POWERING THE GRID: LABOR, ELECTRICITY, AND THE GREEN TRANSITION

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ABSTRACT

The clean energy transition presents a fundamental tension: renewable energy jobs are far less unionized than the fossil fuel jobs they replace, with only 4 percent of solar workers and 6 percent of wind workers in unions compared to over 20 percent of private utility workers — the highest unionization rate of any private sector industry. That disparity is not incidental but the product of deliberate legal and institutional choices: the deregulation of electricity markets beginning in the 1970s, the rise of Independent Power Producers as the primary developers of renewable capacity, and the resulting incentive structures that reward minimizing labor costs. A clean energy buildout that replicates this model risks not only leaving workers behind but undermining the political coalitions necessary to sustain ambitious climate policy. This paper examines the legal conceptualization of labor and the electricity sector and how the doctrinal framework governing state regulation can be leveraged, and reinterpreted, to ensure that the clean energy transition is built with high-road labor standards. After tracing the history of utility regulation and unionization through deregulation and the simultaneous rise of competitive electricity markets and renewable energy, this paper turns to the NLRA's preemption doctrine and the market participant exception that allows states to regulate without being preempted. Drawing on Boston Harbor and its progeny, the paper identifies three legally defensible avenues through which states can attach labor conditions to clean energy development. Namely, a state's procurement power, property management authority, and financing power. However, this paper also examines more contested arguments rooted in the hybrid public-private character of utilities and expanding the market participant exception itself. Finally, the paper confronts the limits of this framework and analyzes how the need to search for oblique proprietary footholds to attach basic labor standards to essential infrastructure is itself a symptom of path dependence in a privatized utility model never designed to serve workers or clean energy goals. Building a true just transition will require not just creative legal argument, but a willingness to reimagine the institutional structures through which clean energy is owned, financed, and delivered, in a way that works for, and not against, workers.

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I. INTRODUCTION

When Los Angeles Mayor Eric Garcetti unveiled his plan for a Green New Deal in 2019, not all of the city's residents were celebrating.[1] The city's own utility workers, furious that the plan promising a cleaner future had no plan for them, picketed in front of the mayor's home and the city's department of public works.[2] Their concerns exemplify a historic tension between climate

[1] Andrea Furnaro & Kelly Kay, *Labor Resistance and Municipal Power: Scalar Mismatch in the Los Angeles Green New Deal*, 98 POLITICAL GEOGRAPHY 102684 (2022), https://doi.org/10.1016/j.polgeo.2022.102684.
[2] *Id.*

and labor movements: that climate action comes at the cost of workers. Although some unions embrace climate action, at key moments, other unions have opposed it.[3] For example, unions affiliated with the California Building Trades Council voiced opposition to the state's 'Climate Superfund' bill which would have required fossil fuel companies to pay for the costs associated with climate adaptation.[4] The New York State Building Trades Council and IBEW locals strongly supported the construction of a new natural gas pipeline in the state.[5]

The reluctance of utility union workers to embrace the clean energy transition makes sense; renewable energy jobs tend to be fewer, less unionized, and less stable than those in legacy fossil fuel industries.[6] Over 20 percent of workers in private utilities belong to unions, which is the *highest* density of any private sector industry.[7] The rate is even higher at nuclear power stations, where more than a third of workers are covered by collective bargaining agreements.[8] By contrast, only 4 percent of U.S. solar workers and 6 percent of wind power workers are in unions.[9] Thus, worker opposition to climate policy is a predictable response to a transition where harms to labor are ignored or externalized.

