Chapter 3

Labor in the World of Cynical Conservative Federalism

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Federalism is a wonderful topic for a legal realist. The rhetoric and inconsistencies engaged in by almost everyone on the subject, especially the conservative members of the Supreme Court, reinforce the broader idea that law is what judges want it to be to serve their policy preferences.

And if federalism in general reinforces a cynical view of the law, federalism and labor policy tend to reveal law at its most ideologically partisan. In fact, the legal realist view that "law" has little fixed meaning outside the political and policy agenda of judges was largely born out of the frustrations of many legal thinkers sympathetic to the way labor rights were treated under federalism doctrines of the pre-New Deal era.

While conservative political leaders and jurists tend to talk and write far more about respecting "state sovereignty" or the Tenth Amendment, they actually override state power at a far higher rate than their liberal counterparts. The House Republican majority in Congress voted more than 57 times between 2001 and 2006 to pre-empt state laws, including action to pre-empt state limits on air pollution, to pre-empt state regulation of contaminated food, and to block tougher state regulation of Internet "spam."[1]

To cite one major example, which had a large national impact, early in the past decade, state predatory lending laws that sought to limit abuses by subprime lenders were shut down by the Bush administration using the club of federal power, yet conservative groups largely supported that wildly destructive attack on state authority.[2] And when Dodd–Frank was being written to give state legislatures and state attorneys general more authority to target abuses in their states by national banks, conservative elected leaders and organizations lined up to support amendments to undermine that increased state authority over local financial abuses.[3]

Ironically, even as conservative political leaders have decried the Affordable Care Act as a violation of state sovereignty, two of the major health reforms proposed by conservative leaders in Congress—"tort reform"[4] and allowing insurance companies to sell their products across state lines[5]—both involved using federal law to limit consumer protections for health care patients provided for by state laws.

This conservative focus on pre-empting state law protections for consumers and workers (which will be discussed in more detail later in this chapter) is hardly accidental. Financial backers of conservative legal efforts, such as the U.S. Chamber of Commerce, have unambiguously argued for pre-empting state regulation in favor of "one set of rules" set by the federal government.[6] An intellectual center for this attack on pre-emption over the past decade especially was the Federalism Project at the corporate-funded[7] American Enterprise Institute (AEI), which readily admits that corporations see federal pre-emption as their "safeguard against unwarranted state interference with the national economy" and use it to stop "aggressive trial lawyers and [state] attorneys general" from increasing regulation on corporations.[8] As the AEI argued, "billions of dollars hang on regulatory nuances" and corporate interests have aggressively supported the right-wing assault on state laws. The corporate-backed AEI even has a project dedicated exclusively to criticizing state attorneys general for seeking to hold corporate lawbreakers accountable.[9]

Still, when it suits them, as with the litigation to overturn the Affordable Care Act, conservative judges and activists will trot out a "states' rights" legal history, highlighting the way federal law can be used to attack state laws they dislike and constitutional attacks in the name of federalism can be used to undermine federal laws they seek to overturn.

HISTORICAL CONTEXT OF FEDERALISM DEBATE

Before turning to the specific context of labor and federalism, it's worth highlighting that the conflict between the rhetoric of states' rights and the reality of conservative love of select federal power when it suits its purposes is long-standing. Those who argue that the "original intent" of the Founders was a strong commitment to a judicially enforced states' rights face a basic inconvenient fact: in the 72 years before the Civil War, the Supreme Court, with one exception, never struck down a federal law as unconstitutional because federal officials had overstepped their powers under the Constitution. The exception was the *Dred Scott* decision, which expanded slavery to territories against the will of Congress and helped lead to the Civil War. As the Supreme Court Justices appointed by those founding drafters of the Constitution said in 1819 in their *McCullough v. Maryland* decision, affirming the wide authority of the federal government:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.[10]

Yet state laws were repeatedly struck down by that court when those laws encroached on the rights of property holders, especially slave property holders. Most notably, the 1793 Fugitive Slave Act, which gave slave owners the right to cross into free states and kidnap alleged fugitive slaves, reflected the pervasive enforcement of slave owner rights, even when it conflicted with local state law.[11] New federal laws protected the international slave trade and overturned state laws that had begun restricting the importation of slaves.[12] In only three court decisions were congressional laws even partially struck down in this period, and in none of these cases were individual human rights or state government power to resist federal direction protected.

