The Death of Labor Law and the Rebirth of the Labor Movement

Alvin Velazquez

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Alvin A. Velazquez[*]

What if the current Supreme Court could do what Congress has failed to do since 1935—reform labor law to facilitate worker organizing? The current Supreme Court has demonstrated a strong antipathy toward unions. The Court and the Fifth Circuit have been trimming back the New Deal administrative state. Companies such as SpaceX are trying to take advantage of that hostility to the administrative state in their fight against workers forming a union by seeking to render the National Labor Relations Board a zombie agency. At the same time, the President has taken measures to undermine its independence. Scholars of both administrative and labor law think this is bad. This Article takes a different approach. The central thesis of this Article is that the dismantling of the National Labor Relations Act could create a viable approach for the rebirth of the labor movement because it creates the conditions for strife, disruption, and a new labor insurgency that organizers can channel toward seeking state and local collective bargaining laws.

This Article analyzes how a Supreme Court that is hostile to labor's interests could instead create conditions that lead to a 1930s style upsurge in labor activity by returning labor law to a primitive state. That primitive state would include a state of law in which the National Labor Relations Act no longer governs collective bargaining in the private sector, but 1) courts are barred by the Norris-LaGuardia Act from issuing injunctions against peaceful protests, and 2) states could create collective bargaining regimes free from the threat of preemption. The fact that states would be free to regulate labor affairs as they see fit would allow unions to take more targeted actions using fewer resources and build toward a national demand for a new federal labor law in time for the general strike that United Auto Workers President Shawn Fain has called on May 1, 2028. While

[*] Associate Professor of Law, Indiana University Maurer School of Law. The author thanks to Nicholas Almendares, Johnda Bentley, Matt Bodie, Yvette Butler, John D'Elia, Michael Duff, Janine Giordano Drake, Hiba Hafiz, Bill Herbert, Brandon Hunter Pazzara, Fred Jacob, Matt Lawrence, Charlotte Garden, Desirée LeClercq, Anne Lofaso, Leandra Lederman, Stephen Lerner, Ariana Levinson, Michael Oswalt, Diana Reddy, César Rosado Marzán, and Bijal Shah. The author also received helpful comments from participants at the following workshops: the Colloquium on Scholarship in Employment and Labor Law (COSELL), the Cornell Work Law Junior Workshop, the Critical Approaches to Public Law Workshop, the Indiana University Maurer School of Law Summer Faculty Workshop, and the Indiana University-University of Cincinnati Junior Faculty Exchange Workshop. Alivia Benedict and Philippe Lin provided excellent editorial and research assistance. The author was counsel to the Service Employees International Union during some of the events described in this Article.

challenges exist to this proposal, returning labor relations to "the law of the jungle" may make "the long arc of justice" bend.

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"You can't win, Darth. If you strike me down, I shall become more powerful than you can possibly imagine."

Obi-Wan Kenobi to Darth Vader[1]

INTRODUCTION

Unions are enjoying a resurgence in popularity even though their members make up just six percent of the private-sector workforce.[2] More people than ever want to join a union but cannot due to employer resistance.[3] The lack of union representation has exacerbated wealth inequality which is now hovering today around similar levels as it was in the period leading up to the Great Depression.[4] Even though unions are winning more of their elections than they previously have, obtaining a first collective bargaining agreement (CBA) from an employer remains a perilous journey.[5] Chris Smalls found that out the hard way. Amazon fired him, but he came back as the driving force behind the Amazon Labor Union. Despite successfully winning a union organizing drive at a Staten Island Amazon facility, the members of his union have not entered into a

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[1] Short Clips, *Ben Kenobi – "If you strike me down..."*, YOUTUBE (Apr. 1, 2015), https://www.youtube.com/watch?v=iVBX7l2zgRw.

[2] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022); Bureau of Lab. Stat., *Union Members Summary* (Jan. 23, 2024).

[3] Greg Rosalsky, *You May Have Heard of the 'Union Boom.' The Numbers Tell a Different Story*, NPR (Feb. 28, 2023); ROGER HARTLEY, FULFILLING THE PLEDGE: SECURING INDUSTRIAL DEMOCRACY FOR WORKERS IN A DIGITAL ECONOMY 17–19 (2024).

[4] *Compare* Becky Little, *Why the Roaring Twenties Left Many Americans Poorer*, HISTORY (Mar. 26, 2021), https://www.history.com/news/roaring-twenties-labor-great-depression (explaining that the top 1% received 23.9% of all pre-tax income), *with* FED. RSRV., *Distribution of Household Wealth In the U.S. since 1989*, https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:127;series:Net%20worth;demographic:income;population:all;units:shares (showing that in Q3 of 1989 the top 1% held 16.6% of total income, but that in Q1 2024 the top 1% holds 23.4%, with a recent high of 24.5% in Q2 of 2021).

[5] *See e.g.*, Robert Combs, *ANALYSIS: Unions, on a Roll, Are Reeling in the Workers*, BLOOMBERG L. (Aug. 21, 2023) (noting that unions won 80% of elections last year and that the trend may continue). *But see In Solidarity: Removing Barriers to Organizing: Testimony Before the H. Comm. on Educ. & Lab.*, (2022) (statement of Kate Brofenbrenner, Dir. & Senior Lecturer, Cornell Sch. of Indus. and Lab. Rel.), https://ecommons.cornell.edu/server/api/core/bitstreams/f5d57fd7-ad19-4368-a46d-71046137185f/content (presenting original research showing that only 36% of newly formed unions earn a first collective bargaining agreement within the first year due to employer opposition, and only 68% three years out).

collective bargaining agreement almost 2 years later.[6] It is this dynamic that led several leading labor law scholars and eminent practitioners to collaborate with the Harvard Center for Labor and a Just Economy and issue a highly influential report called the "Clean Slate for Worker Power Project" which set out numerous suggestions for fixing labor law's ills.[7] The project is comprehensive and features a number of bold elements, but the literature on labor law has not discussed *how* to arrive at a clean slate. This Article seeks to fill that hole in the literature by pointing to the Supreme Court's (Court) recent administrative law cases and engaging in the following thought exercise--could labor law's death at the hands of the Major Questions, Non-delegation, or Unitary Executive doctrine or other constitutional challenge spark the fire that fuels its revitalization? Could a Court decision do what Congress has failed to do since 1935—reform the National Labor Relations Act and open a pathway for millions of workers to organize into unions? Spoiler alert:

The answer is yes.

The central thesis of this paper is that the Supreme Court dismantling the National Labor Relations Act (NLRA) would create a viable approach to labor law reform. Striking down the NLRA in its entirety would generate the conditions for strife, disruption, and a new labor insurgency that can fuel demands for state and local officials to enact collective bargaining free from the preemptive effect of the National Labor Relations Act.[8] In essence, the Court could reform labor law in ways that Congress has failed since 1935. The Court or lower federal courts, acting as unintended agents for returning federal labor law to a primitive state would provide the labor movement with a viable path for obtaining stronger labor protections for unionizing than are possible under the current regime because 1) courts are barred by the Norris-LaGuardia Act from enjoining peaceful labor activism, and 2) states are free from the shackles of preemption to enforce stronger labor laws that protect collective bargaining.

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[6] Haleluya Hadero, *Amazon Labor Union Moves to Affiliate with the Teamsters Union amid Struggles*, ASSOCIATED PRESS (Jun. 4, 2024).
[7] *See e.g.*, BENJAMIN I. SACHS & SHARON BLOCK, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY, CTR. FOR LAB. & A JUST ECON. AT HARV. L. SCH. 55–70 (2020) (recommending several recommendations for reforming labor law and expanding bargaining rights).
[8] *See generally* Desiree LeClercq, *Labor Strife and Peace*, U.C. IRVINE L. REV. (forthcoming 2025).

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Currently, only six percent of the workforce is represented by a union, but according to a 2022 White House Report on Worker Organizing, over fifty-two percent of non-union workers (sixty million) would vote for a union if they could.[9] In other words, there is a major union representation gap between how many workers are union members and how many want union representation.[10] That union representation gap exists even in states with high percentage of union membership in the workforce such as Hawai'i (25.6%) and New York (20.6%). If even these states could make it easier for those workers who want to join a union but cannot, it would make union membership available to millions of people in the State of New York alone and make union avoidance for firms like Amazon that do business across state lines more difficult.[11] This Article makes the doctrinal claim that the interpretation of the severability clause plays a major role in the NLRA's destruction and the path to worker organizing available after its destruction after a constitutional challenge.[12] Even though the application of severability is typically a narrow and technical legal question, in this case it serves a major gating function in determining the tactics that are available to workers seeking to form unions and could very well decide the future of it. In fact, this issue may come up if the Court decides to hear a challenge by ex-Board member Gwynne Wilcox. Pres. Trump fired her without cause, and she has challenged it. In a recent ruling, the Supreme Court previewed that it is likely to use this case to overturn its prior decision in *Humprhey's Executor.*[13] The Court stated that the President may remove executive officers without cause and that "[t]he stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power."[14] In other words, this Article is important because it raises a strategic question for the litigants in the matter: whether they fight to preserve labor law as it is, or seek to strike it down on the

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[9] HARTLEY, *supra* note 3, at 17–18.
[10] *Id.*
[11] *Union Membership (Annual) News Release*, U.S. Bureau of Lab. Sat. (Jan. 28, 2025, 10:00 AM). About 20.6% of the 8.4 million people in New York State's workforce are unionized—approximately 1.68 million people. *Quickfacts New York*, N.Y. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NY/BZA110222. If 50% of New York State's workforce wanted union representation, then over 4.1 million people would be unionized—over 2 million additional people.
[12] The NLRA uses the term "separability" in the statute to mean what is commonly known as severability, or the separating one section of a statute that a court has determined is illegal but preserving the remainder of the statute. 29 U.S.C. §166. This Article will use the term severability for the modern reader's convenience.
[13] 295 U. S. 602 (1935).
[14] Trump, *et al* v. Wilcox, *et al*, 605 U.S. at *1 (2025).

premise that Congress would have preferred it as an independent executive agency instead of another executive agency. This Article will argue that Congress would have preferred the former over the latter.

This Article sits at the intersection of current developments in administrative law, labor law, labor history, and social movements. Catherine Fisk and Diana Reddy observe that labor is a social movement "with a long history of shaping law and being shaped by it in turn"[15] and several scholarly works exploring theories for building countervailing power[16] and the role of strife in labor relations.[17] This Article also dialogues with scholars such as Ellen Dannin who states that, "[l]etting the NLRB be destroyed gives aid and comfort to the enemies of unions and risks returning us to the world in which unions had no legal support."[18]

This Article takes a different methodological tack by offering a counter-factual. It takes no normative position on the Court's administrative law rulings. But it presents a silver lining to administrative and labor law scholars who have raised concerns with the Court's rewrite of administrative law field[19] by showing that the Court's reactionary rewrite of

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[15] Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 66 (2020).
[16] *See* Kate Andrias & Benjamin I. Sachs, *The Chicken-and-Egg of Law and Organizing: Enacting Policy for Power Building*, 124 COLUM. L. REV. 777, 793–96 (2024) (noting that disruption led to the enactment of the NLRA); *See also* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) (providing tripartism as a model for understanding labor law's preemption doctrines and creating a pathway for reform); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351 (2017) (attempting to outline the conditions needed to make organizing workers under the NLRA viable and how law can facilitate organizing); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L & POL'Y REV. 375, 376 (2007) (outlining how labor law is enjoying renewal despite conventional accounts that the Board is insulated from renewal); Kate Andrias, *Constitutional Clash: Labor, Capitol, and Democracy*, 118 NW. L. REV. 985 (2024) (arguing that labor's values provide a coherent democratic alternative to the post new deal constitutional compromise); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, *130* YALE L.J. 546 (2021).
[17] LeClercq, supra note 8; Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 EMPLOYEE RTS. & EMP. POL'Y J. 521 (2012). For more about what worker incivility may look like, see Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 100 (2015).
[18] ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 163 (2006).
[19] *See e.g.*, Cass Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 489–93 (2021) (explaining how a strong version of the major questions doctrine

administrative law could serve as a catalyst for a series of (most likely) unfortunate events as well as fervent organizing opportunities.[20] In that respect, dismantling the NLRA to successfully reform labor law embodies the observation that worker power reached its zenith "*before* [*it was*] *organized into unions*" as demonstrated by the strikes, demonstrations, and actions that took place during the worst parts of the Depression.[21] Additionally, even employer advocates are concerned about returning to primitive labor law. For example, longtime employer lawyer Roger King recently cautioned that employers should not seek the dismantling of the NLRA because doing so would benefit workers and undermine labor peace.[22] He observed that if the Supreme Court somehow ruled that the NLRA was unconstitutional, then "[w]e'll have the law of the jungle, the law of the streets."[23]

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is connected with the non-delegation doctrine and might run into serious objections concerning is reach); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) (describing the MQD as an assertion of judicial supremacy); Nicholas Almendares, *A Theory of Major Questions,* CARD. L. REV. (forthcoming) at *6 (arguing that Congress has more effective tools for dealing with agency behavior than the Court does), Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS. U. L.J. 635, 648-652 (2023) (critiquing the broad powers that the Court is asserting under the banner of the Major Questions Doctrine); Michael Burger & Cynthia Hanawalt, *The Major Questions Doctrine is a Fundamental Threat to Environmental Protection. Should Congress Respond?*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L., A SABIN CTR. BLOG (Oct. 19, 2023) (warning about harms of MQD to environmental law).

[20] My apologies to Lemony Snicket and the "Series of Unfortunate Events" children's novels. Additionally, labor law scholars have long contended with what unions should do in the absence of laws that facilitate collective bargaining. *See e.g.*, Martin H. Malin, *Life After Act 10: Is There a Future for Collective Representation in Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 638–57 (2012) (providing examples when public sector unions negotiated letters of understanding when they were not legally authorized to enter into collective bargaining agreements under state law) *and* Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 59-61 (1993) (despairing over the future of the labor movement after living through the halcyon days of representing 40% of the workforce to 12%).

[21] FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 96 (1978).

[22] Jim Araby, *What is a labor peace agreement, and is it good for the cannabis industry*? MJBIZDAILY (May 5, 2023) (defining labor peace as when unions refrain from engaging in picketing, boycotts, and strikes in exchange for an employer refraining from engaging in actions that would hinder in organizing the workforce). These provisions are a key part of collective bargaining agreements because a union is waiving its rights to engage in these activities in exchange for concessions from the employer.

[23] Steven Greenhouse, *Major US Corporations Threaten to Return Labor Law to 'Law of the Jungle'*, THE GUARDIAN (Mar. 11, 2024), https://www.pressreader.com/australia/the-guardian-australia/20240311/281852943537380.

The Court ruling that the administrative apparatus of the NLRA is unconstitutional would leave a vacuum in labor law, and anger over the death of collective bargaining rights could be widespread. The labor movement and its allies could channel this anger, alongside the deepening inequality in this country, and their remaining resources, to galvanize a new social movement.[24] With enough of a movement, labor could sway discourse from the dead letters of the NLRA to a more moral framework that allows labor to bargain for the common good.[25] Labor could consider using the death of the NLRA to enter into a new "grand bargain" of labor law[26] as part of a general strike that unions such as the United Auto Workers have declared for May 1, 2028.[27] The alternative is to continue to have collective bargaining rights die as a result of a thousand cuts.

The stakes at play in the NLRA's death are high, and the path to resurrection is fraught. As Irving Bernstein explains, "[a] handful of years bears a special quality in American labor history. There occurred at these times strikes and social upheavals of extraordinary importance, drama, and violence which ripped the cloak of civilized decorum from society, leaving exposed naked class conflict."[28] The concentration of wealth is the same today as it was in what Bernstein calls "The Turbulent Years." The United States is in a period of pre-insurgency due to high income inequality.[29] A

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[24] *See* Brishen Rogers, *Passion and Reason in Labor Law,* 47 HARV. C.R.-C.L. L. REV. 313 (2012).

[25] Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1396 (2023) (urging the upending of the law of an apolitical economy to recover labor's normative language).

[26] *See* Michael M. Oswalt, Comment, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J., 691, 695 (2007) (arguing for a new "grand bargain" of labor in which Congress eliminates secret ballot elections in favor of card check in exchange for Congress codifying right-to-work laws nationally to move unions toward more radical action).

[27] Shawn Fain, *May Day 2028 Could Transform the Labor Movement-and the World*, IN THESE TIMES (Apr. 30, 2024); *General Strike*, BRITANNICA (defining general strike as a "stoppage of work by a substantial proportion of workers in a number of industries in an organized endeavour to achieve economic or political objectives.").

[28] IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1940, at 217 (2010)

[29] This Article argues that Congress should examine labor law reforms to ameliorate economic inequality and thereby quell the possibility of workplace strife turning into an insurgency that could give rise to labor reform as a result of the Court taking an aggressive stance against the Board by proactively passing legislation. But Congress will likely fail to act proactively should the Court undo the NLRA, and as a result worker organizing via unsanctioned strikes may arise in response to a Court decision.

strong labor movement in the United States could significantly reduce inequality and the risk of anti-government insurgency.[30] While the amelioration of poverty has a strong moral dimension that informs policy,[31] income inequality in the United States should concern even the most apolitically minded. That is because high rates of inequality suppress the demand for goods and services amongst wide swaths of the population. This suppression in turn harms economic growth.[32] Economic inequality also serves as a basis for fomenting the kind of class-based upheaval masking as political upheaval that currently exists in the United States as inflation continues to disproportionately impact those on the lowest end of the economic spectrum.

This Article proceeds as follows. Part I starts with a description of the administrative law challenges to the National Labor Relations Act. Part I will also make a doctrinal argument that the Major Questions and Unitary Executive Theory pose different challenges to the Act. It examines these theories at length and examines how the severability clause may impact potential remedies as well as the future of labor law. Part II provides a brief historical summary of the role of insurgency in leading to the enactment of the NLRA and its role in today's movements.[33] Part III draws from the history lessons in the previous part and applies them to a world in which the Supreme Court has dismantled the NLRA. That part will argue that the Norris-LaGuardia Act and elimination of preemption provide a pathway for collective bargaining laws at the state level. Part IV addresses potential objections before concluding.

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[30] *See e.g.*, Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV., 513 (2011) (demonstrating that unions decline is responsible for about 1/3 of the growth in economic inequality); Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. DEP'T OF THE TREASURY (Aug. 28, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy; ECONOMIC POLICY INSTITUTE, UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY at 5 fig.D, 8 fig.E (Apr. 23, 2021).

[31] *See* Reddy, *supra* note 25; *see also* Alvin A. Velazquez, Symposium*, Revisiting Religion in the Struggle for Workplace Justice Drawing on the Christian Tradition as a Source for the Renewal of Labor Law Theory*, 69 ST. LOUIS L.J. 285, 290 (explaining how organized labor can draw on the faith-based labor teachings to move from an apolitical understanding of labor law).

[32] Anshu Siripurapu, *The U.S. Inequality Debate*, COUNCIL ON FOREIGN REL. (Aug. 20, 2022) (quoting Joseph Stiglitz). *See also* Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 5, 2023).

[33] By necessity, this will be an incomplete overview of a varied and rich part of American history.

Unfortunately, this Article will not provide prescriptions for how to fix labor law, although I generally endorse the prescriptions that the Clean Slate Project identifies. In a subsequent Article, I will present my vision for a new labor law that looks to the application of bankruptcy law tools to inform labor law reform. I will use the proposals contained in that report as a jumping off point but syncretize the "bargaining for the common good" theoretical framework with sectoral bargaining approaches and bankruptcy law concepts such as the cramdown to inform a new perspective to the already well-developed literature of fixing what ails the NLRA.

