan Avenue Associates v. Shannon*, the Seventh Circuit struck down a law giving hotel attendants a designated amount of paid rest time.[240] In one light, that law was a classic minimum labor standard: It merely gave employees a baseline right to paid rest.[241] But in context, it was anything but. The law targeted one occupation in one industry in one county.[242] It was passed while the affected hotels and unions were locked in contract negotiations.[243] In effect,

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234. *See, e.g.*, Amazon Servs. LLC v. N.Y. State Pub. Emp. Rels. Bd., No. 25-cv-05311, 2025 WL 3295071, at *3-5 (E.D.N.Y. Nov. 26, 2025) (rejecting New York's attempt to set up parallel state system for policing unfair labor practices and supervising union elections as inconsistent with federal system and preempted).

235. *See 520 S. Mich. Ave. Assocs.*, 549 F.3d at 1138 (finding law preempted when it was intended to override existing negotiated dispute resolution process).

236. *See* Thunderbird Mining Co. v. Ventura, 138 F. Supp. 2d 1193, 1196 (D. Minn. 2001) (state capital improvement funds provision preempted because it gave unions asymmetrical pressure in bargaining).

237. *See Derrico*, 844 F.2d at 29 (finding state implied contract claim premised on implied just-cause protection preempted when in practice it would distort strategies and incentives of management and labor); *see also* Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) (stating that minimum labor standards are consistent with the NLRA when they neither encourage nor discourage unionization).

238. *See, e.g.*, *520 S. Mich. Ave. Assocs.*, 549 F.3d at 1138 (finding law suspect and preempted when it intervened to upset bargained-for quota structure in a specific industry); *Thunderbird Mining Co.*, 138 F. Supp. 2d at 1196 (holding that the NLRA preempted a state law that gave unions an additional measure of leverage in negotiations and therefore distorted incentives and the balance of power in bargaining).

239. *See* Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 238 (1967) (describing NLRA as a "comprehensive code ... which no state law can modify or repeal").

240. 549 F.3d at 1139.

241. *See id.* at 1129 (conceding that law did not regulate the bargaining process per se).

242. *See id.* at 1129, 1138-39.

243. *Id.* at 1121-22.

the legislature intervened in bargaining and put its thumb on the scale for one side.[244] The law was intended to—and did—affect the bargaining process.[245]

The *520 South Michigan Avenue Associates* court didn't need a new preemption doctrine to strike the law down. It merely considered the relevant context and applied the doctrine with a harder look. A similar hard look could address the concerns raised here. Instead of asking simply whether a law regulates the bargaining process, a court could ask whether it distorts the overall system. Does the law allow parties to skip steps in the bargaining process? Does it make any step in that process redundant or irrelevant? Was it meant to do that?[246] If the answers are yes, the court should do more than simply label the law a minimum labor standard. It should ask whether the law is consistent with how the NLRA process is meant to work.

CONCLUSION: A REVIVAL, OR A FUNERAL?

In the fall of 2025, New York State enacted S8034-A, a law giving jurisdiction over union elections and unfair labor practices to a state agency.[247] The NLRB promptly sued.[248] It argued that the law interfered with its exclusive jurisdiction and could not be squared with a half-century of judicial precedent.[249] Early reports were skeptical; some commentators wondered whether the NLRB had

244. *See id.* at 1139.

245. *See id.* at 1134 ("[W]hen the parties are not free to devise their own arrangement preemption applies because the statute intrudes on the collective bargaining process.").

246. *Cf.* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 755 (1985) (concluding that mandatory benefit laws were not preempted because they "are not laws designed to encourage or discourage employees in the promotion of their interests collectively"); Ass'n of Car Wash Owners v. City of New York, No. 15 Civ. 8157, 2017 WL 4508489, at *3 (S.D.N.Y. June 20, 2017) (concluding that bonding law was preempted because it did encourage collective bargaining), *vacated and remanded*, 911 F.3d 74 (2d Cir. 2018).