The immediate post-Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth—created a new constitutional mandate of not only freedom and voting rights for freed slaves but more broadly gave Congress the "power to enforce, by appropriate legislation" (Section 5 of the Fourteenthth Amendment) the protection of the "privileges or immunities" of Americans overall and to protect them from state abuses denying them "life, liberty or property." This was followed a few decades later by the Sixteenth Amendment clearly supporting the ability of the federal government to collect income taxes and the Seventeenth Amendment promoting the direct election of U.S. senators, which laid the basis for the New Deal revolution of the 1930s empowering a pro-worker and pro-consumer turn of federal power.

A fundamental failing of almost all states' rights conservative legal arguments is they invoke the intent of the Founders who wrote the 1789 Constitution but are remarkably silent on the intent of those who wrote all the post-Civil War amendments, which were clearly meant to empower the federal government to take wide-ranging action in a range of areas, especially of commerce, including labor relations.

LABOR IN THE FEDERALISM DEBATE

In the case of labor, the fight over federalism has been a pervasive part of the more general capital–labor conflict. Labor unions in our early history were often subject to criminal conspiracy statutes, then anti-trust injunctions, as well as a range of other court-ordered restrictions.[13] Even as federal troops were withdrawn from Southern states following Reconstruction, they were redeployed increasingly to break strikes in the North, often against the will of local government officials who might support the labor action in question. This pattern was set with the Great Railroad Strike of 1877—the year after federal troops stopped enforcing Reconstruction in the South—and continued through the strike wave of 1885–1886 and the 1894 Pullman Strike, and into the Progressive Era.[14]

It is par for the course that even as corporate interests would use the federal government to target labor in the post-Civil War period, the rhetoric of states' rights would become more common to selectively neutralize the aspects of federal power that might favor labor interests.

Armed with the Sherman Anti-Trust Act,[15] federal courts would deploy that new tool against unions much more than against corporations in the law's early years. In an era when the Supreme Court otherwise declared local commerce not subject to federal regulations such as minimum wage or child labor laws, the federal courts were quite willing to jump into suppress local labor disputes. In the 1908 decision in *Loewe v. Lawlor*,[16] the so-called Danbury Hatters case, the Supreme Court upheld an injunction against a hatters union for launching a consumer boycott because it supposedly imposed the conflict on "third parties and strangers involuntarily."[17] Similarly, in *Coronado Coal Co. v. United Mine Workers of America*,[18] the Supreme Court would recognize that local economic activity could affect other regions of the country—in this case arguing an otherwise legitimate local strike could be enjoined because its purpose was not merely to win higher wages locally but also to prevent non-union production from undermining union wages at other companies.[19]

In response, labor unions generally developed a strong anti-judicial orientation. The 1914 Clayton Act created an exception to the anti-trust laws to protect unions from injunction,[20] although the Supreme Court essentially gutted the intent of the law in *Duplex Printing Press Co. v. Deering*[21] by arguing that the exemption applied only to actions taken by employees against their employers,[22] so any sympathy action or boycott could still be blocked by federal courts.[23] With the 1932 Norris–LaGuardia Act , the goal was to take federal courts completely out of the business of regulation by injunction.[24] The 1935 Wagner Act reflected that anti-judicial streak with a clear pre-emption of state and federal courts in favor of decisions being made by a new National Labor Relations Board (NLRB), whose function was to mediate industrial conflict but not impose substantive results on the industrial combatants.[25]

What is interesting about the U.S. system of federalism is that most corporate charters and the laws under which they operate derive from state corporate law statutes, overwhelmingly overseen by the Delaware chancery court,[26] with some aspects of governance effected by federal securities laws. Internal corporate control of corporations governed largely by the Delaware chancery court and labor dispute governed by the NLRB brought about an almost complete procedural and even jurisdictional separation between the realms of internal corporate governance and industrial relations law in the United States. This development avoided even the semblance of the corporatist, social democratic, or codetermination systems that encouraged some direct legal mediation between labor and corporate interests in Europe in the post-World War II period.