I. THE CURRENT ADMINISTRATIVE LAW CHALLENGES TO THE NLRA'S CONSTITUTIONALITY

This Article opens by making the doctrinal observation that there are two possible administrative law doctrines for handicapping the NLRA: (1) a challenge to the NLRA under the Major Questions Doctrine (MQD) and (2) a challenge to the President's authority to remove Board members. In a quixotic move, the DOJ announced that it will no longer defend the NLRA's tenure protections and will ask the Court to overrule *Humprhey's Executor*. That is the Court decision that allows for independent agencies to exist free with agency heads whom the President can remove in limited circumstances.[34] In light of the DOJ's announcement that it will not defend the Board's organic act, this Article chooses to focus on these doctrines because they are the most relevant for purposes of applying the severability clause and shaping the future of labor law post the Act.

In contrast, the Supreme Court's decision in *Loper-Bright v. Raimondo*[35] has important implications for labor law, but it does not provide a basis for setting aside the whole Act. The Court's decision in *Loper-Bright* overruled its earlier decision in *Chevron v. Natural Resources Defense Council.*[36] The reach of the Court's decision in Loper-Bright is limited because the NLRB rarely engages in rulemaking. Instead, it primarily engages in case-adjudication.[37] Second, courts reviewing NLRB

[34] Letter from Acting Solicitor General Sarah M. Harris to Sen. Richard J. Durbin (Feb. 12, 2025).
[35] 603 U.S. 369 (2023).
[36] *Id.* at 409-13.
[37] Charlotte Garden, *Toward Politically Stable NLRB Lawmaking, Rulemaking v. Adjudication*, 64 EMORY L.J. 1469, 1471-74 (2015).

decisions only invoked Chevron only fifteen percent of the time.[38] Finally, as Fred Jacob and Anne Lofaso explain, the Court's ruling in *Loper-Bright* does not mean the end of judicial deference to the NLRB's decisions. That is because the NLRB does not engage in statutory interpretation or rule making, but instead it engages in "iterative construction" of its statute. They explain that "the Board resolves labor disputes by reviewing myriad fact patterns, identifying commonalities, and establishing legal rules that advance the Act's statutory goals consistent with its continuum of experience. Unlike agencies that develop policy primarily through prospective quasi-legislative rulemaking—-the methodology of civil law—Congress wanted the Board to prevent industrial strife and protect organizing rights through adjudication—the methodology of common law."[39] In sum, while *Loper-Bright* may handicap what the Board may do, the likelihood it will do so is very slim.

Similarly, the Court's decision in *SEC v. Jarkesy*[40] has important implications for labor law, but do not appear to provide a basis for setting aside the whole act as the Article will argue in this section. The Supreme Court's decision in *Jarkesy* protects the right to a jury trial anyone accused of a claim for money damages or civil damages that was cognizable at common law.[41] In contrast, the NLRA protects rights that did not arise at common law, but are rather grounded in public law. Even though the NLRB is structured similarly to the SEC in how it uses administrative law judges, the Court's ruling in *Jarkesy* does not apply to the NLRB because it protects statutory rights to organizing into a union that were not cognizable under common law. Additionally, the Board does not have ability to level civil fines. The SEC does have the power to do so.[42]

If the Court invalidates the NLRA on the basis that it violates the Commerce Clause of the Constitution, then the applicability of the

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[38] Jason Vazquez, *The NLRB in a Post-Chevron World,* ON LABOR (Nov. 28 2023), Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedures Act, and Chevron: Now and Then*, 64 EMORY L. J. 1529, 1542-52 (2015) (demonstrating that judges make labor related decisions by defaulting to political biases when applying the first step of the Chevron two-step framework).

[39] *See* Fred B. Jacob and Anne Marie Lofaso, *Beyond Loper Bright: Iterative Construction at the National Labor Relations Board*, 77 U.C. L. J. at *6-7.

[40] 603 U.S. 109, 123 (2024).

[41] *Id.* at 125-6.

[42] *See* Casey W. Baker, Marjorie McInerney, and Kevin G. Knotts, *More Questions than Answers: NLRB Enforcement Actions in a Post-Jarkesy World*, BUSINESS LAW TODAY (Oct. 14, 2024).

severability clause to the relief it grants remains moot. The Court dealt with a facial challenge to the NLRA on the basis that Congress did not have the power under the Commerce Clause in *NLRB v. Jones & Laughlin*.[43] Even though some commentators have called for the Court to revisit that case, it is unlikely that the Court would here such a case.[44] Instead, most of the cases questioning the constitutionality of the NLRA are using the Court's expanded administrative law doctrines, starting with the MQD.[45]

[43] *See supra* Part I., Section A.
[44] *See e.g.* Michael Tavoliero, *Time to Overturn NLRB v Jones and Laughlin Steel Corp*., MUST READ ALASKA (Nov. 18, 2024).
[45] For a brief and excellent summary of cases in the Fifth Circuit that are current enjoining the Board from moving forward with enforcement actions, *see* John Fry, *Tracking Attacks on the NLRB: Fifth Circuit Continues to Stand Alone*, ONLABOR (Oct 7, 2024); John Fry, *Tracking Attacks on the NLRB: Ohio and Michigan Judges Reject Employers' Challenges*, ONLABOR (Sept. 16, 2024).

A. Striking Down the Entire NLRA Through the Major Questions Doctrine

Several scholars have examined or considered the MQD,[46] the non-delegation doctrine,[47] and the separation of powers doctrines.[48] This Article instead asks "what if" the Court applied the MQD to the NLRA? What effect would different doctrinal turns have on the backlash or organizing that could ensue? Several administrative law scholars have criticized or raised serious concerns about the Court's development and application of the MQD, and labor scholars are examining the effects that such challenges could have on labor law.[49] For example, former labor board member William Gould observed the NLRB is the only game in town for getting employers to negotiate with their workers[50] Other labor commentators have

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[46] Nicholas Almendares, *supra* note 19, at *49 ("It lacks a theory justifying it, making at arbitrary exercise of power. And it lacks a democratic defense, making it another example of a Supreme Court aggrandizing
itself at the expense of the people and their representatives."). *See also*, Cass Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 489–93 (2021) (explaining how a strong version of the major questions doctrine is connected with the non-delegation doctrine and might run into serious objections concerning is reach); Michael Burger & Cynthia Hanawalt, The *Major Questions Doctrine is a Fundamental Threat to Environmental Protection. Should Congress Respond?*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L., A SABIN CTR. BLOG (Oct. 19, 2023) (warning about harms of MQD to environmental law); Mila Sohoni, *supra,* note 19, at 266 (noting that MQD is a doctrine of judicial supremacy).

[47] *See generally* Julian David Mortensen & Nicholas Bagley, *Delegation at the Founding,* 121 COL. L. REV. 277 (2021) (arguing against the notion that the founders would endorse the non-delegation doctrine); Blake Emerson, *Administrative Answers to Major Questions, On the Democratic Legitimacy of Agency Statutory Interpretation,* 102 MINN. L. REV. 2019, 2041-49 (2018) (arguing that the non-delegation doctrine fails to promote democracy).

[48] *See e.g.,* Matthew B. Lawrence, *Subordination and the Separation of Powers*, 131 YALE L.J. 78 (2021) (calling for scholars to examine the impact of separation of powers claims on subordinated communities, including class based subordinated communities).

[49] *See e.g.* Brett Milano, *Labor Law Under Threat?* HARVARD LAW TODAY (Oct. 9, 2024), https://hls.harvard.edu/today/block-sachs-assess-the-effects-of-recent-supreme-court-decisions-on-labor-law/; Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355 (2016) (outlining criticisms of the doctrine); Chad Squitieri, *Who Determines Majorness*?, 44 HARV. L.J. & PUB. POL'Y 463 (2021) (arguing the doctrine is inconsistent with the Constitution). *But see* Louis J. Capozzi, *The Past and Future of the Major Questions Doctrine,* 84 Ohio St. L.J. 191 (2023) (arguing that objections to the MQD doctrine on the basis of it being fabricated and unworkable are overstated).

[50] Steven Greenhouse, *supra* note 23 ("For most workers and unions, the NLRB is the only game in town . . . [m]ost employers won't recognize and bargain with unions without the

noted that the Court's MQD could spell the beginning of labor deregulation and negatively impact the balance between the NLRB's authority and the courts relationship with it.[51]

The MQD is certainly one of administrative law's bogeymen, and certainly can hamstring attempts to expand the application of the NLRA to new industries, but it does not present an avenue through which the Court could strike down the NLRA. The Supreme Court first articulated the MQD in *FDA v. Brown & Williamson Tobacco Corp.*[52] In that case, the Court held that Congress had not delegated authority to regulate tobacco products to the FDA. In the Court's view, if Congress had meant for the FDA to regulate such a major portion of the economy with a unique political history, it would have.[53] The Court viewed a degree of common sense guiding its decision as "to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[54] Nicholas Almendares has called the Court's opinion as engaging in "*reductio ad absurdum*."[55]

Nevertheless, the Court has expanded its use of the MQD in recent cases from a limitation on *Chevron* to a broad clear statement rule. In *West Virginia v. EPA*, the Court expanded on its understanding of the MQD explaining that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to

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NLRB requiring them to." (quoting William B. Gould IV, NLRB chair under President Clinton)). For an excellent overview of tactics that an employer can use to quell a union organizing campaign, see JANE MCALEVEY, A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY 58–82 (HarperCollins 2020).

[51] Tascha Shahriari-Parsa, *The Court's "Major Questions Doctrine" is a Canon of Deregulation-and Could be Bad News for Labor,* ON LABOR (Jul. 6, 2022), https://onlabor.org/41535-2/. *But see* Fred Jacobs, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381 (2024) (arguing that the major questions doctrine should rarely apply to the NLRB's operations due to Congress's structuring of the NLRA).

[52] 529 U.S.120 (2000). Rachel Rothschild, *The Origins of the Major Questions Doctrine*, 100 IND. L.J. 57, 66 (2024) (arguing that the "benzene" cases brought by organized labor actually are the root of the major questions doctrine); Cass Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 488-92 (2021)(evaluating weak and strong version of the Major Questions Doctrine and tracing their origins outside of *Brown v. Williamson*).

[53] Brown v. Williamson, 529 U.S. at 159–60.

[54] *Id.* at 133.

[55] Nicholas Almendares, *supra,* note 19, at *15.

be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[56] As Nicholas Almendares observed, "[t]he key factors…seem to be: economic significance, political significance, and how it squares with previous agency practice."[57]

Labor law scholars have questioned the application of the MQD to labor law. For example, in "The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace," Fred B. Jacob contends that despite certain parties' "flirtations" with the MQD, it does not pose a serious threat to the Board's continued ability to operate.[58] He instead argues that Congress created the Board to deal with significant labor policy issues.[59] That may be right, but as he observes in a later article, the doctrine is now becoming a black hole that may also swallow the judiciary's ability to act in the absence of guard rails.[60]

If Jacob is correct, and others have agreed with his description of the MQD's effect,[61] then a natural outcome is that labor law may get swallowed by this doctrinal black hole.[62] Jacob notes that "[F]or older statutes with broad empowering language, finding "clear congressional authorization" is, by design, a high bar, as several Justices have candidly acknowledged."[63] That is especially the case with the NLRA. The NLRA has broad language that provides the Board with a flexible set of tools to make important doctrinal changes to its jurisprudence that will assist it with encouraging the process of collective bargaining.[64] For example, "[t]he Board is empowered, as hereinafter provided, to prevent any person from

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[56]597 U.S. 697, 723 (citations omitted).
[57] Almendares, *supra* note 19, at *13.
[58] Jacob, *supra* note 51, at 1405.
[59] *Id.* at 1405–11.
[60] Fred B. Jacob, *The Black Hole of Administrative Law: The Threat of an Ever-Expanding Major Questions Doctrine to the Judiciary*, 97 ST. JOHN'S L. REV. (manuscript at 13–17) (forthcoming 2025).
[61] Patrick Jacobi & Jonas Monast, *Major Floodgates: The Indeterminate Major Questions Doctrine Inundates Lower Courts*, 62 HARVARD J. LEG. 1, 7–8 (Jun. 24, 2024).
[62] *See also* Almendares, *supra* note 19, at *15 (" If the political and economic significance of tobacco suffices to make it a "major question" then we will be awash in them. The major questions doctrine will swallow all administrative law").
[63] Jacob, *supra*, note 51, at 1385.
[64] *See e.g.*, 29 U.S.C. § 160.

engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."[65] That language is broad, and the conduct that is prohibited under 29 U.S.C. § 158 is similarly broad.[66]

Unfortunately for those wishing to set aside preemption as an obstacle to states passing strong collective bargaining law, a Court applying the MQD to a Board decision would not have an avenue for getting rid of preemption's effects on labor law. It would be easy for the Court to apply the MQD to find that Congress failed to delegate authority concerning independent contractors or the ride-share industry to the Board. Congress enacted the NLRA during a time when manufacturing served as the dominant economic industry. What would the Court do if the Board interprets that parts of the NLRA defining its coverage apply to new economic industries that did not exist in Depression era America?[67]

This is an issue that is currently hotly contested among ride-share companies such as Uber and Lyft on the one hand and organized labor on the other. The NLRA is silent concerning whether gig-drivers are independent contractors,[68] yet up to 16% of Americans have used gig platforms for income, which is significantly higher than the 6% of workers belonging to a union in the United States.[69] The most current operative case on the books is *Atlantic Opera, Inc*. In that case, the NLRB moved toward a standard that could have encompassed many more workers in the gig economy.[70] If the Board took a broad a view of what constitutes an employee for purposes of the Act and included ride share drivers who are independent contractors, then such a ruling could abut with antitrust preemption as well. In that case, the Court could find feel the need to weigh in to harmonize any conflict between the Board's prerogative to expand collective bargaining and antitrust law's goal of regulating competition.[71]

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[65] 29 U.S.C. § 160(a).
[66] 29 U.S.C. § 158 (defining various unfair labor practices in broad terms: As any action that impedes workers from organizing into labor unions or having union representation and frustrates the parties from negotiating a collective bargaining agreement).
[67] 29 U.S.C. § 152(3) (defining employee, but not the term independent contractor.
[68] *Id.*
[69] Monica Anderson et al., *The State of Gig Work in 2021,* PEW RSCH. CTR. (Dec. 8, 2021).
[70] 372 NLRB 95 (2023).
[71] *See* Eugene Kim, Comment, *Labor's Antitrust Problem*, 130 YALE L.J. 428, 456 (2020) (proposing that antitrust enforcement agencies adopt the ABC-test articulated by the

Under an expansionist view, the Court could easily rule that the Board has no authority for deciding whether platform workers are excluded or included under the NLRA if the NLRB were to extend its holding in *Atlanta Opera* to ride share drivers. The Court could reason that Congress needs to address this matter of major economic significance and not leave it to an agency to decide such questions. In this case, the remedy that a court would issue is simply an injunction against the Board. There would be no basis for constructing a way to set aside the entire Act using the MQD as a vehicle. Of course, cogent arguments exist against this interpretation. One factor that complicates the application of the MQD to the Board's interpretation of the NLRA is that the Board rarely engages in rule-making—instead it announces policy changes through case adjudication and what Jacobs and Lofaso call "iterative construction."[72] Courts have mostly applied the MQD to reviewing agency policymaking through rulemaking and not agency rulemaking through adjudication.

If the Court were to hamper a Board action, it would do so by simply reversing a Board's adjudicatory decision as it always has. In this way, Almendares's observation that the Brown decision was a "*reductio ad absurdum"* holds true because it would simply provide another tool for the Court to do what its always done when reviewing cases decided under the National Labor Relations Act. The Court has a long history of reversing Board adjudication. For example, when the Board only had two remaining members out of five, it issued several decisions under a resolution delegating power of a five-member Board to the two remaining members whose terms had not expired. The Court did not countenance such maneuverings. In *New Process Steel* it held NLRA did not authorize the delegation of power from a fully constituted Board to a two-member committee of the Board. It set aside all the decisions issued by the improperly constituted Board.[73]

To be clear, the MQD is a bad outcome if the labor movement is interested in removing the shackles of preemption from it and innovate

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California Supreme Court in Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903 as a means of harmonizing antitrust and labor law preemption regimes and allow for further regulation), Terry Buck, Comment, *Restraining the Uber Model: Antitrust Law and the Gig Economy in New York and California*, 23 NYU J.L.P.P 861,875-6 (2023)(exploring the development of how independent gig-workers are exempt from the protections of the NLRA and subject to antitrust law).

[72] *See* Fred B. Jacob and Anne Marie Lofaso, *supra,* note 39, *6-7.

[73] 560 U.S. 574 (2010).

going forward. The application of the MQD to the Board's declaration of policy via adjudication would have the effect of maintaining the status quo. In practice this would create a situation that Almendares observes regarding the MQD: "[t]he result is not a doctrine confined to the most important or salient policies of the day, but a license for roving intense scrutiny over all policies, the administrative law equivalent to Lochner's regime of pervasive judicial review."[74] That is because if the Board were to apply the independent contract standard so that it could certify bargaining units comprised of gig-drivers or any other major move, it could invalidate such actions as beyond the scope of power Congress delegated to it. Additionally, the current status quo means that a whole buffet of options remains on the table for hobbling the Board. For example, the President could refuse to nominate enough members to make a quorum and prevent it from processing unfair labor practices or otherwise certifying bargaining units.[75] To break free from the preemption trap and set aside the NLRA, organized labor would have to look toward a different constitutional doctrine-the unitary executive doctrine.

B. Constitutional Challenges to the Board's Independence

The MQD provides an extra tool for handicapping the Board's exercise of authority, but any Court ruling applying the MQD would not free organized labor of preemption's grip on state action. Instead, a potential avenue could be for the Court to 1) apply the unitary executive theory to rule that the NLRA's removal protection for members of the Board violates the President's powers under Art. II, Sec. 1 of the U.S. Constitution, and 2) find that the appropriate remedy under the severability clause is to strike the whole Act down.[76] The observations contained in this subsection of this Article are especially salient considering the President's recent removal of Board member Gwynne Wilcox and her challenge currently pending before the Supreme Court.

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[74] Almendares, *supra,* note 46, at *46.
[75] *See* Benjamin Sachs, *Did Trump Just Suspend Garmon Preemption?* ONLABOR (Jan. 31, 2025) *and* Benjamin Sachs, *Going, Garmon, Gone: Why States May Now Be Free to Redesign Labor Law*, ONLABOR (Jun. 4, 2025).
[76] *See* Mila Sihoni, *supra* note 19, at 292 (arguing that the MQD allows courts to curb agency discretion without even needing to address the non-delegation doctrine and presents a much more viable alternative for doing so).