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[3] Anjali Katta, *Labor in Climate Crisis: Union Action for a Cleaner, Greener Future*, ONLABOR (2025) https://onlabor.org/laborclimateaction/.
[4] Aaron Cantú, *Push to Make Big Oil Pay for Climate Damage Losing Steam in California Legislature*, YALE CLIMATE CONNECTIONS (May 22, 2025).
[5] *Ninety-Six Organizations Representing 1.7 Million New Yorkers Statewide Sign On in Support of the Northeast Supply Enhancement (NESE) Project*, NATIONAL GRID (Nov. 7, 2025) https://www.nationalgridus.com/News/Ninety-Six-Organizations-Representing-1-7-Million-New-Yorkers-Statewide-Sign-On-in-Support-of-the-Northeast-Supply-Enhancement-NESE-Project/.
[6] *See e.g.* Ben Cahill & Sandeep Pai, *Working Toward a Just Transition for Coal Communities*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Sept. 27, 2021); Lee Harris, *Workers on Solar's Front Lines*, THE AMERICAN PROSPECT (2022) https://prospect.org/2022/12/07/workers-on-solars-front-lines/ ("While [the solar project] created hundreds of construction jobs, the solar array will only require two full-time permanent jobs)
[7] Matt T. Huber & Fred Stafford, *Socialist Politics and the Electricity Grid*, 6 CATALYST: J. THEORY & STRATEGY, no. 4, (2023), at 62.
[8] *Id.*
[9] Note these include not just utilities but workers in the sector more broadly; *see e.g.* U.S. Dep't of Energy, Office of Policy, *U.S. Energy & Employment Report 2025 (2025),* https://www.energy.gov/media/348941.

Given that the catastrophic effects of climate change are already here and intensifying, a transition to renewable energy is imperative. But a transition that produces worse jobs in its wake does not just harm workers and the communities that depend on them. It erodes the political coalition that ambitious climate policy requires to survive. When the costs of transformation fall disproportionately on labor, the result is a structural fracture at the exact moment the alignment of labor and climate movements is most necessary. Researchers, for example, have found that bills that brought industrial labor unions to positions of support or neutrality were "critical to reducing the ability of fossil fuel coalitions to block new policies."[10] Building power towards a world with climate action and strong workers' rights requires that labor and climate movements work in coalition rather than opposition.[11]

The central challenge then, is how to build clean energy with high-road labor standards and sufficient union density that affected workers become climate advocates rather than opponents.[12] To address this challenge, this paper examines the labor history of the electricity sector, the legal frameworks that regulate labor and utilities, and how those frameworks can be leveraged, or reinterpreted to enable state-level clean energy and pro-worker regulation. This paper both maps the legal footholds that remain available within the current framework and argues that the search for those footholds is itself diagnostic of a deeper structural failure. Since we are primarily concerned with the energy buildout, this paper will focus on generators of electricity and their

[10] *See e.g.* Trachtman, S., Inal, I., & Meckling, J. (2025). *Building winning climate coalitions: Evidence from U.S. states*. ENERGY POLICY, 203, 114628.
[11] *Id.*
[12] Note, these include utility unions as well as building trade councils.

owners, which include both utilities, namely investor-owned utilities, and independent power producers (IPPs).

Investor-owned utilities, a subset of public utilities, generate over half of the net electricity generated in the U.S. and own nearly all the transmission and generation infrastructure.[13] These utilities also directly serve over 70 percent of American households.[14] Independent Power Producers (IPPs), private generators that sell electricity into wholesale markets rather than directly to end-users, account for a further approximately 40 percent of total net electricity generation and have become the dominant developers of new renewable capacity.[15] Before the deregulation of the electricity sector, utilities operated as state-sanctioned monopolies shielded from competition in a defined geographic area.[16] These utilities were referred to as 'vertically integrated utilities' and most states still have these systems today.[17] As privately-owned entities with state-sanctioned monopolies, vertically integrated utilities sit at an ambiguous position between public and private. Specifically, their mandate to provide electricity to consumers at "just and reasonable" rates and to operate for the "public interest" while maximizing returns creates conflicting incentives.[18] To address this conflict and to prevent utilities from charging monopoly prices, historically, states have regulated utilities through agencies called Public Utility Commissions (PUCs). These PUCs