Still, the labor law also largely depoliticized labor action and channeled it into single firm or narrow industry-specific labor actions.[27] Anti-union amendments added with the 1947 Taft–Hartley Act[28] and 1959 amendments,[29] along with National Labor Relations Board interpretations, weakened labor's ability to bargain over many "management" areas while barring labor law protection for supervisors[30] and management personnel.[31] Unions lost not only the ability to contract against the company dealing with non-union subcontractors and suppliers,[32] but the law also largely barred unions from contracting to prevent a firm itself from opening non-union subsidiaries[33] or requiring that workers be retrained for new jobs when automation eliminated their old ones.[34]

In the post-war period, the courts would largely bar states from a direct role in governing labor relations: in *San Diego Building Trades Council v. Garmon* in 1959[35] and *Machinists v. Wisconsin Employment Rel. Comm'n* in 1976,[36] the Supreme Court declared that states could not regulate how unions or employers engaged in organizing campaigns or what economic weapons they could use during strikes and related activity. In *Garmon*, the court argued that whenever any union or employer conduct "is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[37] Even a potential conflict with federal law would pre-empt state law unless a "compelling state interest … in the maintenance of domestic peace" (e.g., preventing physical violence) was at stake.[38] Therefore, regardless of whether a state law helped or hurt workers, it would theoretically be struck down.

Similarly, in *Machinists*, the court declared that Congress meant to leave "self-help" economic weapons in labor conflict largely unregulated.[39] For example, state laws could not ban union members from refusing to work overtime.[40] Labor conflict was to be "controlled by the free play of economic forces."[41] The message to the federal courts and the states was to leave labor regulation to the NLRB.

THE EXCEPTIONS: THE LEGAL GAMESMANSHIP OF LABOR RELATIONS FEDERALISM

The courts, however, would increasingly ignore that message, especially in the hands of conservative justices in recent decades as federalism would selectively shut down or conversely empower state law based largely on whether it further weakened labor union strength in the workplace.

The Right-to-Work Provision

The most obvious states' rights exception in federal labor law is the so-called right-to-work 14(b) provisions added in the Taft–Hartley amendments, which allowed state governments to ban labor unions from

negotiating contracts which required employees benefiting from a union contract from paying fees to the union that negotiated the contract.

From early on, even many conservative economic thinkers found this exception ideologically odd and at cross-purposes with their general view that employers should be able to negotiate any contract they wished with employees. Milton Friedman in his *Capitalism and Freedom* compared restrictions on employer bargaining rights embodied in right-to-work laws with the loss of contractual liberty resulting from anti-discrimination laws.[42] Sheldon Richman wrote as recently as 2012 in the libertarian magazine *Reason* about the long-held belief by many pro-market theorists that allowing state governments to be involved with "banning a voluntary agreement" between employers and employees and instead "substitute the decisions of politicians for those that consumers would like to express in the market place."[43] Yet he notes that most employers didn't want "laissez-faire for labor organizers" but preferred the government policing of the workplace embodied in federal labor law, especially once the limitations on labor power were enacted with Taft–Hartley.

What right-to-work largely did was reinforce the regional divide in the nation between a largely non-union South, where state governments could now use right-to-work laws to prevent unions from getting a financial foothold and the union North where unions could largely block the passage of right-to-work laws. This followed the exemption of agricultural and domestic workers from rights under the National Labor Relations Act (NLRA), provisions demanded by many Southern legislators to deny the then-largely black workforce in those occupations in the South from being able to unionize under the law.