As Sunstein and Vermeule observe, the unitary executive theory is a "bracingly simple idea."[77] In their view, "Article II, section 1 of the U.S. Constitution vests the executive power in "a president of the United States. Those words do not seem ambiguous. Under the Constitution, the President, and no one else, has executive power. The executive is therefore "unitary."[78] In further summarizing the theory, Shane observes that "[t]he unitary executive theory rests on two foundational premises. The first is that the President, constitutionally speaking, is a one-person executive branch…[the] second is that, in vesting "the executive power" in "a president," the Constitution gave the President the entirety of the government's executive power— not "some of the executive power, but all of the executive power…"[79]

Wilcox's case provides a key example of how this theory applies to the Act and merits in depth discussion. Congress designed the NLRB to act as independent agency subject to limited presidential control.[80] Nevertheless, the President applied the unitary executive theory to remove Gwynne Wilcox pursuant to Art. II, Sec. 1 of the U.S. Constitution for failing to meet the objectives of his administration.[81] The District Court for the District of Columbia relied on the Supreme Court decision in *Humphrey's Executor* to enjoin the President from terminating Wilcox. In that case, the Supreme Court held that Congress has the power to create agencies comprised of independent, nonpartisan experts, who are charged quasi-judicial and quasi-legislative duties. In that situation, Congress can limit the power of the President to remove those officers.[82] The district court enjoined the action on the basis that the Supreme Court's decision in

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[77] Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future,* 2020 SUP. CT. REV. 83 (2020).
[78] *Id.*
[79] Peter M. Shane, *The Unbearable Lightness of the Unitary Executive Theory*, THE REGULATORY REVIEW (MAR. 3, 2025).
[80] 29 U.S.C. §153(a).
[81] Letter from Trent Morse, Deputy Director for the Office of Presidential Personnel, to Gwynne Wilcox and Jennifer Abruzzo, (Jan. 27, 2025), https://reason.com/wp-content/uploads/2025/02/2025-02-10-Letter.pdf. The letter also terminated Jennifer Abruzzo, the General Counsel of the Board. The 9th Cir. held that the removal protections given to members of the Board do not extend to the General Counsel of the Board. Therefore, the President may remove them at their pleasure. *See* NLRB v. Aakash, 58 F.4th 1099, 1104-6 (9th Cir. 2023).
[82] Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).

1935 in *Humphrey's Executor* remains good law. In its view, the Court would have to reverse it for the lower court to apply a different standard.[83]

In response, the President filed a request to stay the district court's injunction with the Court of Appeals for the D.C. Circuit. A divided panel of the appellate court granted the stay.[84] All three judges wrote opinions. Of note is Judge Walker's concurring opinion and its thorough exposition of the unitary executive theory and how Art. II, Sec. 1 of the Constitution requires that the President have the power to fire members of the National Labor Relations Board.[85] Wilcox sought relief from the stay with the Supreme Court. It allowed the firing to go forward on the basis that "[t]he stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power."[86] As the dissent notes, the Court is signaling a willingness to overturn *Humprhey's Executor*.[87]

The Court's statement that the President is likely to prevail against Wilcox telegraphs what is likely to be its finding. While that statement did not contain extensive analysis, Judge Walker's concurrence provides a good roadmap because he grounded his discussion of the unitary executive theory in the Supreme Court's decision in *Free Enterprise Fund*, *Seila Law,* and *Collins v. Yellen.*[88] In *Free Enterprise Fund*, the Court held that structures that laws setting up two layers of protection from being fired by the President for inferior officers violated the Constitution.[89] In *Seila Law,* the Court held that Article II of the Constitution vests the entire executive power in the President and that Congress could not insulate the director of the Consumer Financial Protection Bureau from removal.[90] That case contained significant discussion of *Humphrey's Executor* and created a cloud over its continuing viability, but applied the severability provision to

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[83] Michael Kunzelman, *Federal judge reinstates labor board member fired by President Donald Trump*, ASSOCIATED PRESS (Mar. 6, 2025).
[84] Wilcox v. Trump, *et al.,* No. 25-5057 (D.C. Cir. Mar. 28, 2025).
[85] *Id.* at *21 (Walker, concurring).
[86] Trump, *et al* v. Wilcox, *et al*, 605 U.S. at *1 (2025).
[87] *Id. See also dissent* at *2 (describing how the Court effectively blessed the President's removal of Wilcox and overturning *Humphrey's Executor*).
[88] Wilcox v. Trump, *et al., supra,* note. 84, at *21-6. Judge Walker observed that *Humphrey's Executor* had "one good year" in *Weiner v. U.S,* 357 U.S. 349 (1958). Otherwise, he observed that the Court has been seeking to reduce its scope. *Id.* at *20.
[89] 561 U.S. 477 (2010).
[90] Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 232-8 (2020).

avoid ruling that the entire CFPB was unconstitutional.[91] Similarly, the Court held the Housing and Economic Recovery Act of 2008 violated the separation of powers in *Collins v Yellen*.[92] The Court held that Congress could not include a for-cause removal clause that would restrain the President's ability to remove the director of the Federal Housing Finance Agency from office.[93]

It is worth going explaining the NLRB's structure a bit to understand the threat that the Court's decisions in *Seila Law* and *Collins v. Yellen* present to the NLRB. The Board consists of five members and can only be removed for malfeasance by the President. The Board is independent and does not serve at the pleasure of the President.[94] Congress vested the Board with the power to prevent unfair labor practice charges.[95] The Board rarely engages in rulemaking.[96] Instead, the NLRB develops policy through adjudication through what Jacobs and Lofaso describe as "iterative construction" in which it applies the tools of common law to preserve labor peace.[97] While that makes the NLRB distinct from other agencies, the Court is seemingly signaling that this distinction does not matter in making a decision of whether its members are subject to the unitary executive's removal power. Therefore, the Court will have to address the question of remedies.

Any court fashioning a remedy in the Wilcox case, or other unitary executive based litigation involving independent agencies, should consider whether the severability clause requires that the court strike down the entire statute. This Article will delve into two lower court decisions out of the Federal District Court for the Western District of Texas and the District of Columbia to illuminate the doctrinal issues that the Court will have to wrestle with in the *Wilcox* case and their consequences. Even though these cases have to do with whether administrative law judges (ALJs) have one or two layers of protection from removal by the President, for the purposes of this Article they provide a lens for examining how a ruling under the unitary

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[91] *Id.* at 216-218.
[92] Collins v. Yellen, 594 U.S. 220 (2021).
[93] *Id.* at 250, 256.
[94] 5 U.S.C § 3105.
[95] 29 U.S.C. §§ 158(a)–(b), 160–161.
[96] Blake Phillips, *NLRB Case Surge: What It Means and What the Board Can Do About It Right Now*, GEORGETOWN J. ON POV. L. AND POL. BLOG (Feb. 16, 2023) (noting that the Board has only engaged in rulemaking eight times in its history).
[97] Jacob and Lofaso, *supra* note 39, at *6-7.

executive theory interacts with the severability clause and the potential remedies that the Court may hand down when it hears merits briefing in the Wilcox matter.

For example, SpaceX's filed suit against the NLRB rests on the theory that the NLRB's administrative law judges are too far removed from the President's ability to terminate them.[98] The federal district court applied the Fifth Circuit's ruling in *SEC v. Jarseky* holding that the SEC's ALJ structure violated the Constitution's "take care" clause.[99] Since the NLRB's ALJ structure mirrored that of the SEC, the court had no problem finding that it was bound under Fifth Circuit precedent to hold that the NLRA also violated the Constitution.[100] The court concluded that "Congress clearly intended to protect the NLRB from the volatility of the political machine and allow consistent adjudication of employee rights provided by the NLRA. However, Congress is not permitted to 'interfere with the President's exercise of the executive power and his constitutionally appointed duty to take care that the laws be faithfully executed under Article II.'"[101] The court sided with SpaceX and enjoined the Board from prosecuting several unfair labor practice charges against it.[102] The court ruled that the Board and its use of ALJs is *not severable* from the rest of the NLRA. It saw no way of severing the unconstitutional parts of the law that could leave the NLRA in a viable state.[103]

Similarly, the court in *VHS v. NLRB* ruled that the NLRA's use of ALJs violates the unitary executive structure that the framers of the

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[98] Space Expl. Technologies. Corp. v. NLRB, 741 F. Supp. 3d 630, 633–34 (W.D. Tex. 2024).
[99] *See* Jarkesy v. SEC, 34 F.4th 446, 465–66 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023), *cert. denied*, 143 S. Ct. 2690 (2023), *aff'd and remanded on other grounds*, 144 S. Ct. 2117 (2024).
[100] On remand, the 5th Circuit Court of Appeals held that nothing in the Supreme Court's decision upset its prior orders, including its finding that Congress had impermissibly delegated authority to the SEC's ALJ's. Jarkesy v. SEC, 745, 746 (5th Cir. 2024).
[101] Space Expl. Technologies Corp., 741 F. Supp. 3d at 634 (quoting *Morrison v. Olsen*, 487 U.S. 654, 689 (1988)).
[102] *Id.* at 641.
[103] The federal district court in the *SpaceX* case seemed to recognize that. It noted that "While statutes are severable if 'the remainder of the law is capable of functioning independently and thus would be fully operative as a law,' doing so here would circumvent the legislature without clear congressional intent. Here there is no appropriate way to sever any of the removal protections to remedy the constitutional problems with the NLRB's structure." *Id.* at 639.

Constitution designed.[104] In doing so, the court relied on the Supreme Court's ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board* to find that the Board's ALJs have arguably three layers of tenure protection because the President would have to convince the Merit Service Protection Board and the National Labor Relations Board to fire them, and only for malfeasance or cause.[105] The court decided that the removal restriction did not actually inflict harm, however, and provided limited relief by holding that ALJs are at-will employees of the NLRB, which is exactly what occurred in *Free Enterprise Fund*. Thus, the ALJs would have only one layer of protection between them and the President's removal authority.[106] The court in *VHS* arrived at a different result than the Western District of Texas concerning the ability to indirectly sever the ALJs from the NLRB. In *VHS,* applied the principle of severability to the Administrative Procedures Act (APA) even though the APA does not contain one. The court found that it could easily sever the removal protections for ALJs contained in a federal personnel statute from the rest of the APA.[107]

The above cases indicate that courts are open to taking away the removal protections of ALJ's and differ concerning the applicability of severability and may do so with a statutorily created agency headed by a board. The courts hearing the Wilcox case have not yet grappled with the question of whether a Board member's removability is severable from the rest of the statute. However, the independence of an ALJ for the Board, though important, is doctrinally distinct from that of a Board member. That is because Congress has spoken directly to the importance of Board member independence.[108] As discussed further below, in the case of the NLRA, board member independence from the executive was a key design feature of the great labor management compromise leading to the passage of the Act.[109] It also grounds questions about whether the Board could legally exist without independent Board members.

Now that this Article has explained how the NRLA challenges the MQD but is susceptible to a challenge against the application of the unitary

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[104] VHS Acquisition Subsidiary No. 7 v. NLRB, No. 1:24-cv-02577, 2024 WL 5056358, at *2 (D.D.C. Dec. 10, 2024); *see also Space Expl. Technologies. Corp.*, 741 F. Supp. 3d 630.
[105] *VHS Acquisition Subsidiary No. 7*, 2024 WL 5056358, at *5.
[106] *Id.* at *9–10.
[107] *Id.* a *10.
[108] 29 U.S.C. 153(a).
[109] *See* Part I.D, infra.

executive theory doctrine, it will set out an analysis concerning remedies through examining the severability clause. Specifically, this Article next sets out the stakes surrounding severability and answers whether the Court could sever the removal protections of Board members from the rest of the Act.

C. The Stakes Surrounding a Severability Analysis

If the Court decides to take up the question of whether the President could fire a Board member without cause, then the Court will have to address the severability clause in shaping one of two possible remedies. On the one hand, the Court could allow the Board to continue functioning as simply another member of the President's administration. In the alternative, the Court could find that it is impossible to sever the Board members' independence from the rest of the NLRA as the Western District did in the case of the NLRB's ALJs. Cynthia Estlund once observed that "[i]t is not for the Supreme Court to start pulling pillars and beams out of the existing structure, heedless of the harm to its overall integrity, at the risk of bringing the roof down on the heads of the millions of workers who still find shelter there."[110] The Court's ruling in the Wilcox case threatens to do exactly that.

At the risk of engaging in legal sloganeering, severability matters. Applying severability in a way that preserves the NLRA without an independent Board would allow courts to shut down the ability of states to innovate on labor relation matters through the continued existence of the preemption doctrine.[111] This is a problem for those interested in solving labor inequality because, as Andrias and Sachs observe, "more localized disruptive tactics can move state and local governments to act."[112] They additionally note that that this is because "[i]f a social-movement

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[110] Cynthia Estlund, *Are Unions a Constitutional Anomaly*, 114 U. MICH. L. REV. 169, 246 (2015).

[111] Others have argued that setting aside NLRA preemption would create space for states to innovate on labor policy. *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 (2009). Environmental law scholars such as Kamaile A.N. Turčan argue that the Court's decisions in *West Virginia v. EPA* and *Loper Bright v. Raimondo* actually have the effect of diminishing preemption's power, however, they do so while preserving the federal scheme regulating the environment instead of doing so by setting it aside as this Article examines. *See generally* Kamaile A.N. Turčan, *The Bogeyman of Environmental Regulation: Federalism, Agency Preemption, and the Roberts Court,* 109 MINN. L. REV. (forthcoming 2025).

[112] Andrias Sachs, *supra* note 15 at 805.

organization lacks the political power to secure organizing enabling legislation from the federal government through ordinary channels or disruptive activity; the organization might redirect its legislative to a state or local jurisdiction where the political conditions allow it to win a substantively similar or analogous statute."[113] The ability to channel insurgent energy to organizing in states versus seeking it in Congress to obtain relief is a key part of ensuring labor peace in the United States. Andrias and Sachs explain that the lack of a filibuster mechanism at the state level and that some states have single party control makes passing of strong labor legislation more viable.[114] Gali Racabi's recent study of state law concludes that if the Court struck down the NLRA or otherwise lifted labor law preemption, 19 states (including Republican controlled states such as Alabama and Kansas) have "mini-Wagner" acts that mirror federal labor law in many ways.[115] If the Court rules that the Act is not severability, then state options for expanding or contracting collective bargaining against that baseline set out in the NLRA are no longer viable.

The NLRA severability clause states:

> If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.[116]

Typically, courts apply severability clauses to save statutes. The legislative history behind the severability clause does not provide much help in gleaning what to do.[117] However, the Western District of Texas, and not

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[113] *Id.* at 812.
[114] *Id.* at 813, 816.
[115] *See* Gali Racabi, *In Lieu of the NLRA* (March 28, 2025), https://ssrn.com/abstract=5197451, at *7.
[116] Andrias & Sachs, s*upra* note 15, at 816.
[117]The legislative record contains statements from Wagner that the severability clause was meant to be simple boilerplate, and little more. *See* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1108, 1207, 1404; (U.S. Gov't Publ'g Off. 1949), https://archive.org/details/legislativehisto0000unit_p8k0; *See e.g.*, 2 NLRA, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1742 (oppose–majority rule), 3133 (oppose–commerce clause), 3135 (oppose–commerce clause; oppose–freedom of contract), 3135 (oppose–commerce clause), 3139 (oppose–commerce clause), 3178 (support–urge to vote for merit, not constitutionality) (U.S. Gov't Publ'g Off. 1949), https://archive.org/details/legislativehisto0000unit_r9c9.

the District Court for the District of Columbia, reached a conclusion more in line with this Article agues was Congress's intent because a key part of the legislative bargain leading to the Act was the existence of an independent board mediating tensions between capital and labor. Unfortunately, the Western District's decision is thin on analysis. The next subsections will provide a thicker basis for the Western District's conclusion regarding severability. It will do so by explaining how the NLRA's history leans in favor of the Court setting aside the entire Act in the event that it reverses *Humphrey's Executor* or otherwise holds that the President could remove Wilcox without cause despite Congress's clear statement otherwise.

D. Lacking Historical Precedent of an NLRA Without a Board

The history of industrial strife provides important contextual information for applying the severability clause if the Court were to hold that the President could remove Wilcox from office. The evolution of labor law in favor of groups seeking collective bargaining rights in the United States occurs in punctuated equilibriums in which stasis is broken in response to labor-related unrest. For example, in response to brewing labor unrest in the 1930s, Congress passed laws such as the National Industrial Recovery Act (NIRA) that contained language protecting the right of workers to organize into unions. The NIRA included language that encouraged workers to organize into unions; it stated that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[118] The problem was that the NIRA had a voluntary regime that led organizers to tell workers that Roosevelt wanted them to join a union.[119] Additionally, the NIRA had no enforcement mechanism for requiring employers to negotiate with unions. It provided incentives for employers to do so, but those positive incentives did not encourage employers to stand down in their resistance. Eventually, the

[118] National Industrial Recovery Act of 1933, Pub. L. No. 73–67, §7(a), 48 Stat. 195, (1933).
[119] NLRB, *1933 The NLB and "The Old NLRB",* https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1933-the-nlb-and-the-old-nlrb#:~:text=In%20early%201934,%20President%20Roosevelt%20authorized%20the%20NLB%20to (last visited Oct. 14, 2024).

Supreme Court struck down the NIRA.[120] However, the Court's recalcitrance did nothing to stop workplace organizing and in fact created more industrial unrest.

To fix this enforcement problem and seek industrial peace, Congress enacted the Wagner Act, otherwise known as the National Labor Relations Act. The Act required that the Board certify appropriate bargaining units.[121] It also empowered the Board to issue bargaining orders requiring employers to bargain in good faith with the workers' chosen representative.[122] The Act did not give the Board the power to require parties to arrive at a certain contract; instead, the Board has the power only to require that parties must bargain with one another.[123] The drafters of the Act anticipated that employers would file suit challenging it and used the U.S. Constitution's Commerce Clause as the source of authority for passing the Act.[124]

Congress designed the Board to be independent from the executive branch. First and foremost, Congress did not situate the Board within the Department of Labor even though that agency had existed for twenty years by the time Congress passed the Wagner Act.[125] The legislative history contains statements that Congress did not do so because the Department of Labor was an executive department, and Congress wanted to keep the Board separate from presidential control and any political pressure from the executive branch.[126] In fact, Congress struck out language that characterized the Board as an independent agency within the executive branch to doubly underscore its independence from the President.[127] Sen. Wagner, the chief

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[120] *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industry Recovery Act as an unconstitutional exercise of Congress's powers under the Commerce Clause and violating the non-delegation doctrine).
[121] 29 U.S.C. § 159(b).
[122] 29 U.S.C. §§ 158(a)(5), 160(a).
[123] H. K. Porter Co. v. NLRB, 397 U.S. 99, 102–09 (1970) (holding that the Board could not require that the parties arrive at agreement or compel acceptance of an offer made during collective bargaining).
[124] *See* 29 U.S.C. § 151.
[125] Judson MacLaurey, *A Brief History: The U.S. Department of Labor,* U.S. DEPT. OF LABOR, https://www.dol.gov/general/aboutdol/history/dolhistoxford.
[126] 79 Cong. Rec. 9722-25 (1935). *See also* Catherine L. Fisk and Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with its Structure and Function and Suggestions for its Reform,* 58 DUKE L.J. 2013, 2051 (2009) (describing how ex-labor Secretary Frances Perkins would attempt to meddle in Board affairs but did not have statutory tools for doing so).
[127] 79 Cong. Rec. 10298 (1935), *see also* Gray, *Dependent "Indepdendent" Agencies,* 53 CUM. L.R. at 86-87.

architect of the Act, stated that he wanted to remain the Board to be more judicial in nature and free from political influence.[128] Congress embodied this desire by providing fixed terms for the members of the Board[129] and protecting members of the Board from removal except for "neglect of duty or malfeasance in office."[130] As Joan Flynn observed, Congress meant to keep the board independent from control by the executive branch.[131]

In response to Congress's enactment of the Wagner Act, the Chamber of Commerce advised its members not to heed the law because it was unconstitutional. Several employers brought suit confident that the Supreme Court would vindicate their position that Congress had improperly regulated commerce.[132] Employers thought that the Court would support them even though Roosevelt was attempting to pressure the Court through a court-packing plan in which he proposed adding another justice for each one over seventy. Ultimately, the Supreme Court failed to vindicate the confidence that employers had in it. In the "switch in time that saved nine," the Court sustained a challenge to the NLRA's constitutionality as a proper exercise of Congress's power under the Commerce Clause.[133] The Act ushered in which union membership significantly increased and industrial unrest decreased.