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[13] Author's own calculations based on data from U.S. Energy Info. Admin., *Electric Power Annual, tbl. 3.1.A*, https://www.eia.gov/electricity/annual/table.php?t=epa_03_01_a.html (last visited May 4, 2026), U.S. Energy Info. Admin., *Electric Power Annual*, *tbl. 3.2.A*, https://www.eia.gov/electricity/annual/table.php?t=epa_03_02_a.html (last visited May 4, 2026), and U.S. Energy Info. Admin., *Electric Power Annual, tbl. 3.3.A*, https://www.eia.gov/electricity/annual/table.php?t=epa_03_03_a.html (last visited May 4, 2026).
[14] *See also* Nikki Luke & Matt Huber, *Introduction: Uneven geographies of electricity capital*, ENVIRONMENT AND PLANNING E: NATURE AND SPACE (2022).
[15] Jonas J. Monast, *Precautionary Ratemaking*, 69 UCLA L. REV. 520 (2022).
[16] *Id.*
[17] U.S. Env't Prot. Agency, *Power Market Structure*, https://www.epa.gov/green-power-markets/power-market-structure.
[18] Monast, *supra* note 15.

regulate to protect consumers by guaranteeing reasonable rates and reliable service.[19] However, these agencies are constrained by statutory mandates and judicial interpretations that narrowly define the scope of permissible regulation.[20] For example, although utilities often operate under a statutory mandate to serve the "public interest," courts and regulators have interpreted that standard narrowly to mean protection of consumer rates and investor returns rather than a broad authority to address social concerns such as climate change or the labor conditions of the utility workforce.[21]

As state and federal utility regulation was constrained to rates and consumers, utility unions served as the counterweight to protect workers from utility monopolies.[22] Through a combination of strategic organizing and legal support for unionization in the post-WWII era, and the general stability afforded by regulated monopolies with stable rates of return, utility unions, primarily the International Brotherhood of Electrical Workers (IBEW) and the Utility Workers Union of America (UWUA), built some of the strongest collective bargaining relationships in the private sector. They covered an estimated 30-50 percent of the electric utility workforce by the 1970s.[23] Arguably, the traditional 'regulatory compact' between the state and private utilities facilitated union density.[24] Utilities could pass labor costs on to ratepayers and faced no *competitive* pressure

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[19] Gabriel Chan & Alexandra B. Klass, *Regulating for Energy Justice*, 5 NYU L. REV. 97 (2022).
[20] *Id.*
[21] *Id.*; *see also NAACP v. Federal Power Commission*, 425 U.S. 662 (1976) (finding that the "public interest" mandate of the agency is not a broad license to address all social issues, but rather limited to its specific statutory duties related to rates); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (establishing just and reasonable rates as the core of utility regulation).
[22] *See e.g.* E.W. Morehouse, *The Background of Labor Relations of Public Utilities*, J. LAND & PUB. UTIL. ECON, 5, 412 (1929).
[23] Matthew Huber, *Renewable Capital and the Demolition of the Electricity as a "Public Utility" in the United States*." DEVELOPMENT AND CHANGE (2025).
[24] Morehouse, *supra* note 22.

to minimize wages, creating less incentive to resist unionization than in other industries.[25] But this also meant that union power in the sector was always contingent on the regulatory architecture that sustained it.

When that architecture began to erode in the 1980s and 1990s, with the introduction of the Public Utility Regulatory Policies Act (PURPA) and the Energy Policy Act, which introduced competition in electricity generation and retail and encouraged the growth of non-utility generators (e.g. IPPs), the structural foundation of utility unionism eroded.[26] With federal sanction for deregulating the electricity sector, states followed suit and enacted policies that fostered deregulation within their states.[27] Deregulation resulted in a competitive wholesale market for electricity generation from which retail-facing utilities purchase energy and sell it to consumers.[28] Deregulation dismantled the conditions under which union density in the sector had been built and replaced vertically integrated utilities with a new class of competitive generators that had no union history, no rate-based protection from labor costs, and incentives to keep labor costs as low as possible.[29] Unsurprisingly, deregulation resulted in a sharp decline in utility union density in the industry.[30]

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[25] *Id.* Note, there are other incentives to minimize labor costs, but these do not relate to competition from other firms.
[26] Heather Payne, *Private (Utility) Regulators*, 50 ENVTL. L. 999 (2020); Union of Concerned Scientists, *Public Utility Regulatory Policies Act*, https://www.ucs.org/resources/public-utility-regulatory-policy-act
[27] Matthew Huber, *Renewable Capital and the Demolition of the Electricity as a "Public Utility" in the United States*." DEVELOPMENT AND CHANGE, 2025
[28] William Boyd, *Decommodifying Electricity*, 97 S. CAL. L. REV. 937 (2024).
[29] *Id.*
[30] *Id.*

Along with encouraging de-regulation, PURPA also encouraged retail-facing utilities to purchase electricity from qualifying IPPs who produced renewable energy.[31] It did so by requiring utilities to buy power from these facilities at their "avoided cost" rate, which is the cost the utility would otherwise incur to generate the same electricity itself, thereby guaranteeing a market for renewables without raising the utility's costs.[32] Thus, PURPA's consequences were both to spur deregulation and to seed the private IPP model of renewable energy development. This connection between deregulation and clean energy development has persisted and deepened.