The Uncertain State Control of Property Rights Under Labor Law

Access to employer property to discuss labor rights was possibly the most important gain for labor from the original Wagner Act. In *Republic Aviation Corp. v. N.L.R.B.* in 1945,[44] the Supreme Court affirmed that pro-union employees could promote unionization on company property so long as they did so on their own time, but the more disputed issue has been the extent to which *nonemployee* union organizers and picketers could access employer property to inform employees about their rights to unionize.[45]

In 1968, the court held that unions could not be barred from picketing in shopping centers open "generally to the public,"[46] but as conservative jurists were added to the Supreme Court in the 1970s, the court determined that state trespass law would trump National Labor Relations Board rulings on union rights to access employer property. While the NLRB found that picketing was protected under Section 7 of the NLRA,[47] the Supreme Court would rule in the 1978 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* decision that a union picketing

in a department store parking lot could be evicted under state trespass law,[48] despite this clearly contradicting the *Garmon* standard of pre-emption. As Justice William Brennan argued in dissent, "[b]y holding that the arguably protected character of union activity will no longer be sufficient to pre-empt state court jurisdiction, the Court creates an exception of indeterminate dimensions to a principle of labor law pre-emption that has been followed for at least two decades."[49] Justice Brennan argued the majority decision undermined the tradition of establishing uniform national labor law and instead left state courts free to interpret federal labor law.[50]

Even the Reagan-dominated NLRB of the 1980s sought a middle-ground compromise, with a 1988 ruling in *N.L.R.B. v. Jean Country*,[51] which balanced the right to organize with property rights: "[O]ur ultimate concern … is the extent of impairment of the Section 7 right if access should be denied, in balance with the extent of impairment of the private property right if access should be granted."[52] *Jean Country* gave union organizers access to a shopping mall to conduct informational leafleting and area-standards picketing on the premises of a two-store shopping center.[53] But a 5–4 Supreme Court majority in the 1992 *Lechmere* decision written by Justice Clarence Thomas definitively declared that state property law would trump federal labor law unless nonemployee organizers had "no reasonable alternative [way]" to communicate with employees.[54] Because the union could picket at a distance or advertise in local newspapers, the court held that it had the NLRA-required access to workers.[55] The dissenters castigated the majority for overriding the NLRB's own interpretation of the statutes involved and creating a "narrow, iron-clad rule"[56] that de facto undermined the ability of employees to "learn from others the advantages of self-organization":[57]

> [I]t is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.[58]

State property law was thereby used by the conservative *Lechmere* majority to pre-empt support by the federal NLRB to give unions access to employees to better exercise their rights.

What about where state property law was designed to give unions that access? Just 2 years after *Lechmere*, the Supreme Court endorsed the view that federal labor law would pre-empt state efforts to modify state property law to accommodate labor interests. In that decision, the Supreme Court unanimously endorsed a Fourth Circuit decision that had struck down a West Virginia law that determined the state would not intervene in strikes to enforce trespass statutes during a strike ("A [state] may not,

consistently with the NLRA, withhold protections of state anti-trespass law from [an] employer involved in labor dispute").[59] The liberal members of the court had maintained their commitment to pre-emption of state property law by the NLRA, but all the conservative members of the *Lechmere* majority flipped where the state had favored labor in a dispute. This seems to create the Catch-22 that state property law trumps the NLRB's attempts to accommodate the free speech needs of labor to talk to workers on the job, yet states may not themselves try to accommodate those labor interests without potentially seeing those laws struck down as pre-empted.

The West Virginia case had involved the more fraught issue of a strike situation,[60] but the Supreme Court did decide in the recent term not to take cert on a decision by the California Supreme Court, which upheld the so-called California Moscone law,[61] which prohibits injunctions and the application of trespass laws against nonviolent labor picketing. Still, a future case may bring to the Supreme Court the issue brought by employers—and supported by the D.C. Circuit Court of Appeals in another case—that such a law violates the First Amendment because it favors of speech in a viewpoint-discriminatory way. So, we could very well see a future conservative court majority using federal First Amendment law to override state property law, which otherwise overrides federal labor law, with the twists and turns of pre-emption and states' rights mostly having consistency in conservative legal doctrine in coming to anti-union outcomes.