The above legislative history suggests that Congress at that time would have preferred no Act to one in which the Board is beholden to the President. Mechanisms such as the Board's term limits, its creation outside of the Department of Labor for the purpose of maintaining independence from the executive, and the protections for Board members from termination demonstrate a Congressional intent to keep the Board free from presidential interference as a key part of the statute that undergirds its enforcement rational. Additionally, the independence of the Board was a

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[128] *See* A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, to Create a National Labor Relations Board, and for Other Purposes: Hearing on S. 1958 Before the Sen. Comm. on Educ. and Lab., 74th Cong. 488 (1935).
[129] 29 U.S.C. §152(a).
[130] *Id.*
[131] Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB*, 1935-2000, 61 OHIO ST. L. J. 1361, 1363-66 (2000).
[132] BERNSTEIN, *supra* note 28.
[133] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30–31 (1937). The question concerning the Board's structure or the president's appointment powers did not arise because the Court had decided another case dealing with a similar question two years earlier. *See generally* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

key ingredient in maintaining peace between capital and labor.[134] The Board's independence is especially important to keep in mind in these politicized times. Traditionally, the five-member Board has maintained a 3-2 composition with the chair coming from the same party as the current president.[135] In broad, sweeping terms the members of the Board appointed by Democratic presidents tend to be more sympathetic to labor, and those appointed by Republican presidents tend to be more aligned with management interests.[136] If the Court were to side with the President over Wilcox, then the Court would be giving the President authority to upset the delicate balance between labor and management and undermine the neutrality needed for the NLRB to administer the Act and uphold the labor-management that the Act represented. This would have the effect of worsening the regulatory inconsistency that occurs when the party in power switches and fills openings on the NLRB.[137]

In sum, the desire to make members of the National Labor Board beholden to the President makes little sense considering the contextual and legislative history described above. In light of the events described in Wilcox's case, Samuel Estreicher, Roger King, and David Sherwyn urged Congress to create labor courts. They argued that "this country needs an independent entity that adjudicates labor issues in the workplace on a nonpartisan and neutral basis. The "law of the jungle"—more accurately "the law in the streets"—in labor matters that existed prior to the passage of the National Labor Relations Act in 1935 is not an acceptable option."[138] They are right that there needs to be an independent forum for the adjudication of labor disputes. Unfortunately neither the Court nor Congress seems to want to take heed of their caution that they are taking labor relations toward a law of the streets. Unfortunately, the Court's actions may have the result of re-creating the whole cycle that led to the enactment of the Wagner Act in the first place. The next Part imagines what could happen if the Court were to do two things discussed in this Article: 1) apply

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[134] *See supra*, Part. I.D, at *27-28.
[135] Garden, *supra,* note 37, at 1472 n. 9.
[136] For an example of how changes in the composition of the NLRB swing case outcomes, see Robert M. Schwartz, *It's Not Looking Good at the National Labor Relations Board*, JACOBIN (Jan. 12, 2025).
[137] *See e.g.* Garden, *supra,* note 37, at 1476-7 *and* Alvin Velazquez, *When Labor Law Protects Corporate Interests Better than Corporate Law Does*, LPE BLOG (Sept. 15, 2022) (decrying the Board's constantly changing position in articulating when two parties are joint-employers under the Act).
[138] Samuel Estreicher, G. Roger King, and David S. Sherwyn, *The Labor Board Needs Restructuring, Not Destruction*, THE REGULATORY REVIEW (May 27, 2025).

the unitary executive theory in a way that gives the President the power to remove NLRB members at will, and 2) apply the severability clause in a way that strikes down the whole Act because the Court has rendered the a key part of the scheme that Congress designed a nullity. In that case, it would open up the potential for state-based labor insurgency tactics that could lead to the reform collective bargaining at the state level, including some type of state level tribunal along the lines that Estreicher *et al.* urge.

II. LABOR'S TOOLS FOR WORKER ORGANIZING POST-NLRA

The elimination of the NLRA as outlined above will leave labor in a pre-Act situation that will resemble "the law of the jungle" and what Justice Oliver Wendell Holmes observed as the "power of combination", but with some new tools that labor did not fully utilize in the 1930s.[139] In their article urging scholars to study labor unions as a social movement, Fisk and Reddy describe how law "channeled labor from its mass movement origins in the 1930s, into a powerful institution from the 1940s through the 1960s, to its much weakened form today."[140] This Article seeks to build on their contribution. Law can again cause the repeat of that cycle. Specifically, the Court striking down the Act entirely and lifting preemption can create stronger conditions for organizing workers immediately under long dormant labor laws that U.S. territories as well as blue and red states have on their books.[141] For example, Puerto Rico's Constitution bluntly states: "Persons employed by private businesses… shall have the right to organize and to bargain collectively with their employers through representatives of their own free choosing in order to promote their welfare."[142] In the absence of NLRA preemption, residents of Puerto Rico would enjoy a *constitutional* right to collectively bargain. It is not alone. Union dense states such as

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[139] *See* Greenhouse, *supra* note 23. *See* also Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) ("Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.")

[140] Catherine L. Fisk & Diana S. Reddy, *Protection by Law, supra,* note 15, at 151 (2020).

[141] *See* National Center for Collective Bargaining in Higher Education and the Professions, February 2025 Newsletter.

[142] P.R. Const. Art. II § 17.

Illinois have such laws on the books, and low-union density and politically conservative states including Missouri and Florida would as well.[143]

The potential for union growth would be significant. In 2024, only 234,000 workers, or 8.6% of the workforce, were members of a union in the state of Missouri, out of a total of 2.734 million total participants in the workforce.[144] However, if Missouri's protections go into effect after the Court strikes down the NLRA, then even a 10% increase in membership would significantly improve organized labor's ability to build strength. The existence of more favorable laws from the past will not build worker power though. For these laws to provide an avenue for worker organizing, unions will need to prepare. As Sachs observes, the "preconditions for mobilization are common across multiple approaches to social movements."[145] In reality, unions will have to not only use what Michael Oswalt defines as "improvisational techniques" to compel their employers to come to the table and bargain, but advocate for improvisational laws.[146] Before getting into the role of social movements in a post-NLRA environment though, this Article will explore two tools that become available as a result of the Court setting aside the Act: (1) states crafting creative labor protections for workers and (2) the protections of the Norris-LaGuardia Act.

A. The Possibilities for State Collective Bargaining Reform

If the Court were to strike down the NLRA, then organized labor and its allies could leverage already existing protections on the books at the state level *and* push for further innovation without worrying that courts would preempt state and local labor legislation. As noted above, several states and

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[143] *See* National Center for Collective Bargaining in Higher Education and the Professions, *February 2025 Newsletter citing* ILL. CONST. ART. I, §25 ("Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work."), MIS. CONST. ART. I, §29 (same), and FLA. CONST. ART. I, §6 (same).

[144] Bureau of Labor Statistics, *Union affiliation of employed wage and salary workers by state, 2023-2024 annual averages* (last retrieved Mar. 28, 2025), https://www.bls.gov/news.release/union2.t05.htm#union_a05.f.1.

[145] Benjamin I. Sachs, *Law, supra* note 16, at 353 (Noting that the two pre-conditions for success under political process theory are (1) objective structural conditions that make mobilizing feasible, and (2) subjective belief that it would be successful).

[146] *See* Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 649–757 (2016) (outlining how improvisational unionism can breathe new life under a weight of bureaucratic entanglement and hostile law)..

Puerto Rico already have provisions in their statutes or in their constitutions protecting collective bargaining that would go into effect should the Court strike down the NLRA. Gali Racabi conducted a 50-state survey and concluded that nineteen states have laws providing for collective bargaining in the private sector already on the books.[147] These laws set a baseline. There would be room for states to further experiment in the absence of preemption, including bargaining at a sectoral level rather than at the company level as NLRA provides.[148]

Of course, state level bargaining reform relies on collapsing the entire Act via the non-delegation or unitary executive doctrines in order to get rid of NLRA preemption. Befort notes that "[t]he federal preemption landscape consists of a complex web of rules and precedent, and courts often appear to decide cases on the basis of highly technical distinctions. In short, many perceive the topic of federal preemption as a great mystery to be avoided if at all possible."[149] If the Court interprets the severability clause as discussed in Part I, then organized labor and its lawyers can avoid the quagmire that is federal preemption.

There are three relevant preemption doctrines for labor law. The Supreme Court has created two of those: *Garmon* and *Machinists* preemption.[150] In *Garmon,* the Court held that federal labor law preempts state regulation of core concerns regulated by the NLRA, such as those implicated by Section 7 and Section 8 of the NLRA.[151] That doctrine aligns with the arrangement that other federal statutes have with overlapping state regulation. The second doctrine, *Machinists*, is where the NLRA's

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[147] *See* Gali Racabi, *supra* note 115, at *3.

[148] William Brennan famously said that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932). *See also* César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States*, 90 U. CHI. L. R. 703,734-5 (2023) (Arguing that the Seattle Domestic Workers Standards Board and California's Fast Food Accountability and Standards Recovery Act come closest under current NLRA restrictions to creating tri-partite sectoral bargaining boards).

[149] Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. L. 429 (1998).

[150] *See e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976).

[151] *See Garmon*, 359 U.S. at 244–45.

preemption doctrine develops in an especially unusual manner.[152] The Court held in that case that the NLRA also preempts all laws regulating what Congress left to economic forces or otherwise did not regulate. The courts have applied *Machinists* preemption to strike down laws of general applicability providing for paid breaks[153] and a California state ban on using the state's resources to support or oppose union organizing drives.[154] The third preemption doctrine is based on Section 301 of the Labor Management Disclosure Act.[155] It grants federal courts the jurisdiction to hear contractual disputes between labor and management and requires federal courts to apply federal common law instead of state contractual law to these kinds of disputes.[156]

The advantage of setting aside federal preemption doctrine for organized labor is that states could then become laboratories of work law and fill in where Congress has not acted. Andrias and Sachs previously noted that engaging in disruptive tactics is much easier at the state level than at the federal level.[157] In May 2021, the Harvard Law Clean Slate for Worker Power Project issued a report called "Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level" that succinctly set out what innovations states and localities could implement in the absence of federal labor law preemption or the articulation of a new norm through the PRO Act.[158] Those innovations include:

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[152] At least one commentator has argued that NLRA preemption is amongst the broadest of preemption doctrines. *See e.g.*, Benjamin I. Sachs, *supra* note 15, at 1154. Some commentators would say that ERISA preemption, which has to do with retirement and is workplace adjacent, is the broadest of federal preemption schemes. *See e.g.*, Lawrence P. Postel, *ERISA Preemption: A Strong Shield Against State Law Claims*, 9 LAB. LAW. 561 (1993) (observing that the breadth of ERISA preemption is without question).
[153] *See* 520 S. Mich. Ave. Assoc., Ltd. v. Shannon, 549 F.3d 1119, 1139 (7th Cir. 2008).
[154] *See generally* Chamber of Commerce v. Lockyear, 364 F.3d 1154 (9th Cir. 2004). For a critique of that decision, *see* Stephen F. Befort & Bryan N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyear*, 20 LAB. L. 107, 108 (2004) (arguing that California's legislation did not implicate any of the interests that either preemption doctrine was meant to protect).
[155] 29 U.S.C. § 185(a).
[156] *See* Loc. 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 105 (1962).
[157] Andrias & Sachs, *supra* note 15, at 789.
[158] CLEAN SLATE FOR WORKER POWER, OVERCOMING FEDERAL PREEMPTION: HOW TO SPUR INNOVATION AT THE STATE AND LOCAL LEVEL (2021).

- "[e]xpand[ing] collective bargaining coverage and protections to those not covered under the NLRA,"[159]
- "[p]rovid[ing] for enhanced labor standards related to wages, hours of work, and/or benefits,"[160]
- "[r]egulat[ing] employer's use of state or local funds to attempt to defeat union organizing campaigns,"[161] and
- "[c]ondition[ing] state funding on labor peace or neutrality agreements"[162]

While these remedies certainly help workers seeking to organize into unions, more would be possible under this Article's analysis because states could not only consider these actions but could actually engage in regulating labor within their own borders. Andrias and Sachs note how "[m]ovement actors translate disruptive capacity into political power that they deploy to secure government concessions."[163] This is especially true at the local government level.[164] The possibilities at the local and state level encourage innovation.[165]

To that end, California's legislature is currently seeking to push the bounds of current preemption doctrines. Ben Sachs argues that states are free from the restrictions of *Garmon* preemption when the Board lacks a quorum and may enact stronger labor law protections.[166] Sachs finds authority for that proposition in the fact that *Garmon* preemption is tied to the existence of a functioning labor agency. Since the President's removal of Gwynne Wilcox leaves the agency without a quorum and in a non-functional state, states are free from preemption's grip to innovate.[167] Sachs

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[159] *Id.* at 19.
[160] *Id.* at 22.
[161] *Id.* at 24.
[162] *Id.* at *25*; *See also* Sachs, *supra* note 15, at 1209 (describing how "labor preemption not only prevents the passage of labor legislation, but also results in the reshaping of another area of law.").
[163] Andrias & Sachs*, supra* note 15, at 805.
[164] *Id.*
[165] Fisk was commenting on how Estlund and Liebman's work sought to squeeze in current gig workers for companies like Uber and Doordash into already existing statutory antitrust labor exemptions or the NLGA. They would not need to engage in such an exercise in the absence of preemption. *See* Fisk, *supra* note 28; Cynthia L. Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMPAR. LAB. L. & POL'Y J. 371, 372 (2021).
[166] *See* Sachs, *supra* note 75.
[167] *Id*.

cites to the 4th Circuit's recent decision in *National Association of Immigration Judges v. Owen* for support.[168] A key question in that case concerned whether courts are able to take jurisdiction over claims brought governmental employees under the Civil Service Reform Act when the agency that Congress charges with adjudicating such matters is functionally inoperant. In concluding the 4th Circuit's decision, Judge Berner wrote that:

> "Congress designed the CSRA to divest district courts of jurisdiction to review legal challenges like those raised by NAIJ. The structure of the CSRA relies fundamentally, however, on a strong and independent MSPB and Special Counsel. Serious questions have recently arisen regarding the functioning of both the MSPB and the Special Counsel. We cannot allow our black robes to insulate us from taking notice of items in the public record, including, relevant here, circumstances that may have undermined the functioning of the CSRA's adjudicatory scheme."[169]

The California legislature is now looking at adopting Sachs's suggestion and applying the lessons contained in the 4th Circuit's opinion. Assembly Bill 288 (AB 288) responds to workers who have petitioned to form a union but have not received certification from the Board for any number of reasons, including being without quorum.[170] AB 288, if enacted, would authorize California's Public Employees Relations Board (PERB) to assert jurisdiction if "*the National Labor Relations is repealed or narrowed, and they are not otherwise covered by the Railway Labor Act (45 U.S.C. Sec. 151 et seq.) or any other law that subjects them to the Public Employment Relation Board's jurisdiction."*[171] Alternatively, the bill also expands PERB's jurisdiction if "[t]*he worker* petitions the National Labor Relations Board to vindicate their rights to full freedom of association, self-organization, and *or* designation of representatives of their own choosing but *has* not *received a determination* or remedy within the specified statutory timeframe may petition the Public Employment Relations Board to vindicate those rights."[172]

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[168] Natl Assn of Immigration Judges v. Owen, No. 23-2235 (4th Cir. 2025).
[169] *Id.* at *31.
[170] Molly Gibbs, *Unions ask California to lead fight for workers at the state level*, SACRAMENTO BEE (Jun. 19, 2025).
[171] CA. ASS. BILL 288, §2(b)(1)(A).
[172] CA. ASS. BILL 288, §2(b)(1)(B).

The proposal takes advantage of a functional lacunae in the law. However, if the Court strikes down the NLRA in the manner described above, then California would not have to skirt around preemption by debating what is in essence a trigger law.[173] It could instead simply expand the PERB's jurisdiction without any conditions. Getting rid of preemption could also change scholarly debate concerning labor law. Labor scholars would not have to continue engaging in lamenting labor law's political and legal ossification,[174] but instead think about expanding bargaining protections to wider swatches of the work force and getting into debates about how to balance competing interests within a new regime. Setting aside the Act would open up the possibility for workers to advocate for state wage boards because, as César F. Rosado Marzán posits, if the NLRA is dismantled and labor politics are disrupted, that could create conditions for the creation of new labor institutions as occurred in Puerto Rico in the 1960's.[175] Finally, getting rid of the Act would also resolve another problem. Racabi notes that employers seek on the one hand to get rid of federal labor law and on the other use preemption to push back state regulation on the other. Getting rid of the Act in the manner noted in Part I.b of this Article operationalizes Racabi's argument that "[d]ismantling the constitutional structure to shake down your workers should come with a high price tag; being left without preemption arguments."[176]

In the case of the gig economy, the picture could get a bit more complicated. The change in labor law preemption would allow states to regulate gig company workforces through the imposition of collective bargaining. For example, California could convert its recently formed Fast

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[173] "Trigger law is a general term for a law that is currently unenforceable (sometimes due to federal preemption, the pecking order of legal authority) but becomes enforceable when certain conditions are met. Simply put, trigger laws are anticipatory laws." Megan Thorsfeldt and Gali Racabi*, What Are Trigger Laws?*, ILR CAROW NEWSLETTER (Mar. 12, 2025).

[174] Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (being the first to coin the term to describe the cutting off labor law from democratic processes leading to its renewal).

[175] César F. Rosado Marzán, *Can Wage Boards Revive U.S. Labor?: Marshaling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 156 (2020). This would hold true even though the political situation between Puerto Rico and the United States during the 1960s is very different than the national political situation present in the United States currently.

[176] Gali Racabi, *supra* note 115, at *24.

Food Council into a full collective bargaining regime.[177] In Massachusetts, voters will soon consider whether to make gig drivers employees for purposes of a bargaining-like law after efforts to work around bargaining fell short in the legislature. By defining gig workers not as independent contractors but as employees, state law could get around impediments that antitrust law places on gig workers conspiring to bargain.[178] Without labor law preemption, Massachusetts lawmakers could simply legislate a bargaining regime for Uber and Lyft drivers through normal mechanisms or ballot referendum and defining them as employees for purposes of collective bargaining instead of independent contractors.[179]

To be clear though, the risk that an employer affected by such changes would challenge them on the basis of antitrust preemption remains. The Chamber of Commerce successfully challenged a City of Seattle ordinance facilitating collective bargaining between ride-share drivers and platform companies.[180] The 9th Circuit held that while the NLRA did not preempt Seattle's ordinance, antitrust law did preempt the ordinance.[181] Specifically, the court found that the ordinance did not provide a role for the State of Washington to supervise of bargaining and as a result the ordinance could not receive the benefit of state-action immunity from antitrust liability.[182]

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[177] Suhuana Hussein, *A new law could raise fast-food wages to $22 an hour — and opponents are trying to halt it*, YAHOO! (Sept. 12, 2022), https://finance.yahoo.com/news/law-could-raise-fast-food-130039773.html; *See also* Cal. Lab. Code §§ 1474–1477.