IPPs became the primary developers of wind and solar capacity and to this day produce the majority of new renewable capacity in the U.S.[33] This IPP renewable dominance has been reinforced through tax credits and governmental subsidies.[34] Most major federal (and many state) renewable subsidies are structured as tax credits that flow most easily to IPPs rather than vertically integrated utilities, pushing projects into tax-equity deals in which large banks provide capital in exchange for using the tax benefits.[35] This system has effectively financialized the rollout of renewable energy, and consistent with the well-documented corrosive effects of financialization on organized labor, union power within IPP-owned projects has struggled to grow.[36] IPPs strategically avoid labor regulation, resist unionization, and minimize labor costs. For example,

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[31] Nathan R. Lee, *When Competition Plays Clean: How Electricity Market Liberalization Facilitated State-Level Climate Policies in the United States*, 139 ENERGY POL'Y 111308 (2020), https://doi.org/10.1016/j.enpol.2020.111308.

[32] Lowell J. Chandler, *Localizing Energy Independence: How PURPA and Community Power Legislation Can Drive Development of Resilient and Reliable Local Clean Energy Projects*, 44 PUB. LAND & RESOURCES L. REV. 199 (2021).

[33] Brian R. Murphy, *Renewable Energy Ownership: A Game Plan for Utilities*, UTIL. DIVE (May 22, 2019), https://www.utilitydive.com/news/renewable-energy-ownership-a-game-plan-for-utilities/555268/\.

[34] *See* Sarah Knuth. *Rentiers of the low-carbon economy? Renewable energy's extractive fiscal geographies.* ENVIRONMENT AND PLANNING A: ECONOMY AND SPACE, 55(6), 1548–1564. (2023).

[35] *Id.*

[36] *See e.g.* Michael Wallace, Todd E. Vachon & Andrew S. Fullerton, *Neoliberalism and Labor's Long Decline: Financialization, Precaritization, and Union Density in the American States, 1964–2023*, 98 RES. SOC. STRATIFICATION & MOBILITY 101031 (2025).

they often structure their projects below a certain threshold to avoid certain labor requirements like prevailing wages.[37] Moreover, because IPPs operate in competitive wholesale markets and cannot directly pass labor costs on to ratepayers, they face strong incentives to minimize those costs and maximize returns.[38] The unionization gap between fossil fuel-based and renewable energy-based electricity was not a market accident but the direct result of entrusting the renewable buildout to private, financialized firms whose structure incentivizes avoiding the labor standards that the traditional utility model made possible.

Although some of the unionization gap reflects technical differences between renewable and fossil-based electricity as renewables often require less ongoing labor, much of the gap is a product of legal and institutional choices that can be re-made. More can be done to reinterpret laws, doctrines, and structures, particularly at the state level, to ensure that this clear distinction between working conditions and labor power in clean energy and fossil fuels is mitigated. Because utility and IPP workers are treated as private employees, states seeking to impose labor conditions on clean energy development are constrained by the National Labor Relations Act's (NLRA) preemption doctrine.[39] The NLRA preempts state or local regulation that is arguably protected or

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[37] *See e.g.* U.S. Dep't of Labor, Wage & Hour Div., Inflation Reduction Act (IRA) Guidance, https://www.dol.gov/agencies/whd/IRA. IRA exempting projects below 25MW from prevailing wage requirements.