Public Money and Labor Rights Under State Public Contracts

One other clear area of state government authority in labor relations traditionally pertained to state and public employees, who are excluded from protection under the federal NLRA. Yet as states have increasingly turned to using private contractors to provide public services, they have seen federal labor law cited in trumping state rules seeking to maintain rights for workers performing state public services. In some cases, foreign policy concerns have motivated these limitation, such as the court striking down Massachusetts' "Burma law," which had banned government agencies from doing business with the then-Burmese dictatorship.[62]

The trend has gone further in essentially mandating that public money go to companies that abuse workers and violate labor laws. For example, back in 1986, the Supreme Court unanimously pre-empted a Wisconsin law that prohibited state contracts from going to companies that had repeatedly violated the NLRA. In *Wisconsin v. Gould*, states were barred from requiring that the money they spent on government services match their public policy preferences; the refusal to give an employer the privilege of a government contract was treated as a "punishment" for breaking federal law, where any punishments for such violations were reserved "exclusively for the [National Labor Relations] Board."[63] In 1996, the D.C. Circuit Court of Appeals extended the *Gould* rationale to apply to federal procurement policies, striking

down an executive order from the Clinton administration barring companies that had hired striker replacements from bidding on federal contracts.[64]

For liberals, this was restating their decades-old support for pre-emption in the federal labor law context, but the support for such expansive pre-emption of state spending powers hardly fits the conservative rhetoric of states' rights. For conservative justices, state control of property rights had in fact been so fundamental that they overrode NLRB decisions, but a state's control of its own spending was not so fundamental and had to bow to federal pre-emption.

More recently, the Supreme Court ruled that states could not even require that money provided to contractors go only to the work contracted for; instead, a California law prohibiting public funds from being used to hire lawyers or other consultants to oppose employee unionization was struck down as pre-empted by the NLRA.[65] In that case, Justices Ruth Bader Ginsberg and Steven Breyer dissented from this radical extension of pre-emption, saying it forced states to be "conscripted into paying" for anti-union employer speech.[66] So, not only do states have to give public money to anti-union contractors, they have to fund their anti-union attacks on their employees while performing those contracts.

THE CYNICISM OF CONSERVATIVE PRE-EMPTION OF STATE INDIVIDUAL EMPLOYMENT RIGHTS

The selective pre-emption of rights under federal labor law at least has some historical reflection in the tension between the original pro-labor Wagner Act and the anti-labor amendments added in the 1947 Taft–Hartley Act, but the recent string of decisions by the Supreme Court voiding state employment rights based on employees signing contracts agreeing to arbitrate those claims and the 1925 Federal Arbitration Act[67] overriding state law[68] highlights the fundamental cynicism of the conservative Supreme Court majority.

For essentially 75 years after passage of the 1925 Federal Arbitration Act (FAA), it was understood that the law was meant to enforce arbitration agreements between businesses and did not apply to employment contracts. In fact, the issue of its application to workers was debated at the law's passage, and a specific clause was inserted in the FAA that no arbitration would apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". Then-Commerce Secretary Herbert Hoover argued that there was no intention to cover employment contracts at passage, and organized labor dropped their opposition to the bill only with that assurance.