[178] Sanjukta Paul and Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 U. ST. THOMAS L.J. 44, 47-9 (2019) (explaining how antitrust laws empower firms to coordinate but bars Uber drivers from forming an association to coordinate) *and* Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 235 (2017) (outlining how antitrust law and labor law intersect as applied to Uber drivers based on their status as independent contractors instead of employees). *See also* Kim, *supra* note 71, at 456 (proposing that antitrust enforcement agencies adopt the ABC-test articulated by the California Supreme Court in Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903 as a means of harmonizing antitrust and labor law preemption regimes and allow for further regulation).

[179] Rebecca Bellan, *The Question of Gig Worker Status in Massachusetts Is Back on*, TECHCRUNCH (Sept. 6, 2023), https://techcrunch.com/2023/09/06/the-question-of-gig-worker-status-in-massachusetts-is-back-on/#:~:text=The%20proposal%20filed%20in%20August%20by%20Flexibility%20and%20Benefits%20for.

[180] Seattle, Wash., Ordinance 124968 (Dec. 23, 2015).

[181] Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769, 782-90 (9th Cir. 2018).

[182] *Id.* at 788-9.

Even though the risk of antitrust preemption for independent contractors may remain, I agree with Racabi that: "[c]ompared with a battered and collapsed federal labor law, which resisted repeated reform attempts to fix its well-known vices, possibilities for local labor law seem a worthy prize to consider."[183]

The next subsection discusses how the Norris-LaGuardia Act provides important protections for engaging in the labor activism necessary to achieve some of the labor law reforms outlined in this Section.

B. The Norris La-Guardia's Protections of Labor Insurgency

One of the most important protections that organized labor and workers would have available post-NLRA is the Norris LaGuardia Act (NLGA). Specifically, unions will have to rely on it as they and their allies rally and protest in support of collective bargaining rights at state capitals across the United States. Congress's motive for passing it was simple. As Michael Duff describes it, "[a]ggressively ousting federal courts from labor disputes altogether was the legislative motive behind passage of the [NLGA]."[184] Congress's passage of the NLGA was in response to the trend of courts in the early part of the 20th century entering injunctions to quell peaceful labor strikes and pickets. The NLGA states that:

> [n]o court of the United States, as defined in this chapter, shall have the jurisdiction to issue an restraining order to temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[185]

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[183] Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, 95 TLN. L. REV.1167, 1222-3 (2021).
[184] Michael C. Duff, *Labor Injunctions In Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, 678 (2009). Duff also argues that the NLGA protects unions from having their actions enjoined while their employer is in bankruptcy. One area worth further inquiry is whether the NLGA would protect a union that itself filed a bankruptcy petition under Chapter 11 when engaging in strikes or other concerted protected activities. My work in progress, *Bankrupting Collective Power*, will examine that issue.
[185] 29 U.S.C. § 101.

The NLGA bars federal courts from enjoining private sector employees from peacefully engaging in picketing, leafletting, and strikes in labor disputes.[186] The NLGA also outlaws "yellow dog" contracts, or agreements for employment in exchange for waiving any rights to collective bargaining. Its policy is to allow workers the full freedom to associate and self-organize to negotiate the terms and conditions of employment.[187] Most importantly, the NLGA bars courts from enjoining the refusal to work or peaceably assemble, or "[a]dvising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . ."[188] The NLGA leaves employers with the ability to seek damages for strikes but does not allow them to stop strikes from happening.[189]

Organized labor may want to use the NLGA to keep courts away from it given the makeup of the current Supreme Court and its antipathy toward organized labor issues. In a recent blog post about the NLGA by the Law and Political Economy Blog, David Boehm and Lynn Ta provide language that appears to support the thesis of this Article, but they appear to hold less hope in the NGLA's power. They are also concerned about what the Supreme Court may do in light of constitutional challenges to the NLRA. They caution that:

> We should not, however, overstate its power: Norris-LaGuardia is ultimately an indirect law that advances only negative rights, prohibiting judicial interference with a worker's "freedom of labor." As scholars have argued in the housing rights context, workers will have greater power when they operate against a background of robust, universal protections that lend more substance to "freedom of labor," protections that exceed the safeguards in the NLRA and that are tied to the fundamentality of this right. *For now, however, workers must wield the power they have*.[190]

The authors correctly point out that the NLGA will take on significant importance in a post-NLRA world, but they have doubts about whether worker power within the current context of the NLRA is a sufficient

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[186] 29 U.S.C. §§ 101–115.
[187] 29 U.S.C. § 102.
[188] 29 U.S.C. § 104(i).
[189] *See Glacier Northwest Inc. v. Teamsters*, 598 U.S. 771 (2023) (concluding that the right to strike does not insulate unions from actions for damages).
[190] David Boehm & Lynn Ta, *The Promise of America's Forgotten Labor Law*, LPE BLOG (Sept. 26, 2024) (emphasis added).

impetus to cause labor reform. That is a legitimate concern. The Fight for $15 and a Union campaign fought to expand union rights.[191] Despite the campaign's incredible success in changing the national conversation regarding the minimum wage, it did not lead to Congress or a state passing a new collective bargaining law.[192]

If history is any indicator, a new national labor insurgency will need to occur to provoke a congressional response or state action, especially if the Court issues a ruling gutting the NLRA. The first part of the road to insurgent success lies in the use of the NLGA to keep federal courts from enjoining labor related protests and activity. The power of the NLGA prevents federal courts from using the injunction to quell peaceful labor actions, nonviolent insurgency tactics, or semi-outlawry.[193] It also allows labor unions to use tactics such as recognitional picketing that the NLRA has circumscribed. Recognition picketing is when unions engage in picketing to coerce employers to recognize them as collective bargaining agents.[194] If the NLRA is set aside, then unions can engage in recognitional picketing free of federal court interference and receive the protection of the NLGA so long as the picketing remains peaceful.

C. The Remaining Challenge of Secondary Boycotts

Even though organized labor could use a potential Supreme Court decision gutting the NLRA to facilitate state-level experimentation bolstered by the NLGA, there is at least one aspect of the NLRA that may remain. Most significant is the prohibition of secondary boycotts.[195] As

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[191] YANNET LATHROP, MATTHEW D. WILSON & T. WILLIAM LESTER, NAT'L EMP. L. PROJECT, TEN-YEAR LEGACY OF THE FIGHT FOR $15 AND A UNION MOVEMENT: REDUCING THE RACIAL WEALTH GAP AND GENERATING TENS OF BILLIONS IN ADDITIONAL ECONOMIC ACTIVITY 6–7 (2022).

[192] Ashley Pratte, *Fight for $15, Success or Failure*, THE HILL (April 29. 2015), https://thehill.com/blogs/congress-blog/labor/240367-fight-for-15-campaign-success-or-failure/.

[193] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 51 (Harv. Univ. Press 1991).

[194] 29 U.S.C. § 158(b)(7).

[195] 29 U.S.C. § 158(b)(4). Even though the NLRA defines secondary boycotts, section 303 of the Taft-Hartley Act grants a private right of action to a victim of an illegal secondary boycott as defined under 29 U.S.C. § 158(b)(4). Because this grant of jurisdiction came into existence after the Wagner Act, this Article moves forward as if a Supreme Court decision striking the Wagner Act down leaves behind the prohibition on secondary boycotts. *See generally* Note, *Sections 8(b)(4) and 303: Independent Remedies Against Union Practices Under the Taft-Hartley Act*, 61 Yale L.J. 751 (1952).

defined in Wex, "[s]econdary boycotts refer to boycotting actions taken against an organization or company that does business with another organization with whom the primary dispute exists. Secondary boycotts mainly arise in labor disputes where a labor organization or other entity unsuccessfully boycotts an employer, and in order to increase pressure, the groups pressure suppliers or buyers to discontinue business with the employer."[196]

Historically, secondary boycotts were extremely effective tools for organized labor to obtain major concessions from employers at the bargaining table because the secondary would prevail over the primary entity with a labor dispute to settle the conflict.[197] As a result of their disruption on commerce, Congress enacted the ban as part of the Taft-Hartley amendments to the Act in 1947.[198] Not only did Congress prescribe conducting or participating in a secondary boycott, but also inciting it.[199] The Board is the only entity under the Wagner Act to bring forth complaints to prevent unfair labor practices and is deeply intertwined into the NLRA.[200] That changed in 1959 when Congress granted damages and injunctive relief to anyone injured by a secondary boycott with the ability to bring a direct claim in federal court.[201] Congress passed the Taft-Hartley amendments to the Act as a check on the power that unions had acquired, including through use of the secondary boycott. Upon Congressional passage of those amendments, labor scholars criticized the ban on secondary boycotts as being an improper infringement of speech and in violation of the First Amendment and continue to do so.[202]

That Congress wrested part of labor regulation from the Board and placed it with private parties and the federal courts in a reversal of policy

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[196] *Secondary Boycott*, WEX , https://www.law.cornell.edu/wex/secondary_boycott.
[197] PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 499 (Anchor 2011).
[198] 29 U.S.C. § 158 (b).
[199] 29 U.S.C. § 158 (b)(4)(i).
[200] Kati L. Griffith, Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake, 36 Berkeley J. Emp. & Lab. L. 331, 339 (2015).
[201] 29 U.S.C. § 187.
[202] Estlund, *supra* note 110, at 202 (2015) (Summarizing opposition to ban on secondary boycotts and noting that "For now it is enough to recognize that unions are subject to restrictions on expression that would be unconstitutional if applied to other voluntary associations").

has a major implication for this Article.[203] As much leeway as the NLGA gives unions to engage in peaceful actions free from the threat of injunction, the NLGA's provisions may not protect labor organizations seeking to escape financial liability for engaging in secondary activities even if the Court eliminated the Act.[204] States, for example, may pass their own prohibitions against secondary boycotts in the absence of a federal act prohibiting them, and several states in fact already have such prohibitions. The Court could conceivably hold that private actors could bring a secondary boycott action against a union. Even though the justification for the existence of the secondary boycott as a check on labor power post elimination of the NLRA is weak, a court or a state legislature could continue endorsing its viability as a legal claim. Unions could consider bringing a renewed first amendment challenges to overturn the prohibition on secondary boycotts. Nonetheless, until those legal challenges are resolved union will have to manage their activities and mitigate the risk of becoming bankrupt from an intentional tort that is potentially non-dischargeable in bankruptcy, such as secondary boycotts.[205] Some objectors to this proposal will argue that the secondary boycott prohibition presents a problem for organized labor in a post-NLRA world.[206] That is true, but it was also problem for the pre-NLRA world. The only way to fix that problem is through congressional action as the PRO Act bill does.[207] The benefits of the proposal set forth in this Article still outweigh the risks, and the next Part will explain why.

III. WORKER INSURGENCY AND ITS PAYOFF

While the tearing down of preemption would create a situation in which pre-existing state laws concerning collective bargaining would go into effect and allow states to innovate a situation in which the NLRA no longer exists,[208] it will also force organized labor to experiment by stretching its available tools to survive much like organized labor before

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[203] *See* Megan Stater Shaw, Comment, *"Connote no Evil": Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334, 336 (2021) (noting that secondary boycotts predate the NLRA).
[204] *Id*. at 338; *See also* Robert Koretz, *Federal Regulation of Secondary Strikes and Boycotts: A New Chapter*, 37 Cornell L. Rev. 235, 239–44 (1952).
[205] 11 U.S.C. § 523(a)(6).
[206] *See e.g.*, Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018) (putting forward an economic effects–based standard for secondary picketing).
[207] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).
[208] *See* Gali Racabi, *supra* note 115, at *4.

Congress passed the National Labor Relations Act. Anne Lofaso has noted that "[l]abor rights in countries with predominantly free market economies have generally passed though three stages—repression, tolerance, and recognition."[209] Lofaso correctly observe even though the NLRA technically allows for the recognition of labor unions, the U.S. is at least debatably in a pattern of union repression.[210] It took a 60 year social movement to lead the U.S. toward tolerance and recognition of labor rights, and it may take a similar cycle to reclaim labor law starting with the Supreme Court repressing the Act.

Literature chronicling the rise and fall of social movements suggests that even devastating court losses do not mean defeat of the movement. Rather, the literature suggests that organizers must engage in repeated attempts to achieve their goals.[211] Beckwith states that, for movements to recover from devastating defeats, "[f]raming actual defeat as a positive outcome involves recasting the aims of the defeated actors and valorizing their defense."[212] The existence of state laws that would go into effect once the Court strikes down the NLRA provides a plausible way to frame defeat into a positive outcome. However, in order to protect the legal protections that already exist in the 19 states that have mini-Wagner Acts and to build on them, they would have to mobilize and possible build a labor focused insurgency aimed at convincing state legislators to enshrine those protections. Otherwise, erosion will come for them. The next subsection will look at the role of strife toward building a movement and protecting worker rights at the statehouse.

A. Strife as a Precondition for Worker Insurgency

It is easy to construct a narrative of valor from the struggles workers face getting employers to bargain in good faith or losing in court. This Article's message is different. This Section recasts the aims of the defeated

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[209] Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition,* 62 MAINE. L. REV. 200 (2010).
[210] *Id.* at 201.
[211] *See e.g.*, Karen Beckwith, *Narratives of Defeat: Explaining the Effects of Loss in Social Movements*, 77 J. POL. 2 (2015) (arguing that how a social movement constructs its narrative of defeat has serious implications for whether it will succeed), https://doi.org/10.1086/678531; Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 983 (2011) (noting that loss can have a positive impact on mobilizing constituents, building resolve, fundraising, and other benefits typically associated with winning litigation).
[212] Beckwith, *supra* note 211, at 5.

actors and encourages them to use the tools they still have available for constructing either "countervailing power"[213] or, alternatively, a social movement to inform the reconstruction of labor unions and their relationship to capital.[214] Strife is an unfortunate, but key component of labor law and labor organizing, and courts have been quelling labor strife and its role for an expanded understanding of labor peace.[215] Duff aptly states that "[o]nly the passion engendered by [vigorous union] campaigns will produce a labor movement capable of developing and executing tumultuous economic weapons. . . . The potential for the creation of tumult is the *sine qua non* of a bona fide labor law."[216] LeClercq draws on movement theory to explain how strife starts in the workplace, and she joins Sachs and Rogers in noting that law changes the risk calculations for individual workers. The stronger the law is, the more likely workers are to act.[217] LeClercq further argues for using a doctrinal framework to accommodate strife within modern labor law, including in nonunionized settings.[218]

The negative of this insight regarding risk is true as well. If law is too weak, then workers are likely to rebel against it and mobilize once they realize they believe they have nothing to lose. Similarly, if labor organizations such as unions have nothing to lose, then they too have plenty of incentive to act. Additionally, mobilizing youth is key to successful nonviolent movements.[219] Polls concerning Gen Z demonstrate that they are

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[213] Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551 (2021). Andrias and Sachs define countervailing power as . . . an "approach [that] is concerned with the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth." *Id.*

[214] *See* Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 337–41 (2014).

[215] LeClercq, *supra* note 8, at 6–7. ("It argues that, by narrowing strife protections and broadening peace protections, the NLRB and federal judges radically undermine the potential solidarity and collective identity that worker protest could have generated in the nonunion workplace. Ironically their labor doctrine undercuts solidarity's more peaceful collective bargaining and dispute resolution system, leading to unpredictable strikes and workplace anger.").

[216] Michael C. Duff, *supra* note 17, at 526 (emphasis in original).

[217] LeClercq*, supra* note 8, at 9–10. (citing Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 357–58 (2012)); Sachs, *supra* note 16, at 364.

[218] LeClercq, *supra* note 8, at 49–56.

[219] Matthew D. Cebul, *Youth Activism, Balancing Risk and Reward*, U.S. INST. OF PEACE (Jan. 19, 2023), https://www.usip.org/publications/2023/01/youth-activism-balancing-risk-and-reward.

less attached to the workplace as a source of identity than other generations.[220] Moreover the Court striking down the NLRA may incentivize unions to change their tactics and their expenditure of organization resources because the NLRA will no longer inhibit actions such as peaceful recognitional picketing, and possibly secondary boycotts.[221]

Labor organizations may need to explore whether, in such a world, they are reformist institutions or, paradoxically, both reformist and disruptive institutions. Certainly, organized labor will need to experiment and decide whether to commit resources to state law organizing projects. They will also have to determine whether to adopt the arguments that this Article lays out or use legislation such as the one being considered in California to create a legal battle over preemption.

Labor history may provide some illumination on the way forward though. Samuel Gompers found that the simple unionism approach worked best during decades before the NLRA passed due to the aggressive use of injunctions and crippling financial judgements against labor.[222] Organizers may find that a different model of labor organizing works best for their location and the particular industry that they are willing to organize, and that they may have to develop a new playbook for handling repercussions like bankruptcies should employers sue them.[223]

Over the years, employers have found various ways to stifle worker rights under the NLRA, and labor law has become ossified due to removal from democratic renewal processes.[224] Labor history shows that destroying only the processes by which organizing energy is channeled appears the only way to stifle rights. If the "Red for Ed" teachers movement demonstrated anything, it is that workers will strike even if it is illegal.[225]

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[220] *See e.g.*, Melissa De Witte, *8 Ways that Gez Z Will Change the Workplace*, STANFORD REPORT (Feb. 14, 2024), https://news.stanford.edu/stories/2024/02/8-things-expect-gen-z-coworker.
[221] 29 U.S.C. § 158(b)(4) and (7).
[222] FORBATH, *supra* note 193, at 98.
[223] Bankruptcy law prevents courts from discharging intentional tort judgments. 11 U.S.C. § 523 (a)(6).
[224] *See generally* Estlund, *supra* note 174.
[225] Madeline Will, *Teacher Strikes, Explained: Recent Strikes, Where They're Illegal, and More*, EDUCATION WEEK (Oct. 30, 2023), https://www.edweek.org/teaching-learning/teacher-strikes-explained-recent-strikes-where-theyre-illegal-and-more/2023/10;

Organized labor cannot call for the end of labor law due to the fiduciary duties that unions owe to all of their members[226] and due to their own bureaucratic imperatives.[227] The hammer strike must come quickly from the outside to provoke a crisis and a proportionate response[228]—in this case, the Supreme Court's application of doctrines that are undoing the regulatory state may serve quite nicely.

The Supreme Court's potential dismantling of the NLRA may create a viable approach for labor law reform by creating the conditions for a social movement that fuels the creation of state- and local-level collective bargaining laws[229] or reinvigorates the use of long dormant state level labor organizing laws.[230] A partial dismantling that leaves the agency without a quorum, or otherwise inoperative, actually suppresses the ability for states

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see also Melissa Lyon, *The Power of Teacher Strikes*, POWER AT WORK (Oct. 6, 2024), https://poweratwork.us/the-power-of-teacher-strikes.

[226] *See e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (establishing duty of union to fairly represent all of their members under the NLRA). While unions will disclaim bargaining units from time to time, I have not located any cases in which a union disclaimed representation of a bargaining unit due to a politically based dispute between the union and its members. It would be strange though for a unit to actively disclaim all of its memberships and renounce the current collective bargaining regime writ large.