[38] Matthew Huber, *Unbundling the Grid: Renewable Capital and the Demise of Electricity as a 'Public Utility' in the United States*." DEVELOPMENT AND CHANGE, 2025 ; *see also e.g.* Michael Sainato*, New York Solar Firm Accused of Union Busting After Furloughing Staff*, GUARDIAN (Jan. 6, 2024), https://www.theguardian.com/us-news/2024/jan/06/empower-solar-new-york-union-election-workers-furloughed-united-auto-workers (EmPower Solar hired National Labor Relations Advocates, which advertises a 90% success rate at helping clients "avoid any threat of a union coming into your business" to thwart unionization efforts); Enaya Saleh, *Unionized Energy Workers Concerned About Employment Frictions with Transitions to Renewable Energy*, WorkRise (Sept. 1, 2023), https://www.workrise.org/resources/unionized-energy-workers-concerned-about-employment-frictions-with-transitions-to-renewable-energy/ (finding workers see renewable energy as a source of low-paying, low-skill, temporary jobs"); Lauren Kaori Gurley, *Shifting America to Solar Power Is a Grueling, Low-Paid Job*, Vice (June 27, 2022) https://www.vice.com/en/article/shifting-america-to-solar-power-is-a-grueling-low-paid-job/ (documenting that many solar companies use temp agencies and subcontractors with horrendous working conditions)

[39] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011)

prohibited by the NLRA, under the name of *Garmon* preemption, or that touches an area Congress intended to leave unregulated, under the name of *Machinists* preemption.[40] On one end, then, states cannot enforce laws that interfere with the private rights of utility employees to join and form unions and participate in collective bargaining.[41] These include, for example, regulations that limit or interfere in a utility employee's ability to strike.[42] On the other hand, however, states can regulate minimum labor standards, such as prevailing wages, enact limited oversight of utility employees as they relate to safety, and adjust rates downward to prevent utilities from recovering increased, bargained-for, wages and benefits.[43] Beyond enacting minimum labor standards, such as prevailing wages, the only meaningful exception to preemption arises when the state acts not as a regulator but as a "market participant."[44] The Supreme Court held that when a state acts in its proprietary role as a market participant, it may attach labor conditions in the same way that a private actor could, such as agreeing to a labor peace agreement.[45] Thus, the most protective option to integrate high-road labor standards in clean energy is to locate them where a state, or municipality, is acting as a market participant.

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[40] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Committee*, 427 U.S. 132 (1976).
[41] Inara Scott, *Keeping the Lights On: Examining and Reimagining NLRA Preemption in a Time of Electric Necessity*, 35 ENERGY LAW JOURNAL 415 (2014); States also cannot regulate over management decisions. *See W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294 U.S. 63, 72 (1935) ("Good faith is to be presumed on the part of the managers of a business . . . [and][i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay."); *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 501 Pa. 153, 159 (1983) (absent express legislative authority, Public Utility Commission is powerless to interfere with the general management decisions of public utility companies).
[42] Scott, *supra* note 42; *see also Communications Workers of America, Local 5714 v. Reeb,* 520 N.E.2d 111 (Ind.App. 1 Dist.,1988) (finding a Utility Anti-Strike Act was preempted by the NLRA)
[43] *See e.g. Southern Union Gas Co. v. Rhode Island Div. of Public Utilities and Carriers*, 306 F.Supp.2d 129 (D.R.I., 2004) see also WASH. ADMIN. CODE § 480-93-080 (2014) (covering welder and plastic joiner identification and qualification)
[44] Sachs, *supra* note 40; *See e.g. Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 (1985); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (Boston Harbor),* 507 U.S. 218 (1993).
[45] *Boston Harbor* 507 U.S. at 223.