The question is how did the five conservative members of the Supreme Court in a majority decision 76 years later in the 2001 *Circuit City Stores*

v. Adams decision[69] find that state law protections of employment rights had to give way to a federal law? They made the bizarre move of claiming that the specific legislative exemption for employment contracts applied only to the specified classes of employees such as seamen and railroad employees mentioned in the text and not to the far larger group of workers engaged in interstate commerce as defined by the New Deal Court a decade later. And Justice Anthony Kennedy for that majority stated bluntly that "we need not assess the legislative history of the exclusion provision."[70]

As Justice Stevens lambasted the majority in dissent, they had cynically ignored the language and intent of the Federal Arbitration Act and were "[p]laying ostrich to the substantial history behind the [labor exclusion] amendment." He added on behalf of the four dissenters, "Today, the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text" of the law.[71]

Ultimately, the conservative Supreme Court majority's cynical disrespect for state authority is reflected in the twists of both legislative history and the language of the text of a federal law to find pre-emption where none was intended or warranted.

CONCLUSION

Labor in the modern judicial landscape faces, in many cases, the worst of worlds, where federal law pre-empts the most favorable aspects of state law, while unfavorable state law overrides the more pro-labor aspects of federal law. Under the most conservative state governments, this has meant that labor density is at unfathomably low levels, with less than 3% of employed workers in a union in North Carolina.[72]

The main encouraging fact is that some of the more pro-labor states have managed to maintain an environment supportive of a degree of union density. New York in particular still has 23.2% of its workforce who are members of a union,[73] while California stands out as a state where the percentage of the workforce in a union has actually defied the national downward trend and increased marginally over the past decade, rising from 16.8% of the workforce in 2003 to 17.2% in 2012. Much of this difference can be attributed to support for unions in the public sector or publicly funded sectors, such as home health care and construction, but the sharp differences in labor density among states show that there has been some room to promote supportive state policy for unions despite the obstacles of federal pre-emption.

Still, as noted previously, states have repeatedly seen supportive policy struck down by the courts, creating almost a cat-and-mouse relationship between pro-labor state policy makers and anti-labor courts. No legislative victory has been secure because success at the state level, or even the

federal, has been so often subject to a judicial voiding of that success in the name of some twist of pre-emption or states' rights legal doctrine as it suits conservative legal interests.

ENDNOTES

[1] *Congressional Preemption of State Laws and Regulations, United States House Of Representatives Committee on Government Reform.* Minority Staff Special Investigations Division (June 2006). <http://bit.ly/1t6TIjd>

[2] J. Mijin Cha, *The Predatory Lending Bubble and How the Feds Made It Worse*, Progressive States Network Stateside Dispatch, March 19, 2007. <http://bit.ly/1pP2IYJ>

[3] Nathan Newman, *Financial Reform: Keep State AGs and State Law on the Beat Against Predatory Lending Practices*, Progressive States Network Stateside Dispatch, May 10, 2010. <http://bit.ly/1j3s02n>

[4] Americans for Insurance Reform, *Major Study of Malpractice Insurance Industry Finds No Basis to Further Limit Liability of Unsafe Health Care Providers*, Press Release, July 22, 2009. <http://bit.ly/1saDEZy>

[5] Elizabeth Carpenter, Len Nichols, and John Bertko, *Across State Lines Explained: Why Selling Health Insurance Across State Lines Is Not the* Answer, New America Foundation Report, October 8, 2008. <http://bit.ly/TIbR6y>

[6] *How Are Businesses Affected by Latin American's Legal Environment?* <http://bit.ly/1saDLUM>

[7] SourceWatch website. <http://bit.ly/1vGYqAb>

[8] *Federal Preemption: Law, Economics, Politics*, The Federalism Project: American Enterprise Institute. <http://bit.ly/1msjYkv>

[9] *AG Watch: The Federalism Project's Eye on Attorneys General*, The Federalism Project: American Enterprise Institute. <http://bit.ly/1n0XZQG>

[10] *McCulloch v. Maryland*, 17 U.S. 316 (1816).

[11] Kaczorowski at 1027.

[12] Foner 2002 at 173.

[13] Between 1880 and 1930, state and federal courts issued roughly 4,300 anti-strike decrees. *The Oxford Companion to the Supreme Court of the United States 490* (Kermit Hall, ed., 1992).