247. *See* S.8034-A, 2025-2026 Legis. Sess. (N.Y. 2025) (enacted).

248. *See* Complaint, NLRB v. New York, No. 25-cv-01283 (N.D.N.Y. Sep. 1, 2025).

249. *See id.* ¶ 10 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-46 (1959)).

standing to sue.[250] After all, the state hadn't yet enforced the law against anyone.[251] And until it did, the issue might not be ripe.[252]

That issue was mooted by the Teamsters. Only days after the NLRB filed suit, the Teamsters filed charges with the state agency against (who else) Amazon.[253] Amazon responded in kind, filing its own lawsuit in federal court.[254] Like the NLRB, it argued that the New York law was preempted.[255] And unlike the NLRB, it faced no questions about standing to sue.[256]

A U.S. district court agreed with the company.[257] The court blocked the law, refusing to recognize any new exception to preemption doctrine.[258] Instead, it applied longstanding case law and enjoined the state from enforcing a law incompatible with the NLRA.[259]

In that sense, the decision was a microcosm of the new legal landscape. It started with a state's foray into territory long occupied by federal law. That foray seemed at first defensible on technical legal grounds. But because of a union's overreach, the issue came squarely before a court. And when it did, the court did what courts do: it applied settled precedent and defended the NLRA's integrity.[260]

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250. *See* Chris Marr, *NLRB's New York Law Challenge Must Overcome Technical Hurdles*, BLOOMBERG L. (Sep. 16, 2025, at 12:14 ET), https://news.bloomberglaw.com/daily-labor-report/nlrbs-new-york-law-challenge-must-overcome-technical-hurdles [https://perma.cc/7A7W-5W97].

251. *See id.*

252. *Cf.* NLRB v. Oregon, No. 20-CV-00203, 2020 WL 5994997, at *3 (D. Or. Oct. 9, 2020) (dismissing NLRB lawsuit against state over captive-audience law because NLRB failed to show a concrete injury to its own interests or jurisdiction).

253. *See* Emily Brill, *Teamsters Bring Labor Complaint Under NY NLRB Fill-In Law*, LAW360 (Sep. 18, 2025, at 21:36 ET), https://www.law360.com/employment-authority/articles/2389754 [https://perma.cc/WU7Y-ZLQG].

254. *See* Complaint for Declaratory and Injunctive Relief, Amazon.com Servs., LLC v. N.Y. State Pub. Emp. Rels. Bd., No. 25-cv-05311 (E.D.N.Y. Nov. 26, 2025).

255. *Id.* ¶¶ 21–25.

256. *See id.* ¶¶ 44–47 (describing immediate injuries company faced from overlapping regulatory regimes).

257. *See Amazon.com Servs.*, No. 25-cv-05311, 2025 WL 3295071, at *3-5.

258. *Id.*

259. *See id.*

260. *See id.* at 8 ("[L]ower courts 'cannot and will not invent an exception to Supreme Court doctrine.'" (quoting United States *ex rel.* Best v. Barbarotta, No. 12-cv-6218, 2013 WL 308972, at *2 (E.D.N.Y. Jan. 25, 2013))).

Whether unions will again overreach, or have already done so, remains to be seen. But the trend is firmly in the direction of conflict. Unions have been determined to carry their agendas to statehouses; indeed, they have few other options.[261] Whether that trend continues, or whether it dissolves into a historical memory, will depend on the approach to preemption doctrine taken by courts.

261. *See* Dirnbach, *supra* note 89 (describing pressures brought on by declining membership); Rachel Reed, *Unions' Extension into Politics Was Necessary—and Contributed to Their Decline*, HARV. L. TODAY (Mar. 16, 2023), https://hls.harvard.edu/today/unions-extension-into-politics-was-necessary-and-contributed-to-their-decline-says-harvard-law-expert/ [https://perma.cc/J5QU-YADT] (quoting Laura Weinrib as arguing that labor is weaker than it has been in a generation and its political engagement is part of the reason—but also that the extension was necessary to combat increased political engagement by corporations).