The Supreme Court established the NLRA market participant exception in *Boston Harbor*. This case, and its progeny, establish that when a state steps into the marketplace as a buyer, a property owner, a lender, or a grantor of subsidies, it acquires a proprietary interest that permits it to condition its participation on labor standards tailored to protect that interest.[46] In the clean energy context, this opens at least three legally defensible avenues: procurement power, exercised through competitive solicitations and Renewable Energy Credit (REC) contracts as illustrated by New York State Energy Research and Development Authority's (NYSERDA) offshore wind model; property management authority, exercised through leases on state-owned land for solar and wind development, as analogized from the Ninth Circuit's decision in *Los Angeles World Airports*; and financing power, exercised through green bank lending, direct grants, and tax increment financing, as grounded in *Sage Hospitality* and *Lavin*.[47] The paper also examines more contested arguments rooted in the PUC's broader regulatory authority, the hybrid public-private character of utilities, the potential use of franchise agreements as proprietary instruments, and the possibility of borrowing from the Dormant Commerce Clause's more permissive market participant exception, given that the NLRA's version was derived from that body of law. Yet the very need to excavate these oblique proprietary footholds, searching for market participant hooks in procurement contracts, financing terms, and property leases just to attach basic labor standards to essential infrastructure, is itself a symptom of path dependence in a privatized utility model never designed to serve workers or clean energy goals. It is also worth noting that expanding state latitude to act as a market participant is not inherently pro-labor: the same doctrinal tools that allow a pro-

[46] *Id.*
[47] *Northern Illinois Chapter of Associated Builders and Contractors Inc v. Lavin*, 431 F.3d 1004 (7th Cir. 2005); *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources,* 390 F.3d 206 (3d Cir. 2004)

labor state to attach union conditions to clean energy procurement could allow a hostile state to attach conditions designed to suppress organizing or exclude union contractors.[48] That double-edged quality does not make the framework less worth pursuing, but it does underscore that legal doctrine alone cannot substitute for the labor and political power necessary to ensure these tools are used to build worker power.

This paper is structured as follows. Section II provides background on utilities, electricity production, and electricity regulation in the United States, outlining the relationships between the various institutional actors. Section III traces the history of public utilities and unionization in the post-World War II era, highlighting the transition from a system of entirely vertically integrated utilities to a mixed system of vertically integrated and competitive markets and the resulting uneven union density across energy sectors. Section IV provides background on NLRA preemption, the market participant exception, and the current state of the law as applied to utilities and labor standards. Section V, given those existing constraints, examines possible paths forward for state actors seeking to implement high-road labor standards in their clean energy buildouts, whether through procurement power, ownership authority, or financing power. Section VI explores other, more speculative, options to expand state authority to regulate labor, and finally, Section VII contemplates the limits of the PUC-centered, privately provisioned model for achieving just outcomes both for ratepayers and for the workers who build and operate essential energy infrastructure. The story of a clean energy buildout with minimal union density is ultimately a story of deregulation, financialization, and market craft. But what law and markets have made, they can also unmake. Legal frameworks can be reinterpreted, markets can be reshaped, and

[48] *See e.g. Mich. Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572, 578 (6th Cir. 2013) (finding a state law prohibiting governmental entities from signing PLAs with unions was not preempted by the NLRA).

worker power can be rebuilt. The task is to ensure that the clean energy buildout is not merely good for the planet, but good for the people who build it.

II. A PRIMER ON UTILITIES, ELECTRICITY PRODUCTION, AND ELECTRICITY REGULATION

Electric utilities, regardless of their ownership structure, have traditionally generated, transmitted, and delivered electrical power to homes, businesses, and other end-users.[49] States where a single utility is the sole actor within a defined area are called vertically integrated states. Most states in the U.S. are still vertically integrated.[50] States where multiple entities, such as Independent Power Producers (IPPs), participate in generation or other steps along the electricity delivery supply chain, are referred to as restructured or deregulated states.[51]

Historically, due to the enormous infrastructure costs (such as constructing and operating power plants, transmission lines, and distribution networks), the provision of electricity was often considered a "natural monopoly."[52] Consequently, many states granted, and still grant, utilities monopolies to operate exclusively within a specified jurisdiction.[53] In exchange for a state-granted monopoly or exclusivity of service as well as some governmental powers, the public utility agrees to increased regulatory oversight that is usually prohibited for private corporations.[54] This

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[49] The focus of this paper is on Investor-owned utilities and IPPs. Note, in some states, utilities do not generate power and only deliver power to end-users. In those states independent power producers are the electricity generators.
[50] U.S. Envtl. Prot. Agency, *Power Market Structure*, https://www.epa.gov/green-power-markets/power-market-structure.
[51] RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (1999).
[52] National Academies of Sciences, Engineering, and Medicine, *The Future of Electric Power in the United States* (2021); Aneil Kovvali & Joshua C. Macey, *Private Profits and Public Business*, 103 TEX. L. REV. 715 (2025).
[53] *Id.*; *see e.g.* Kan. Stat. Ann. 66-1,172 (West 2023) ("[C]omission shall cause the state to be divided into electric service territories. Within each such territory, only one retail electric supplier shall provide retail electric service")
[54] *Id.*

relationship of mutual obligation between the utility and the state has been coined the "regulatory compact."[55]