[14] See Josiah Bartlett Lambert, *If the Workers Took a Nation: The Right to Strike and American Political Development* (2005) for one of the most detailed histories of federal action against the right to strike in American history.

[15] See Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2000) (making some labor union activities a violation of the anti-trust laws because they restrain trade).

[16] *Loewe v. Lawlor*, 208 U.S. 274, 308 (1908).

[17] *Id.* at 294.

[18] *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

[19] *Id*. at 310.

[20] Clayton Act of 1914 §§ 6, 20, 15 U.S.C. § 17 (2000), 20 U.S.C. § 52 (original version found at Ch. 323, §§ 6, 20, 38 Stat. 730 (1914)); *see also* William E. Forbath, *Law and the Shaping of the American Labor Movement*, 156–58 (1991) (discussing the exceptions found in sections 6 and 20 of the Clayton Act). The Clayton Act exceptions would essentially be nullified by a narrow interpretation by the Supreme Court in *Duplex Printing*

Press Co. v. Deering, 254 U.S. 443, 468–75 (1921) (holding that sections 6 and 20 merely codified pre-existing common law).

[21] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

[22] *Id.* at 472.

[23] *Id.* at 479.

[24] Norris–LaGuardia Act, 29 U.S.C. §§ 101–115 (original version at 47 Stat. 70 (1932)); *see also* Forbath, *supra* n. 30, at 159–63 (discussing the Norris–LaGuardia Act as a collective libertarian impulse).

[25] Wagner Act, § 3, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 153). The chairman of the Senate committee that drafted the National Labor Relations Act declared: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660 (statement of Senator Walsh) (cited in *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 484 (1960)).

[26] On the rise of Delaware as the premier venue for corporate incorporation, *see* Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del. J. Corp. L. 885 (1990), and William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 663–70 (1974).

[27] Mark Barenberg contrasts the NLRA's upholding of exclusive representation chosen by a majority of workers as reflecting a view of workers in a firm as "organic groups unified by solidarity interests and norms." Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1381, 1452–53 (1993).

[28] Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in 29 U.S.C. §§ 141–197 (2000)).

[29] Labor–Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 543 (1959) (codified as amended in 29 U.S.C. § 158(e) (2000)). In 1959, Section 8(e)—the "hot cargo" amendment—was added to the NLRA to further tighten prohibitions on unions negotiating with firms for agreements by the firm "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer." 29 U.S.C. § 158(e); *see also* Theodore J. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in the Balance of Power*, 40 U. Det. L.J. 189, 205–11 (1962) (analyzing the history of Section 158(e)).

[30] In exclusions to NLRA coverage, Section 2(3) added "[t]he term 'employee' shall … not include … any individual employed as a supervisor" with supervisor defined in Section 2(11): "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. …" 29 U.S.C. § 152(3), (11).

[31] While the NLRA has no specific management exclusion clause, the NLRB developed its own doctrine that management employees were not entitled to the protections of the Act. *In re* Denver Dry Goods, 74 N.L.R.B. 1167, 1175 (1947).

[32] See, e.g., *NLRB v. Milk Wagon Drivers Union, Local 753*, 335 F.2d 326, 328–29 (7th Cir. 1964) (holding that a union-only subcontracting clause violates Section 8(e) of the Labor–Management Relations Act); *Unis v. Int'l Bhd. of Teamsters*, 541 F. Supp. 706 (W.D. Pa. 1982) (holding subcontracting clauses for unions only violates Section 8(e) of the Labor–Management Relations Act).

[33] In *D'Amico ex rel. NLRB v. Painters & Allied Trades Dist. Council No. 51*, 120 L.R.R.M. 3473, 3477 (D.Md. 1985), the NLRB barred contracts by unions to prevent the creation of such "double-breasting" non-union subsidiaries doing bargaining-unit work. In this case, a court issued an injunction against a strike to attain such a clause, declaring it an illegal "hot cargo" strike in violation of Section 8(e).