[227] PIVEN & CLOWARD, *supra* note 21, at xxii ("Thus the studies show that, all too often, when workers erupted in strikes, organizers collected dues cards . . . when people were burning and looting, organizers used that "moment of madness" to draft constitutions"); *see also* Oswalt, *supra* note 146, at 649–757 (outlining how improvisational unionism can breathe new life under a weight of bureaucratic entanglement and hostile law); Cynthia Estlund, *supra* note 110, at 199 (explaining that trade unions have special privileges in exchange for severe restrictions).

[228] PIVEN & CLOWARD, *supra* note 2, at xxi (noting that energies that arise from insurgency are short lived).

[229] Scholars have noted the relationship between changes in constitutional law and its relationship with the conflict of social movements. *See e.g.* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA,* 94 CAL. L. REV. 1323, 1327 (2006) (outlining how constitutional culture and social movement create the environment for setting forth proposals for change). *See also* Matthew B. Lawrence, *Addiction and Liberty,* 108 COR. L. REV. 259, 334 (2023) (observing that constitutional litigation can fuel popular constitutionalism, and vice-versa).

[230] *See e.g.* Julius G. Getman, 42 IND. L. J. 77, 83-9 (1966)(outlining Indiana's private sector labor law pre-passage of the NLRA). *See also* Minn. Statutes. Annotated §179.10 and S.D. Stat. §60-9-4 (providing remedies in courts of law and equity for failing to engage in collective bargaining*). See* National Center for Collective Bargaining in Higher Education and the Professions, *February 2025 Newsletter* (setting out statutes in several states and territories which "may no longer be preempted if the NLRA becomes unenforceable or if the NLRB declines jurisdiction over particular questions of representation").

to engage in creative law making. In a way, organizing from below using those state and local laws could serve as the basis for a new national labor law in much the same way that the Court's defeat of the NIRA galvanized organizing.[231] Labor scholar Catherine Fisk observed that "[b]y now it borders on cliché to note the similarities between 2020 and 1918, 1930, and 1968. Yet the comparisons are useful if they serve as a guide to legal reforms that will complete the unfinished business of the progressive movements of the past."[232] In this case, the 1930's especially serve as a useful guide for imagining a social movement.

For the purposes of this Article a social movement is:

> [A] deliberate collective endeavor to promote change in any direction and by any means, not excluding violence, illegality, revolution or withdrawal into "utopian" community . . . A social movement must evince a minimal degree of organization, though this may range from a loose, informal or partial level of organization to the highly institutionalized and bureaucratized movement and the corporate group . . . A social movement's commitment to change and the raison d'étre of its organization are founded upon the conscious volition, normative commitment to the movement's aims or beliefs, and active participation on the part of the followers or members.[233]

Activist William Moyers sets out the MAP model of social movement organizing. That model is useful for thinking about labor's trajectory and how to use a defeat in the Supreme Court to move its goals forward.

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[231] *But see* Leonard Bierman et al., *Achieving the Achievable: Realistic Labor Law Reform,* 88 MO. L. REV. 311, 317 (2023) (aiming for more modest reform given that the Supreme Court may also present roadblocks to more pro-union labor reform).

[232] Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 686 (2021). Scholars twenty years earlier had been making the same connection between labor rights and the civil rights movement; *See also* James Gray Pope*, Contract, Race, and Freedom of Labor in the Constitutional Law of 'Involuntary Servitude'*, 119 YALE L.J. 1474, 1493 (2010) (underscoring the intertwined nature of labor and race issues influencing the Civil Rights Movement's focus on economic justice); William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. BUS. L. 697, 717–18 (2000) (arguing that decoupling labor rights from civil rights in the 1930s had a major impact on both movements and negatively affected labor).

[233] Ariana Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 337 (quoting CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION 39–40 (Longman Higher Educ. 1978) (internal quotation omitted)).

According to Anna Rose, Moyers's model contains eight steps. Those eight steps include:

Stage One: Normal Times
Stage Two: Prove the Failure of Institutions
Stage Three: Ripening Conditions
Stage Four: Social Movement Take-Off
Stage Five: Identify Crisis of Powerlessness
Stage Six: Majority Public Support
Stage Seven: Success
Stage Eight: Continuing the Struggle.[234]

The conditions for Stage 2 have been met. Labor scholars have demonstrated that the NLRA no longer adequately protects workers' right to collectively bargain.[235] The question is whether labor and its allies will allow for conditions to remain in Stage 3 and allow conditions to further ripen, or view the Supreme Court's action as an opportunity to create a "trigger-moment" and ripen the conditions needed for a social movement, or rather work within the existing institutional framing.[236]

Even though labor law grew out of a social movement, its history and relationship with the legal order is messy and dialectical in nature.[237] In the United States, organized labor and management have traditionally been locked in a sort of Hegelian dialectic[238] in which the parties only come to truth through expressing economic and political power. At first, judges frequently enjoined the activities of labor organizations for being criminal

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[234] Anna Rose, *Bill Moyer's Movement Action Plan*, THE COMMONS SOCIAL CHANGE LIBRARY, https://commonslibrary.org/resource-bill-moyers-movement-action-plan/. *See generally* WILLIAM MOYERS *ET AL.*, DOING DEMOCRACY: THE MAP MODEL FOR ORGANIZING SOCIAL MOVEMENTS, NEW SOCIETY PUBLISHERS 2001.
[235] *See e.g.* Kate Andrias, *The New Labor Law,* 126 Yale L.J. 1, 13-45 (2016) (collecting scholarship critiquing the current limitations on the NLRA and how they frustrate the purposes of the original Act).
[236] Rose, *supra* note 234.
[237] LeClercq, *supra* note 8, at 53–56. Usually, insurgency is defined as violence against a government. In this Article, I do not mean that. Instead, I mean a much narrower definition of labor insurgency that is confined between labor and management over terms and conditions of employment.
[238] *Hegelian Dialectic*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/hegel-dialectics/ (last visited Oct. 13, 2024) ("'Dialectics' is a term used to describe a method of philosophical argument that involves some sort of contradictory process between opposing sides.").

conspiracies. When Congress passed the Sherman Act in 1890 to provide tools to break up mergers that restrained competition, employers used the new law to file lawsuits against labor unions who were colluding with workers seeking to restrain wages from competition. By and large, courts agreed with employers, as employers won twelve of the first thirteen successful lawsuits that came against labor unions under the Sherman Act. In 1914, Congress passed the Clayton Act, which declared that "[t]he labor of a human being is not a commodity or article of commerce."[239] It also prohibited courts from enjoining peaceful labor activity under the Sherman Act.[240]

Courts did not get the message. As the Supreme Court acknowledged, courts narrowly interpreted the Clayton Act to enjoin peaceful labor activity.[241] This dynamic, among others, caused the labor movement to experience what ex-Supreme Court Justice Felix Frankfurter called "government by injunction"—a period in which judges regularly enjoined peaceful labor action, and governors deployed national guards to enforce the injunctions.[242] As trade unionists were trying to reach respectability, the injunctions created the perception that they were outlaws instead of organizers.[243] The struggle between labor and management led to the proliferation of even more acts of "semi-outlawry".[244] These acts occur when workers engage in measures, in support of worker organizing, that are technically illegal but clearly nonviolent. These events led Congress to respond with the Norris LaGuardia Act (NLGA) in 1932, which stripped federal courts of the necessary jurisdiction to issue injunctions against peaceful labor activity.[245]

The next subsection will further illustrate the role that semi-outlawry and insurgency played in the NLRA's enactment.

B. Worker Insurgency's Legal Impact Through the 1930s

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[239] 15 U.S.C. §17.
[240] 29 U.S.C. §52.
[241] Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 712 (1982).
[242] FORBATH, *supra* note 193, at 51.
[243] *Id.* at 125–27.
[244] *Id.* at 98.
[245] 29 U.S.C. § 101.

Traditional accounts of why unions in the United States during the Gilded Age were not as militant as their European counterparts purport that U.S. unions were erroneously steeped in favor of individualism's appeal.[246] In reality, workers in the United States had developed a class-based and craft-based militancy. For example, Samuel Gompers and the Knights of Labor were interested in forming labor unions with a social justice orientation informed by socialist principles. Gompers's move to "simple unionism," or unionism that focused only on economic contractual conditions between an employer and a minimalist set of politics, resulted from running headlong into fierce employer opposition and seeking a way to ensure the labor movement's success. In that way, Gompers's move to simple unionism was pragmatic, but it was not the original intent for his organization.[247]

As much as Gompers and other trade unionists may have tried to flee from the appearance of "semi-outlawry" in fighting for the legitimacy of the labor movement, Congress decided to act when labor insurgency activity reached a nadir and caused an existential threat to recovery economic efforts. Labor's history in the years leading to the NLRA were filled with insurgent-like conditions and industrial violence in which company security guards and local law enforcement were beating organizing workers and sending them to prison.[248] The events that pre-dated and led to Congress's enactment of the NLRA were in response to worker insurgency.[249] As Goldfield states: "Labor influence was central to the structure of the political situation in 1934 and 1935, both because of the growing strength of its insurgent and disruptive activities and because of the growing strength of highly organized radicalism."[250] In response to these types of activities, Congress first passed the Norris La-Guardia Act (NLGA). That law barred federal courts from issuing injunctions against peaceful labor activity. Congress built on the NLGA when it enacted the National Industry Recovery Act (NIRA).[251] Section 7(a) of the NIRA

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[246] FORBATH, *supra* note 242, at 11.
[247] FORBATH, *supra* note 193, at 11, 49–57.
[248] *See e.g.*, KIM KELLY, FIGHT LIKE HELL: THE UNTOLD HISTORY OF AMERICAN LABOR 45–48 (2022) (discussing violent incidents that occurred on the picket line during a 1912 strike); PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 136–40, 169–75 (2010) (recounting violence that occurred during the Haymarket Riot and the Homestead Strike of 1892 (also known as the Battle of Homestead).
[249] Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Legislation*, 83 POL. SCI. REV. 1257 (1989).
[250] *Id.* at 1278.
[251] National Industrial Recovery Act of 1933, Pub. L. No. 73–67, 48 Stat. 195 (1933).

provided that, for business to participate, employers would have to grant "the right to organize and bargain collectively through representatives of their own choosing . . . ."[252] When that opened the floodgates of organizing, workers found themselves frustrated at the lack of enforceable mechanisms in the NIRA.[253] Additionally, the Supreme Court nullified Title I of the NIRA on May 27, 1935, leaving workers who wanted to join a union frustrated. Still, they continued to self-organizing into unions.[254]

As all of this organizing activity was going on, then-President Roosevelt was forming policies to bring the United States out of the throes of the Great Depression.[255] He was battling the effects of high inequality and its correlation for fostering authoritarian movements.[256] During that period, the United States was lurching dangerously close to authoritarianism. Authoritarian figures like Huey Long and his "share the wealth" campaign rose to prominence and challenged Franklin Roosevelt's grip on power from the political left.[257] Not to be outdone, business leaders on the political right schemed to install what the Washington Post characterized as a "dictator"—retired Major General Smedley Butler—as part of the "Wall St. Putsch."[258] These forces required Roosevelt to find a middle ground. Labor leaders like then-President of the United Mine Workers John Lewis presented that middle ground. Lewis testified at a Senate hearing in 1935 that "American labor . . . stand[s] between the rapacity of the robber barons of industry of America and the lustful rage of the communists, who would lay waste to our traditions and our constitutions with fire and sword."[259]

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[252] *Id.* § 7(a).
[253] BERNSTEIN, *supra* note 28, at 217 (noting that labor erupted in the summer of 1934 due to 1856 work stoppages affecting 1,477,000 workers).
[254] Schecter Poulty Corp. v. United States, 295 U.S. 495 (1935) (invalidating Title I of the National Industrial Recovery Act and with it the federal right to collective bargaining).
[255] *See* BERNSTEIN, *supra* note 28, at 172 (noting that Roosevelt believed that the National Industrial Recovery Act's grant of labor rights would quell labor unrest, but instead led to more unrest).
[256] *Id.*
[257] DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 237, 241–43 (1999).
[258] Gillian Brockell, *Wealthy Bankers and Businessmen Plotted to Overthrow FDR. A Retired General Foiled It*., WASH. POST (Jan. 13, 2021), https://www.washingtonpost.com/history/2021/01/13/fdr-roosevelt-coup-business-plot/; *see also* SALLY DENON, THE PLOTS AGAINST THE PRESIDENT: FDR, A NATION IN CRISIS, AND THE RISE OF THE AMERICAN RIGHT (Bloomsbury Press 2012).
[259] David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945*, at 299 (Oxford Univ. Press 1999) (alteration in original).

Neither side completely won, and instead labor and capital arrived at an accord. Congress passed the NLRA only a few months after the Supreme Court rejected the NIRA.[260] The NLRA carried over Section 7(a) of the NIRA, but the NLRA added sections that (1) created the National Labor Relations Board, and (2) imbued the Board with enforcement powers.[261] Roosevelt signing the NLRA constituted a major high point for organized labor. Immediately after signing the NLRA, labor organized millions of workers and eventually reached a union density of 40% or more in the transportation, building trades, mining, and clothing trades fields. The density of workers organized in those sectors was at or around 10% before passage.[262] But not everyone lived happily ever after. Even though the Supreme Court blessed the NLRA as a legitimate exercise of Congress's powers under the Commerce Clause, it took years of organizing for the NLRA to really become "the law." As Karl Klare observed, "The Act 'became law' only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers. This was one of the rare instances in which the common people, often heedless of the advice of their own leaders, seized control of their destinies and genuinely altered the course of American history."[263] Even with the NLRA in operation, "semi-outlawry" still exists, and the next Section will reflect on what "semi-outlawry" looks like in today's context.

C. Worker Insurgency's Role in Recent Pay Raises

Throughout the last ten years or so, workers have begun to demonstrate an aptitude for engaging in insurgency-like tactics that resemble the semi-outlawry that occurred in the 1930s. As Diana Reddy observes, strikes are really protests mediated by considerations of political economy.[264] Strikes, even when illegal, serve an expression of "the labor movement and the polity."[265] In other words, strikes as both political and economic actions can be successful even if they cut against the legal regime.[266]

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[260] *See* Reddy, *supra* note 16, at 1415–16.
[261] *Compare* National Industrial Recovery Act of 1933, Pub. L. No. 73–67, §7(a), 48 Stat. 195 (1933), *with* 29 U.S.C. §§ 157, 160–161.
[262] BERNSTEIN, *supra* note 28, at 769–70.
[263] Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 U. MINN. L. REV. 265, 266 (1978)
[264] Diana S. Reddy, '*There is No Such Thing as an Illegal Strike': Reconceptualizing the Strike in Law and Political Economy,* 103 YALE L.J.F. 421, 423–24 (2021) (footnote omitted).
[265] *Id.* at 443.
[266] *Id.* at 458.

The "Red for Ed" strikes that occurred in politically conservative states in 2018 are evidence that workers were willing to go on strike even when doing so was illegal under the states' bargaining laws.[267] In that way, the strikes were an insurgency tactic that demanded not only better working conditions for teachers, but more resources for ensuring classroom success in spite of a prohibition on striking.[268] Reddy also examines the strikes that occurred in the aftermath of the Black Lives Matter movement, in which NBA players went on a wildcat strike, as evidence that there are normative issues for which workers are willing to put themselves at risk.[269] The current uptick in organizing and increasing labor militancy reflects a potential turning point in labor management relations.[270]

There is reason to think that Gen Z could be the generation to see the fruits of a renewed labor movement. Michael Duff observes in his paper "Of Courage, Tumult, and the Smash Mouth Truth" that "no labor movement is possible until workers understand and accept the inevitability of labor-management conflict."[271] Certain demographic descriptions of Gen Z in the workplace indicate that the generation would engage in strike activity or workplace conflict even if the Supreme Court were to gut the NLRA.[272] For example, a recent *Forbes* article notes that Gen Z values businesses that balance corporate responsibility, social responsibility, and environmental stewardship.[273] Compared to many preceding generations, Gen Z has the most favorable view of unions, even though many of them

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[267] *Id.*; *See also* Andrias & Sachs, *supra* note 15, at 805-06 (2024) (noting that teachers engaged in similar strikes in the 70s and 80s).
[268] *See e.g.* LEO CASEY, THE TEACHER INSURGENCY: A STRATEGIC AND ORGANIZING PERSPECTIVE 6 (Harv. Educ. Press 2020).
[269] *Id.* at 455; A "wildcat strike" is one that takes place without union approval and typically violate the terms of a collective bargaining agreement. They are called wildcat strikes due to their unpredictable nature. *Wildcat Strike*, BRITANNICA, https://www.britannica.com/topic/wildcat-strike (last visited Oct. 13, 2024).
[270] Larry W. Isaac, *Turning Points in U.S. Labor History, Political Culture, and the Current Upsurge in Labor Militancy*, 50 WORK & OCCUPATIONS 359 (2023), https://doi.org/10.1177/07308884231162944.
[271] *See generally* Duff *supra* note 17.
[272] I define Gen Z for purposes of this Article as someone born between the mid-1990s and early 2000s. *Gen Z*, Britacnica, https://www.britannica.com/topic/Generation-Z (last visited Oct. 13, 2024).
[273] Hassan Choughari, *The Impact of Gen Z on the Workplace*, FORBES (Feb. 4, 2024), https://www.forbes.com/councils/forbeshumanresourcescouncil/2024/02/05/the-impact-of-gen-z-in-the-workplace/#:~:text=Gen-Z%20demonstrates%20a%20profound%20concern%20for%20environmental%20and.

have not been in a union.[274] Gen Z is especially eager to win unions at their workplaces. They have also shown an aptitude for engaging in activism in a very different way from previous generations.[275] Only time will tell how their aptitude for engaging in activism will respond to the Court's anticipated rolling back of labor rights.[276] But one thing is sure: The Court's interpretation of the NLRA's severability clause will affect the response of labor and its Gen Z allies in workplaces like Starbucks. Depending on how the Court rules, striking down the NLRA may create a disconnect between the legal legitimacy and the social legitimacy of such a decision in the low-wage workplace, similar to the *Lochner* era.[277] The disconnect between the two could fuel support for a new labor law.[278]

The real question for whether Gen Z can reach their activist potential rests on several factors. For example, will Gen Z organize and engage in disruption of the workplace in a way that causes governments to respond with legislation that provides workplace concessions?[279] In their essay "The Chicken-and Egg of Law and Organizing," Andrias and Sachs see law and organizing working synergistically to the democratic project.[280] They make the descriptive claim that there are three routes to solving the problem of whether law spurs organizing, or organizing spurs changes in law:[281] disruption, the use of state and local law, and judicial action.[282]

For disruption to have success, labor organizations and their allies must be willing to commit resources to organizing workers who have

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[274] Jane Thier, *Could Gen Z Bring Unions Back into the Mainstream*, FORBES (Dec. 14, 2021), https://www.forbes.com/councils/forbeshumanresourcescouncil/2024/02/05/the-impact-of-gen-z-in-the-workplace/#:~:text=Gen-Z%20demonstrates%20a%20profound%20concern%20for%20environmental%20and.

[275] *See e.g.* Li Cohen, *From TikTok to Black Lives Matter, How Gen Z Is Revolutionizing Activism*, CBS NEWS (Jul. 20, 2020), https://www.cbsnews.com/news/from-tiktok-to-black-lives-matter-how-gen-z-is-revolutionizing-activism/.