Approximately half of U.S. states have adopted some form of electricity deregulation, while the remainder retain vertically integrated utility systems.[56] In restructured states, such as Texas and California, utilities may not own all generation infrastructure, though they primarily still own transmission and distribution assets.[57] Instead of a single vertically integrated utility, a variety of firms, including IPPs and competitive retailers, generate and sell power into centralized wholesale markets. These markets are overseen by regional entities called Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs), which assumed responsibility for grid operation and wholesale market administration following deregulation.[58] Thus, in these states, a variety of firms generate and sell power to a wholesale market that utilities then purchase from to sell and deliver to their end-users.[59] Rather than relying on centralized planning, restructured markets use competitive mechanisms to determine generation investment, with generators selling power to load-serving entities that then distribute it to end-users.[60] Utilities in these states do not generate their own power but instead purchase electricity from the wholesale market and deliver it to their customers.

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[55] Heather Payne, *Private (Utility) Regulators*, 50 ENVT'L L. 999 (2020)
[56] ElectricRates.org, *Deregulated Energy States: Complete List*, https://electricrates.org/blog/deregulated-energy-states-complete-list. For example, deregulated states include Texas (a right-to-work state), New York (not right-to-work), and Illinois (not right-to-work), whereas regulated states include Florida (right-to-work), Georgia (right-to-work), and California (not right-to-work). *See* National Right to Work Legal Defense Foundation, *Right to Work States*, https://www.nrtw.org/right-to-work-states/
[57] Severin Borenstein & James Bushnell, *The U.S. Electricity Industry After 20 Years of Restructuring*, ANN. REV. ECON. (2015)
[58] *Id.*
[59] HIRSH, supra note 51.
[60] Richard J. Pierce Jr., *Realizing the Promise of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451 (2005).

What began as localized, state-regulated monopolies has evolved into a set of interconnected regional systems (predominantly) federally regulated at the transmission and wholesale generation level[61] and (predominantly) state regulated at the retail and distribution level.[62] Often, a utility needs both approval from the state and an agreement from a local government to operate.[63] State public utility commissions (PUCs) retain primary authority over retail sales and local distribution.[64] Generally, PUCs must set "just and reasonable rates" as to not be confiscatory of the private corporation's returns, and in return, require the utility to uphold its duty to provide electricity to the public subject to regulated prices and non-discrimination.[65] Through this ratemaking authority, PUCs play the primary regulatory role in mitigating the consequences of the monopoly grant enjoyed by investor-owned utilities i.e. preventing utilities from charging monopoly prices at the expense of ratepayers.[66] However, PUCs do allow utilities

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[61] In terms of wholesale/transmission, utilities in restructured states interact with Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) by scheduling power flows, submitting generation bids into the wholesale market, and coordinating grid reliability and congestion management. ISOs and RTOs operate high-voltage transmission networks and coordinate wholesale electricity markets across multiple utility territories, often spanning state lines, but they do not own the transmission infrastructure they manage. Utilities, by contrast, own and maintain generation, transmission, and distribution assets and serve retail customers. ISOs and RTOs are regulated by the Federal Energy Regulatory Commission (FERC) under the authority of the Federal Power Act. 16 U.S.C. §§ 791a–828c.

[62] Troesken, W., *Regime Change and Corruption: A History of Public Utility Regulation*, NBER (2006) (Describing how regulation of the gas and electric industries progressed through four phases: weak municipal "franchise" control (1850–1899), aggressive municipal regulation (1900–1909), state regulation (1907–1977), and limited state/municipal oversight with some competition after the passing of PURPA (1978–present))

[63] *See e.g.* Jeffrey J. Cook et al., *Wait, Cities Can Do What? Achieving City Energy Goals Through Franchise Agreements*, 144 ENERGY POLICY 111619 (2020), https://doi.org/10.1016/j.enpol.2020.111619.