[34] While courts and the NLRB protect union contracts that protect traditional bargaining-unit work, they bar union efforts to negotiate inclusion of new work within the bargaining unit, even in most cases where the new jobs functionally substitute for the older jobs being lost to automation. *See* Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of N.L.R.A. §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1004–05 (1965); Ted Cassman, *Deconsolidating the Work Preservation Doctrine: Dolphin-Associated Transport*, 4 Indus. Rel. L.J. 604 (1981); Alicia G. Rosenberg, Note, *Automation and the Work Preservation Doctrine: Accommodating Productivity and Job Security Interests*, 32 UCLA L. Rev. 135, 148–49 n.69 (1984). However, while this general NLRB policy was upheld, some flexibility was introduced in *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980), and *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985), in which some work replacement rules were upheld where "the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. at 510.

[35] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

[36] *Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Employment Rels. Comm'n*, 427 U.S. 132, 140 (1976).

[37] *Garmon*, 359 U.S. at 245.

[38] *Id.* at 247. While labor activity containing elements of violence may violate Section 8(b)(1)(A), it might seem to come under the *Garmon* pre-emption; see *id.* at 247–48, but the court has allowed state courts to stop violent or threatening actions by unions. See *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) (upholding the prohibition of picketing because it could incite extreme violence); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (damages allowed in state court because of the violence of the threats involved). *Garmon* emphasized that these kinds of state actions were allowed only because of the " 'type of conduct' involved (e.g., 'intimidation and threats of violence')." *Garmon*, 359 U.S. at 248.

[39] *Machinists*, 427 U.S. at 140.

[40] This was the state law involved in *Machinists*.

[41] *Machinists* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

[42] *Capitalism and Freedom*, 4th ed. (2002).

[43] Sheldon Richman, "The Libertarian Case Against Right-to-Work Laws," *Reason*, December 16, 2012. <http://bit.ly/1xtbw6G>

[44] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[45] In *NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)*, the court held that "an employer may validly post his property against nonemployee distribution of union literature."

[46] *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 313, 319 (1968).

[47] Scott Hudgens, 230 NLRB 414 (1977).

[48] *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

[49] *Id.* at 215.

[50] *Id.* at 231–32.

[51] *N.L.R.B. v. Jean Country*, 291 NLRB (1988) 11.

[52] *Id.* at 19.

[53] See *Giant Food Mkts., Inc.,* 241 NLRB (1979) 727.

[54] *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 537–38 (1992).

[55] *Id.* at 540.

[56] *Id.* at 544.

[57] *Id.* at 543 (citation omitted).

[58] *Id.* at 543 (citation omitted).

[59] See *Livadas v. Bradshaw*, 512 U.S. 107, 199 n. 13 (1994), citing to the Fourth Circuit's decision, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991).

[60] This is based on a 1976 decision that protected the right of each side to "make use of 'economic weapons,' not explicitly set forth in the Act, free of governmental interference." *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 150 (1976).

[61] *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*.

[62] See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (national legislation imposing sanctions on Burma pre-empted additional sanctions or actions by state governments).

[63] See *Wisc. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 291 (1986).

[64] See *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (DC Cir. 1996).

[65] *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008).

[66] *Id.*, 554 U.S. at 80 (2008).

[67] 9 U.S.C. § 1 et seq.

[68] See *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991) (employees can be forced to waive jury trial if an arbitration agreement is signed); *Circuit City Stores, Inc. v. Adams*, 352 U.S. 105 (2001) (arbitration can pre-empt jury trial for all workers involved in interstate commerce); *Rent-a-Center v. Jackson*, 130 S.Ct. 2772 (2010) (arbitrator can decide what issues are subject to arbitration under a contract); *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013) (voiding right to seek class actions in employment disputes).

[69] *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

[70] *Id.*

[71] *Id.* at 128.

[72] *Union Affiliation of Employed Wage and Salary Workers by State, 2011–2012 Annual Averages*, Bureau of Labor Statistics. <http://1.usa.gov/VLTY8N>

[73] *Id.*