[276] *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure,* 39 SUFF. L. REV. 27, 29-30 (2005)(arguing that social movements shape the development constitutional law even though courts are designed not to be influenced by them).

[277] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1453-54 (2000).

[278] *Id.* at 1387, 1439, 1445.

[279] *See* PIVEN & CLOWARD, *supra* note 2 , at 5.

[280] *Id.*

[281] *See* Andrias & Sachs, *supra* note 15, at 845–46.

[282] *Id.* at 846.

grievances and are ready to take pro-active demonstrable action, and then shift those resources to other states as they gain power in one.[283] The reality is that organizing takes resources and plannings. For example, "Local 32BJ allocates between 20 and 30 percent of its budget to organizing. For the last five years, this is around $15 million a year."[284] If the Court strikes down the NLRA as described above, then it will force organized labor into a difficult choice between conserving its resources in a defensive struggle to hold onto what remains or spending massively on organizing workers in an uncertain environment using a stream of income that may run out as collective bargaining agreements expire.

There is another factor to consider as well: will GenZ translate online sentiment into organizing action? Lessons from China may be instructive. In a forthcoming work titled "Voice without Representation: Worker Voice in China's Networked Public Sphere", Duanyi Yang and Tingting Zhang describes a lesson that I learned in my own time as an in-house union lawyer who consoled on social media matters. They state:

> …our analyses also revealed the obvious shortcomings of worker voice on social media, especially in a setting without collective representation. Users of social media tend to react to significant events spontaneously, but the discussion around each event is short-lived. To sustain the online discussion and draw the attention of the state or firms, the communication needs to be strategically orchestrated by frequently injecting new events or talking points. To mobilize public opinion, the discussion needs to be supplemented with other voice options to achieve its mobilization goals. *In addition, although there was a collective desire to stop unnecessary exploitative overwork in the Chinese case, no clearly defined goals or offline actions were proposed in the discussion. Without the opportunity to develop collective voice in the workplace, tech workers had to rely on state intervention to end the 996 practices…* In other words, worker voice on social media may not have sufficient power to advance worker interests in an authoritarian setting without collective representation.[285]

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[283] *Id.* at 828, 831-832.
[284] Rob Hill and Stuart Eimer, *Winning Against the Odds: The 32BJ SEIU Organizing Model*, NEW LABOR FORUM (Apr. 18, 2022).
[285] Duanyi Yang and Tingting Zhang, *Voice without Representation: Worker Voice in China's Networked Public Sphere*, Cornell ILR Rev. (forthcoming) at *33 (emphasis added).

While Yang and Zhang make their observations about the impact on social media and workplace change in the Chinese workplace, they readily point to the U.S. as a place for further inquiry because Section 7 of the National Labor Relations Act does protect workers who take concerted action on social media.[286] They point out that digital activists take a different approach than unions as they try to connect communities from online activism to offline protests.[287] They recognize that "[a]lthough actions are grassroots-driven most of the time, experienced organizers play critical roles in establishing movement goals, facilitating online discussions, building a cohesive online community, and coordinating online-offline actions."[288]

Unions are the parties best able to provide paid organizing staff to do the work that Yang and Zhang describe---to give shape to a social movement that can adopt online activist techniques and translate them to protests, but they must be willing to do so. In the introduction, this Article suggested that UAW President Sean Fain's call for a general strike provides a goal for the labor movement with a definite date.[289] Fain's call provides a goal. Unions have infrastructure, but from time to time it needs new fuel to make it go. In fact, unions provided the infrastructure to the "Red for Ed" movement which spread beyond Republican controlled states into Democratic controlled states.[290] As Tarlau observes,

> "The 2018 #RedForEd movement swept across the country and mobilized teachers for collective action in places unions had failed, resulting in more workers on strike than the previous three decades. Often, these strikes were much larger than the unions themselves. And, in many ways, these were quintessential 21st-century movements, seemingly spontaneous, sparked by social media, and highly suspicious of traditional organizations and their leaders. Facebook was critical to their emergence. *Nonetheless, these networked teacher movements fed into the infrastructure of the unions, bringing union members and non-members together to discuss what was happening, make decisions on what to do, and put*

[286] *Id.* at * 35.
[287] *Id.*
[288] *Id.*
[289] *See* supra, Introduction, at 8.
[290] Rebecca Tarlau, *Networked Movements and Bureaucratic Unions: The Structure of the 2018 #RedForEd Teachers' Strikes*, 76 ILR Rev. 833, 834 (2023).

> *into motion statewide strikes. Without this infrastructure, coordinating prolonged, statewide strikes might not have been possible. Without the "piston-box" of the union, this "steam" might have dissipated.* As a new wave of labor activism currently spreads across the United States, the question of how this energy can help to reimagine and reinvent our labor unions will be critical.[291]

The proposal set out in this Article envisions a different approach. If the Court sets aside the NLRA, then unions will have to use their political strength in places like California to build a model regime, and to build their financial resources to expend resources organizing in states with a weaker union culture. After solidifying their power in states with a culture of unionism, they could use the constitutional protections in the Republican governed states to maintain a toehold and build an infrastructure that could activate the rights under state labor law that have lied long dormant under *Garmon* preemption.

The choice to affirmatively seek the end of a law that has been in place for over 100 years is difficult and controversial. Organized labor in America has endured two schisms around the issue of committing resources to organizing. The first occurred in 1935 when John Lewis founded the Congress of Industrial Organizations (CIO) in response to the American Federation of Labor's (AFL) refusal to commit resources to organizing unskilled workers.[292] The second came in 2005 when several unions believed that the AFL-CIO was not doing enough to organize new workers.[293] This Article urges labor to make a massive investment in organizing should the Supreme Court strike down the NLRA, and to argue that should the power of the President extend to firing Wilcox without cause to appoint someone loyal to them, then the whole Act must go down with it. Doing so would respect Congress's wishes with the President's authorities under the Constitution. Labor should then seek to support organizing either through already existing state organizing laws or seeking the enactment of local laws that would not have otherwise been possible due to the preemptive effect of the NLRA as set out by Racabi's paper "In Lieu of the NLRA.[294]

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[291] *Id.* at 857-8.
[292] PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 442-45 (Anchor 2011).
[293] Dave Jamieson, *SEIU Rejoins AFL-CIO After Splitting Off 20 Years Ago*, HuffPost (Jan. 8, 2025).
[294] *See generally* Racabi, *supra* note 115.

IV. LONG-TERM INSURGENCY BENEFITS VS. THE SHORT-TERM RISKS OF ELIMINATING THE NLRA

This Part argues that the long-term benefits of allowing the Court to destroy the NLRA outweigh the significant risks that the proposal carries from a tactical standpoint. This Part also responds to potential arguments that objectors may raise. The significant literature proposing changes to labor law generally assume that the current NLRA serves as unions' bargaining baseline. The proposal to expand collective bargaining rights in California does as well. In that way, the legislation that California considers appears to be what Oswalt would describe as legislative bargaining.[295] It is easier to think about improving law within existing frameworks than abandoning them. To that end, several articles have carefully examine how social movements lead to legal reform, including labor law reform.[296] In some ways, an objector to the proposal to abandon the Act could argue that it would be easier to seek stronger laws from an already existing institutional framework then to negotiate without it.

The problem is that these approaches mirror what labor unions see in bankruptcy. As Andrew Dawson has pointed out, management at bankrupt firms treat unions as agents from which to extract concessions.[297] That is because unions have something to lose in bankruptcy, and capital can use the potent weapon of setting aside collective bargaining agreements.[298] If unions have nothing from which to negotiate legislatively, unions and their allies have a great incentive to engage in insurgency and to do so creatively. As things currently stand, unions in the private sector have very little to bargain with. Despite excitement concerning recent organizing drives at Amazon, Trader Joes, and other companies, the reality is that those companies only have an obligation to bargain in good faith, not reach an agreement.[299] Additionally, organized labor represents only six percent of

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[295] *See e.g.*, Michael M. Oswalt, Comment, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 Duke L.J. 691, 695 (2007).
[296] *See e.g.*, Kate Andrias, & Benjamin I. Sachs, *Constructing Countervailing Power,* 130 Yale L.J. 546 (2021)(examining the use of law to build power for the poor).
[297] Andrew B. Dawson, *Labor Activism in Bankruptcy*, 89 Am. Bankr. L.J. 97, 98–9 (2015).
[298] 11 U.S.C. § 1113. Additionally, Dawson concluded that labor unions had lost every time they contested a motion brought by a corporation pursuant to 11 U.S.C. § 1113. *See generally* Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 Am. Bankr. L.J. 103, 117 (2010).
[299] 29 U.S.C. §158(d). *See also* H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970).

the private sector workforce and ten percent of the workforce overall.[300] Finally, organized labor's excitement concerning some of the decisions coming out of the NLRB such as the General Counsels more aggressively seeking to enjoin unfair labor practices under Section 10(j) of the Act, or the Board's decision in Cemex, may wain given the less than enthusiastic response that the current General Counsel has for enforcing them.[301]

The following Sections will explore potential objections. This Part echoes Catherine Fisk's call to be clear-eyed about the role of law in leaving the work of prior progressive movements—such as the labor and civil rights movements—undone.[302] The caution this Part takes goes somewhat in the opposite direction of those movements. This Part cannot overstate the role of a social movement or insurgency in changing law. Even though there are dozens of potential objections to this proposal, this Article will focus on three types of objections. First, that the Court's potential action will fail to spark insurgency or backlash. Second, even if the Court sparks a movement, that Congress will fail to act on it. Third and finally, even if the Court's actions spark a movement, and Congress perhaps acts on it, that change will come too late because unions would have died via a thousand cuts in the interim.

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[300] In fact, the low density of private sector unions caused the Clean Slate for Worker Power Project at Harvard Law School to conclude that any new AI policy should provide for AI monitors instead of place such powers within labor unions. *See* HARVARD CENTER FOR LABOR AND A JUST ECONOMY, WORKER POWER AND VOICE IN THE AI RESPONSE 8 (2024), https://clje.law.harvard.edu/app/uploads/2024/01/Worker-Power-and-the-Voice-in-the-AI-Response-Report.pdf.

[301] *Compare* NLRB OFF. OF GEN. COUNS., MEMORANDUM GC 21-05 (2021), https://www.jacksonlewis.com/sites/default/files/docs/NLRB-GCMemo21-05UtilizationSection10_j_Proceedings.pdf *with* NLRB Off. Of Gen. Couns. Memorandum GC 25-05 (2025) (rescinding enforcement of *Cemex* decision), https://www.nlrb.gov/news-outreach/news-story/gc-25-05-rescission-of-certain-general-counsel-memoranda.

[302] Fisk, *supra* note 28, at 688. I also take concerns about seeking only what is achievable seriously. *See e.g.*, Bierman et al., *supra* note 231, at 316. (proposing modest reforms that are possible, including further use of mail balloting, sponsoring debates, and increased use of labor neutrality agreements).

A. Failure to Spark a Counter-Insurgency

The first and most serious objection is that the Court's proposed hamstringing of the Board will fail to spark an effective labor counter-insurgency, especially in the short-term. Brishen Rogers notes that organizing is less about aggregating preferences and is instead a disruptive and emotionally charged collective action.[303] Several objectors might argue that looking to the 1930s as a model for how labor unrest could lead to labor law reform is misguided and dangerous because the historical and political factors for disruption to succeed are uncommon.[304] Even though inequality in the United States mirrors the 1930s, an objector might argue that the economic situation during the Great Depression was so dire that even business interests understood that they had to acquiesce to collective bargaining for the United States to avoid falling into communism.[305] To use Rogers's language, people today will not be angry enough to actually go out and organize.[306]

This argument has significant weight. The Depression elevated language about class consciousness into everyday vernacular. Bernstein describes how 1,856 work stoppages took place in 1934 as an "eruption."[307] In comparison, the Department of Labor tracked 33 strikes and stoppages in 2023,[308] which was a twenty-three-year high.[309] Even though Gen Z may have a less deferential attitude to the workplace than previous generations and be more open to activism, critics may argue they are not in position to capitalize on an organizing moment. Additionally, the situation in the United States is not so dire as to make a labor-based insurgency seem like an effective route to seek reform because Americans are materially better off today than in the 1930's. Finally, strike actions may be less effective because the "fissured workplace" makes building solidarity extremely difficult because the interest of workers who are employed by the main

[303] Rogers, *supra* note 24.
[304] Andrias & Sachs, *supra* note 15, at 789.
[305] *See supra* Section I.A.
[306] *See* Rogers, *supra* note 24, at 357–58.
[307] *See* BERNSTEIN, *supra* note 288, at 217.
[308] Grace Yarrow, *Strikes Hit 23-Year High Last Year, Labor Dept. Says*, POLITICO (Feb. 21, 2024), https://www.politico.com/news/2024/02/21/labor-statistics-agency-tracks-high-number-of-strikes-and-lockouts-in-2023-00142394.
[309] *Id.*

company are not always aligned with those who have a more distant relationship with the main employment brand.[310]

The above objection seems to posit a question of timing. What serves as a trigger point to spark a movement and a moment can be unpredictable.[311] Even if the Court's decision on the Board's constitutional viability does not spark a movement in the short term, it could add fuel to the fire for major labor reform in the United States in the medium to long term. It is true that the central proposal in this Article places faith in Gen Z to act, and implicitly on millennials and Gen Xers to support Gen Z.[312] However, recent events have demonstrated that workers are willing to engage in insurgency even when the law constrains them or threatens them with sanctions. For example, as noted above, the Red for Ed campaign demonstrated a situation in which professional workers struck and engaged in an insurgency without union sanction. In that case, teachers in several conservative states were threatened with losing their jobs for walking out, and yet they did so despite not making hunger-inducing wages.[313] In other words, the financial situation was already bad enough for white-collar workers that they are willing to risk their jobs for a potential raise. That campaign led to legislative settlements in the form of legislatively mandated pay raises, and it demonstrated that teachers were willing to defy statutorily imposed legal constraints with the help of union infrastructure.[314]

In a similar way, members of Gen Z (on both political sides) have shown a penchant for engaging in protests and seeking to use collective

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[310] DAVID WEIL, THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 1-5, (2014). Fissuring occurs when a company slits off functions that were once managed internally and subcontracts them out. This has the result of shedding the responsibilities of the employment relationship on another party. *See also* Carla Lima Aranzaes, Christian Lyhne Ibsen, Phillip S. DeOrtentiis, & Maite Tapia, *Solidarity with atypical workers? Survey evidence from the General Motors versus United Auto Workers strike in 2019*. 62 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 72, 75 (2024), https://doi.org/10.1111/bjir.1276.

[311] *See* Alvin Velazquez, *Lucha Si, Entrega No: How an "Awkward Power Sharing Arrangement" Enabled Retirees to Upend a Plan of Adjustment*, 97 A.B.L.J. 836, 885 (2023) (describing how a scandal involving the Governor of Puerto Rico led to protests that helped retirees protect their pension benefits from being impaired).

[312] *See supra* Section I.B.

[313] Jonaki Mehta, *What Has and Hasn't Changed for Teachers in the 5 Years Since 'Red for Ed' Walkouts*, NPR (May 22, 2023), https://www.npr.org/2023/05/22/1177576762/what-has-and-hasnt-changed-for-teachers-in-the-5-years-since-red-for-ed-walkouts.

[314] *See* Tarlau,*supra* note 290, at 834.

action to make wage demands at companies like Trader Joe's, Chipotle, and Amazon. They have engaged in what Michael Oswalt has called "improvisational unionization."[315] He observes that the messy tactics undergirding improvisational unionization can be useful for forwarding labor law reform.[316] His observations, although made in the context of union sponsored campaigns, match occurrences in the unorganized or newly organizing workplace. Campaigns such as Amazon's received little support from nationally established unions. In fact, it was only after four years of campaigning for a first contract that the self-organized Amazon Labor Union (ALU) finally affiliated with the Teamsters. Unions such as the ALU have been organizing at these companies despite incredible difficulties with obtaining first contracts that exist under the current legal regime. These organizing campaigns occurred on their own under "hot shop" conditions with little investment (at first) from organized labor, demonstrates that these workers have considered the risks and still decided to move forward with taking workplace action without institutional support.

Such bold action gives hope that, even if the Supreme Court takes away the Board, labor will channel movement energy because inequality is growing amongst all races. In turn, that means that at some point, growing inequality may cause further labor insurgency because the Court's decision would weaken one of the proven bulwarks of the fight against inequality—labor unions. As Reverend Barber points out, discussion of who is poor used to focus on African American and Latino communities. He concentrates on how working-class white communities also suffer under the yolk of poverty. College educated workers, however, are also finding that higher education is no longer an automatic ticket to middle class comfort.[317] One only need to think about how the deployment of generative artificial intelligence tools has already transformed and will continue to transform the white-collar workplace.[318] The threat of AI turned unions that the public perceived as business unions into organizing forces who were willing to

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[315] *See* Oswalt, *supra* note 146, at 643–44 (noting the powerful emotional effects that organizing, even if at the law's margins, has on low-wage workers).
[316] *Id.* at 649.
[317] *See* REV. DR. WILLIAM J. BARBER II WITH JONATHAN WILSON-HARTGROVE, WHITE POVERTY: HOW EXPOSING MYTHS ABOUT RACE AND CLASS CAN RECONSTRUCT AMERICAN DEMOCRACY, 140–41.
[318] Greg Iacurci, *A.I. is on a Collision Course with White-Collar, High-Paid Jobs — and with Unknown Impact*, CNBC NEWS (Jul. 30, 2023), https://www.cnbc.com/2023/07/31/ai-could-affect-many-white-collar-high-paid-jobs.html.

engage in disruptive tactics for 148 days![319] Additionally, one might consider how adjunct professors understand that reality.[320] Overall, the widespread growth of poverty creates the potential for new coalitions that can break through some of the culture war fog that is currently dividing the working class.

B. Congress's Failure to Act in Response to Counter-Insurgency

The second major objection that someone may raise is that Congress may refuse to act even in the face of nationwide insurgency. Congress's inability to timely fund the government in recent years demonstrates that its ability to function orderly is in question.[321] However, convincing Congress to pass labor law reform has been especially difficult even with a strong, and near filibuster-proof, Democratic majority. To paraphrase the bankd Green Day, labor has long traveled on its own Boulevard of Broken Dreams.[322] One stop on that boulevard is the Employee Free Choice Act (EFCA)[323] which Congress failed to pass in 2008 when President Obama took office with a near filibuster-proof Democratic majority in the Senate and a strong majority in the House of Representatives.[324] Instead, several Democrats refused to support key parts of the bill.[325] The Obama administration moved up the Affordable Care Act in the legislative queue and passed that Act instead. EFCA languished, and organized labor

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[319] Ryan Smith, *Biggest Winners and Losers as Writers' Strike Ends*, NEWSWEEK (Sep. 27, 2023).
[320] Jamie K. McCcalum, *Higher Ed Labor Organizing Is Just Getting Started*, THE NATION (Jan. 6, 2023).
[321] Melissa Quinn, *A History of Government Shutdowns: The 14 Times Funding Has Lapsed Since 1980*, CBS NEWS (Sept. 27, 2023), https://www.cbsnews.com/news/government-shutdown-history-congress/.
[322] GREEN DAY, *Boulevard of Broken Dreams*, *on* AMERICAN IDIOT (Rob Cavallo & Green Day 2004). Green Day frontman wrote the song about his time working alone in a loft in New York City and was reflecting on the death of James Dean. *See* Thom Donovan, *The Meaning Behind "Boulevard of Broken Dreams" by Green Day and Walking Alone with James Dean,* AMERICAN SONGWRITER (Aug. 25, 2024).
[323] Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). EFCA would have reformed the Act by (1) eliminating the need for an additional ballot to require an employer recognize a union if a majority of workers have already signed cards expressing their wish to have a union, (2) requiring that an employer begin negotiating with a union and reach a collective agreement within 90 days or otherwise submit the agreement to mediation and arbitration if talks fail, and (3) imposing civil fines for committing an unfair labor practice.
[324] Jennifer Granholm, *Debunking the Myth: Obama's Two-Year Supermajority*, HUFFPOST (Oct. 1, 2012).
[325] Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, (Jul. 16, 2009).

operatives felt like the administration had forgotten them.[326] That was not the only time Democrats failed to achieve labor reform. Former President Jimmy Carter failed to support organized labor when a filibuster threatened a similarly structured labor reform.[327] In more recent times, labor advocates have called for passage of the Protect the Right to Organize (PRO) Act and that too has seen no congressional movement.[328]

The potential objector who raises this concern could go further. They could raise the argument that an insurgency-based approach may fail to move Congress into action on labor issues. Specifically they could emphasize that lawmakers regularly pass laws that improve the lives of workers but do not build up organized labor's institutional interests.[329] Indeed, the objectors might even point to the "Fight for $15 and a Union" campaign as an example.[330] During that campaign, commentators pointed out that workers mobilized successfully for $15, but the "and a Union" part of the campaign failed because union density remained on current trends.[331] States passed a rash of wage increases. At the beginning of the campaign, seeking a $15 minimum wage seemed absurd to many. However, the $15 minimum wage is now part of the national conversation around the minimum wage, and several states including California, Connecticut, and Washington have passed minimum wages at or in excess of $15 dollars an

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[326] For more on the complicated relationship between ex-President Obama and labor arising out of the passage of the Affordable Care Act, see Mike Elk, *Abandoning EFCA Is Obama's Political Suicide: Lessons From Three Presidents on Workers' Rights*, TRUTHOUT (Jan 6, 2010); Joseph P. Williams, *Obama and Labor Relationship: It's Complicated:* U.S. NEWS (Mar. 31, 2015).

[327] *See* Elk, *supra* note 326.

[328] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021-2022). The bill contained a number of reforms that went over and above even EFCA. *See generally Summary of H.R. 842*, CONGRESS.GOV (2021).

[329] *See e.g.*, SANFORD M. JACOBY, LABOR IN THE AGE OF FINANCE: PENSIONS, POLITICS, AND CORPORATIONS FROM DEINDUSTRIALIZATION TO DODD-FRANK (Princeton Univ. Press 2021) (arguing that labor's foray into finance failed because it led to financial reform but not to specific collective bargaining agreements). *But see* Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193, 252 (2013) (arguing that unions bring social impact litigation that also supports collective bargaining positions).

[330] I worked as counsel to the Service Employees International Union (SEIU) during the Fight for $15 campaign.

[331] *See e.g.*, Liza Featherstone, *After Almost a Decade, Fight for $15 Has Made Progress — But It's Not Enough*, JACOBIN (May 20, 2021); Alina Selyukh, *'Gives Me Hope': How Low-Paid Workers Rose Up Against Stagnant Wages*, NPR (Feb. 26, 2020). *But see* Steve Ashby, *In Defense of the Stunning Fight for $15 movement* ,WORK IN PROGRESS (Jun. 6, 2018).

hour.[332] Washington, D.C., Chicago, New York, and Portland are some of the cities that have increased their minimum wage to $15 as well.[333] Finally, an objector might point out that workers are willing to mobilize for a minimum wage, but not for a union when they have a pay raise in hand. If a state can give the relief that workers are seeking, then (1) where would the energy for a major social movement come from, and (2) why would Congress bother acting on a hot-topic issue that lines up along partisan divides when a state could dissipate it?

The answer to this objection lies in how inequality can spur action. While minimum wage increases certainly alleviate the poverty of low-wage workers, increases do not provide a long-term solution to the rampant inequality and related social unrest existing in the United States. As Charlotte Garden points out regarding union representation and its salutary effect on protecting democracy, "[f]irst, union representation helps reduce economic inequality, which is important because economic inequality undermines democracy. Second, unions increase workers' abilities to have their voices heard and preferred policies enacted." In contrast, episodic responses to episodic organizing around the minimum wage do not meet these objectives.[334]

Unions can overcome objectors who raise this objection in another way—by focusing on how they give voice to voiceless workers. Part of President Trump's support is from formerly union, formerly middle-class workers who have lost their status. These supporters have especially raised their discontent and, as Theda Skocpol shows, joined gun clubs and other clubs when they lost their union and their jobs. These are people who remember the benefit that came with a union job.[335] However, low-wage workers look at the few people with unionized jobs with a sense of jealousy.

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[332] DEP'T OF LAB. WAGE & HOUR DIV., *Minimum Wage by State,* https://www.dol.gov/agencies/whd/minimum-wage/state#:~:text=Find%20out%20the%20minimum%20wage%20rates%20and%20overtime%20rules%20for (last visited Sept. 29, 2024).

[333] *Id*.

[334] Charlotte Garden, *Unions and the Democratic First Amendment*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 145, 146 (Angela B. Cornell & Mark Barenberg ed., Cambridge Univ. Press 2022).

[335] *See* LAINEY NEWMAN & THEDA SKOCPOL, RUST UNION BLUES: WHY WORKING-CLASS VOTERS ARE TURNING AWAY FROM THE DEMOCRATIC PARTY 1–21 (Colum. Univ. Press 2023) (using Western Pennsylvania as a case study to demonstrate how the loss of union as a source of community gave space for more politically conservative, and non-union, affinity groups to fill a vacuum and move voters toward the Republican Party).

That trend will continue. A report by *The Pew Charitable Trusts* demonstrates that middle-class income increases have lagged those at the very top.[336] These facts track also with the United States' growing Gini coefficient, which is an important index that tracks inequality. The collective memory of the United States is such that people know that unions were synonymous with the middle class, and recent populist candidates failed to deliver policies that would protect them.[337] Workers currently want to join a union; they just do not know how to do that or fully understand all of the tools that employers have on hand to suppress unionization.[338]

But there is an additional point to make here. If this Article is correct that the Supreme Court should destroy the entire NLRA if it decided that the President can fire Wilcox without cause, then it does not matter that Congress could act because the Court's actions would open a road of possibilities at the state level to channel the energy of a social movement. In an NLRB-less world, the states provide protection through existing state law and would be able to legislate without fear of NLRB preemption.[339] States could, for example, pass their own workplace organizing laws in response to local mobilizations.[340] Additionally, due to the NLGA's protections, workers could engage in recognitional picketing at their employers without restraint as long as the pickets are peaceful, though they would have to continue working around any potential secondary boycott risks.[341]

There is an important counterpoint to consider when thinking about the possibilities of states regulating the workforce in favor of labor organizing—the reality that Republican controlled states may use the freedom from preemption to enact laws that make it all but impossible for

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[336] Katherine Schaeffer*, 6 Facts About Economic Inequality in the U.S.*, PEW RESEARCH CENTER (Feb. 7, 2020).
[337] *See* Matthew T. Bodie, Rena Khalil, & Mauro Pucheta, *Right-Wing Populism and the Deconstruction of Labour Laws in the Americas: Old Wine into New Wineskins*, 39 International Journal of Comparative Labour Law and Industrial Relations 19, 26 (2023) (arguing that despite populist rhetoric seemingly in support of labor's interest, the policies of populist movement candidates in the United States, Argentina, and Brazil dramatically undermined worker rights).
[338] *See supra* Introduction.
[339] *See also* Racabi, *supra* note 115, at *4 (arguing that labor can build off of existing laws concerning preemption). *Cf.* Sachs, *supra* note 15, at 1209 ("It is quite possible, however, that even absent preemption, labor could enact its desired reforms only with the cooperation of employers or other interest groups.").
[340] *See* Andrias & Sachs, *supra* note 15, at 845–46.
[341] *See supra* Section III.A.

workers to organize. There is a short- and long-term perspective to this. In the short term, there is a very real possibility that Republican controlled legislatures would introduce and pass legislation repealing their statutory based labor law regimes and do so fairly easily. In states such as Missouri that have constitutional provisions, there would have to be voter mobilization to repeal those protections, but voters would receive those protections in the meanwhile.[342] However, the reality is that workers in Republican led states in the private sector with no constitutional or statutory protections such as South Carolina, where union density is 1.5%, could lose their ability to collectively bargain in the short term.[343] The reality though is that collective bargaining and union power is disappearing throughout the United States via death through a thousand cuts under the current regime. This article attempts to present a mechanism for accelerating death to facilitate resurrection. The ability to resuscitate labor in blue states provides the ability for it to begin building the resources needed to initiate organizing in red-states with an organizing budget for doing so.

C. Organized Labor's Death While Waiting for Government Action

An objector may argue that the Supreme Court setting aside the NLRA raises serious questions about how long labor can survive without regulatory clarity and the financing that comes from a stable stream of dues dollars. Specifically, they could point to the fact that union density rose after enactment of the NLRA. This shows that the key to union density was having public institutions shaping the relationship between capital and labor. There are two responses to this line of objection.

First, the Court's action could have the effect of incentivizing organized labor to work quickly toward a major march like the proposed May Day 2028 strike. The real question is not whether Congress would act, but rather whether organized labor would adapt its tools to a new reality and use organizing to build worker power. In his forthcoming paper, Michael Oswalt discusses how smaller unions without resources make use of *bricolage* principles to form resilient unions.[344] He defines bricolage as

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[342] *Id.* (distinguishing between states that constitutionally protect collective bargaining versus those that statutorily do so).
[343] Brandon Wilkerson, *Private Sector Unionization Rates in Selected States, 2025 Update*, S.C. DEPT. OF EMPLOYMENT AND WORKFORCE (Apr. 29, 2025).
[344] *See* Michael W. Oswalt, *Disorganized Labor (Law)*, presented at the Colloquium on Scholarship in Employment and Labor Law (2024) (on file with the author).

"making due with whatever is at hand."[345] In many ways, this method is how the unions that existed before the New Deal behaved. Unions existed before the Act gave them legal sanction and continued to exist. In other words, history has shown that organized labor can survive and make gains for workers even when there are no regulatory structures governing labor relations. However, even if the NLRA is done away with, workers would not be starting from scratch. In some states, they would be able to rely on the legal protections that are already on the books waiting to be activated. As Racabi rightfully points out, "…the legal infrastructure for collective action already exists in many places. We don't have to invent it from scratch; we have to develop strategies to utilize it and strengthen its capacities with personnel and budgets."[346]

Another point to highlight is that only 10 percent of the workforce is in a union despite the existence of the NLRA.[347] However, one-third of that percentage is in the public sector and therefore not covered by the NLRA, but rather by local, state, and federal labor organizing schemes.[348] That means doing away with the NLRA would have no effect on those units who are organized under state public sector law.[349] Additionally, even though there appears to be a boom in union interest, the numbers tell a story of a movement still experiencing decline.[350] Additionally, unlike the unions of pre-NLRA times, the unions of today have several tools that they can use to keep functioning. First, organized unions in the private sector who are

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[345] *Id.* at 4.
[346] Gali Racabi, *In Lieu of the NLRA: How State Laws Can Rebuild Worker Power*, POWER AT WORK, (May 11, 2025).
[347] *See* Bureau of Lab. Stat., *supra* note 2.
[348] CONGRESSIONAL RESEARCH SERVICES, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 2 (2023), https://crsreports.congress.gov/product/pdf/R/R47596; *see also, e.g.*, 5 U.S.C. §§ 7111–7120 (setting out the rights of certain federal government employees to organize into unions); CAL. LAB. CODE § 3512 *et seq.* (1977) (establishing collective bargaining rights for State of California employees); Conn. Gen Stat. §§ 7-467 to -476 (granting Connecticut's municipal employees collective bargaining rights); *News Release: Union Members—2024*, BUR. OF LAB. STAT. (Jan. 28, 2025, 10:00 AM), https://www.bls.gov/news.release/union2.htm.
[349] 29 U.S.C. §152(2)-(excluding employees of states of their political subdivisions from the reach of the NLRA).
[350] Greg Rosalsky, *You May Have Heard of the 'Union Boom.' The Numbers Tell a Different Story*, NPR (Feb. 28, 2023), https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story#:~:text=The%20National%20Labor%20Relations%20Board%20saw%202,510%20union.

covered by unexpired CBAs would not lose the protection of those agreements because they are private agreements. Since most agreements average between three and five years in duration, that alone would provide some time for organized labor to develop new tactics in the midst of a vacuum.[351]

Next, as discussed above, the unions of today have the benefit of the Norris-LaGuardia Act (NLGA) anti-injunction rule.[352] The unions of yesteryear did not get to maximize the benefits of that law before Congress enacted the NIRA and NLRA. The NLGA's protection of certain types of peaceful strikes and activities from court action provides unions with an opportunity to engage in insurgency at the state level. Of course, judges that are hostile to the interests of organized labor or workers seeking to organize generally may develop doctrines to work around or undermine the protective effect of NLGA. They could, for example, expand the reach of the Court's ruling in *Glacier Northwest v. Teamsters* to disincentivize strikes by imposing damages for actions that the NLGA prohibits from enjoining.[353] In that case, the Court held NLRA preemption did not protect the Teamsters from liability for causing damage to cement trucks because of strikers walking off the job in the middle of deliveries.[354] A Court looking to harm labor could return to the tortification of labor law in favor of employers and bankrupting unions.[355]

Finally, as discussed above, states are likely to move in quickly and fill the breach. For example, even though the United States does not have a comprehensive data protection law or artificial intelligence law, federal agencies and the State of California could move to fill the gap if unencumbered by the NLRA's preemption law.[356] This ability alone would

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[351] Lance Compa, *An Overview of Collective Bargaining in the United States,* CORNELL E-COMMONS, at 95 https://ecommons.cornell.edu/server/api/core/bitstreams/4cea305f-41bd-40b3-b597-4885de192dd6/content#:~:text=The%20law%20does%20not%20specify%20any%20length%20of%20time%20for.

[352] See *supra* Section III.A.

[353] 598 U.S. 771 (2023).

[354] *Id.* at 783-4.

[355] Bankruptcy law does not allow for the discharge of intentional torts. If courts found that unions were engaging in intentional torts, they would have to pay those back or go out of existence. 11 U.S.C. §523(a)(6).

[356] *See e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that federal labor law preempted state regulation of core concerns regulated the Act); *see also*

allow organized labor to seek labor law reform at the state level equivalent to, if not better than, parallel federal law reforms in a time period before labor peace provisions would cease to be effective.

CONCLUSION

At the opening of their work on labor as a social movement, Fisk and Reddy quote rapper LL Cool J's famous lyric "Mama Said Knock You Out":

> Don't call it a comeback
> I've been here for years! [357]

They correctly describe that "[t]he labor movement is a social movement, with a long history of shaping law and being shaped by it in turn".[358] Apropos of the song, the accompanying video focused on boxing.[359] In this case, I am calling for the engagement of some unusual legal boxing. In my opinion, one route toward reviving labor laws could run through abandoning labor law quickly via the current Supreme Court. This Article outlines how the Court would treat questions under the Major Questions Doctrine and the Unitary Executive Theory. After the Court rules that the President has the ability to run the NLRB as an extension of the executive, the Article focuses closely on the application of the severability clause in fashioning relief. That clause holds a key to determining which avenues for labor organizing are available to organized labor and its allies. This Article finds that the MQD simply gives the Court another tool for doing what it already has been doing for almost 100 years- reviewing the actions of the Board to ensure that it does not exceed its authority. The Major Questions Doctrine is unlikely to have much effect on the operations of the NLRB because it announces policy through iterative construction—stated otherwise—it makes policy decisions via case adjudication instead of through rulemaking. The real power lies in the Unitary Executive Theory.

Int'l Ass'n of Machinists & Aero. Workers v. Wis. Emp. Rel. Comm'n, 427 U.S. 132 (1976) (preempting all laws that would regulate what Congress left to the free play of economic forces).

[357] Catherine L. Fisk & Diana S. Reddy*, supra,* note 15, at 65 *quoting L.L. Cool J, Mama Said Knock You Out, on* MAMA SAID KNOCK YOU OUT (Def Jams Recordings 1990).

[358] *Id.* at 66.

[359] *See generally* LL COOL J - *Mama Said Knock You Out (Official Music Video)* at https://www.youtube.com/watch?v=vimZj8HW0Kg&t=2s.

This Article takes the position that if the Court upholds that the President can remove the Board members at will, then it should also rule that the entire Act is unconstitutional since Board independence is a key part of the statute. Upon making that prediction, this Article then reflects on how labor insurgency held the key to the original enactment of the National Labor Relations Act, and it emphasizes that insurgency will guide the resurrection of the labor movement. Gen Z's distrust of the current workplace may lead them to take direct action in a situation in which the Court leaves the Board inoperant. No matter what happens, once the Court acts, labor will need to prepare for "a steep, but not impossible uphill climb."[360] Labor and its allies will have to use what's left of their financial reserves and go for broke if the Court sets aside the NLRA. The events of the 1930s demonstrate that sometimes that energy is synergistic with creating organizing opportunities.[361] As Duff observes, he "cannot accept that [workers] will simply sleep through the arrival of a new gilded age. . . . The boss's overreaching may be on the verge of resolving all ambiguity within the hearts and minds of workers respecting the righteousness of the ends of resistance (i.e. survival and self-defense) and set them on their first steps this century towards honest reflection on the scope and *means* of resistance."[362] I agree with Duff.

I want to end this Article on a personal note. I practiced labor law organizing low-wage workers for over fifteen years before transitioning into the academy and felt a sense of despair.[363] I take no joy in saying that I could think of no better way to reform labor law than through this mechanism. Longtime labor scholar Catherine Fisk summarized the irony I feel as a labor lawyer turned academic when she wrote in response to another article that:

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[360] Larry W. Isaac, *Turning Points in U.S. Labor History, Political Culture, and the Current Upsurge in Labor Militancy*, 50 WORK & OCCUPATIONS 359 (2023), https://doi.org/10.1177/07308884231162944.

[361] *See* BERNSTEIN, *supra* note 28 (explaining how the National Industrial Recovery Act both created organizing energy and well as undermined it with a lack of enforcement powers).

[362] Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 961,979 (2015) (emphasis in original).

[363] Other long-time practitioners turned academics have also engaged with labor law from a similar place. *See e.g.* Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, at note 17, 69 Chi.-Kent L. Rev. at 93-6 (suggesting that granting employee stock ownership may give employees leverage over their employers in the absence of unions).

> There is a bitter irony in reading an article by a leading scholar of labor law and the former Chair of the National Labor Relations Board that pays zero attention to the elegant structure of the federal labor law in which they have long worked. It's a sign of how broken our legal system is that federal labor law experts must turn their back on that law and dig deep into both antitrust law and state and local law to find a path to legal protection for some of the poorest and most exploited workers in the world's wealthiest country.[364]

[364] Catherine Fisk, *Collective Bargaining Without the Protection of Labor Law*, JOTWELL (April 12, 2022), https://worklaw.jotwell.com/collective-bargaining-without-the-protection-of-labor-law/ (reviewing Cynthia Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMPAR. LAB. L. & POL'Y J. 1 (2021).