[64] PUCs are generally state agencies created by legislature. Nat'l Conf. of State Legislatures, *Engagement Between Public Utility Commissions and State Legislatures* (Oct. 28, 2019), https://www.ncsl.org/energy/engagement-between-public-utility-commissions-and-state-legislatures. However, in some cases PUCs are a creation of the state constitution rather than a legislature, potentially implying greater regulatory authority. *See e.g. Miller v. Arizona Corp. Comm'n*, 227 Ariz. 21 (Ariz.App.Ct. 2011)

[65] See United States v. Consol. Edison Co. of New York, 580 F.2d 1122, 1128 (2d Cir. 1978); Southwestern Bell Telephone, 262 U.S. at 289; People ex rel. Cayuga Power Corp. v. Public Service Commission, 226 N.Y. 527, 532 (1919) (Cardozo, J.) (emphasizing that "(t)he duty to serve the public goes hand in hand with the privilege of exercising a special franchise."); United States v. Consol. Edison Co. of New York, 580 F.2d 1122, 1128 (2d Cir. 1978).

[66] Monast, *supra* note 15; Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REG. 1 (2023)

to recover a fixed rate of return on costs included in a utility's rate base.[67] Utilities can also recover variable operating costs (like fuel and labor) but these costs are not included in the rate base so they cannot earn a return on them.[68]As a privately run enterprise with an incentive to maximize profits, utilities, then, have a financial incentive to prioritize expensive construction, investment in infrastructure, and overbuilding generation capacity (which are included in the rate base) while minimizing fuel and labor costs (which are not included in the rate base).[69] PUCs also ensure reliable service for customers, impose service requirements, approve major infrastructure projects, implement state energy policies, monitor utility compliance, and direct long-term resource planning.[70] Utilities are also affected by other state laws, as state legislatures structure franchise and licensing laws, set climate goals, establish siting and environmental review procedures, and create and regulate PUCs.[71]

To construct new generation or operate in a new jurisdiction, utilities interface with every layer of governance. New electricity generation is regulated through a combination of federal, state, and local requirements, with utilities typically needing Federal Energy Regulatory Commission (FERC) approval for interconnection and wholesale participation, state PUC approval for siting and cost recovery, and local permitting for construction and environmental compliance.[72] As utilities are private companies whose employees are subject to the NLRA,

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[67] *Id.*
[68] Rates are set by determining a utilities required revenue set by the formula: revenue = rate base x rate of return + operating costs. *See generally* JIM LAZAR, ELECTRICITY REGULATION IN THE U.S. (2nd ed. 2016).
[69] Monstat, *supra* note 15. Note, as argued *infra*, in Section III, this imperative to minimize labor costs is arguably lower for rate-regulated utilities as compared to generators competing in a wholesale market.
[70] Alison Gocke, Public Utility's Potential, 133 YALE L.J. 2772 (2024)
[71] *See* Cook *supra* note 63. Franchise laws determine what provisions agreements between utilities and local governments can contain, *see e.g.* Cal. Code Regs. Tit 1 § 6201 (2024) (regulating municipal utility franchising in California).
[72] Steven Ferrey, *Siting Technology, Land-Use Energized*, 66 CATH. U. L. REV. 1 (2017).

utilities and developers have primary authority to set labor conditions for new generation as owners and managers of the new projects. PUCs, state agencies, and municipalities when certain conditions are met can also set labor standards for these new projects.[73] Thus, these actors are the main focus of this paper.

IPPs also operate within a dual federal and state regulatory framework but are often less directly regulated by a PUC than a traditional utility.[74] IPPs are regulated by federal authority by FERC under the authority granted to them by the Federal Power Act (FPA).[75] However, to construct and maintain generation infrastructure, IPPs are subject to state and local siting, environmental, and interconnection regulations.[76] In states without retail competition, IPPs may contract directly with retail utilities, and these contracts may be reviewed by PUCs.[77]

III. HISTORY OF UTILITY LABOR AND CLEAN ENERGY

The source of differing density between unionized, primarily fossil fuel, utility labor and non-unionized renewable energy labor is arguably found within the linked histories of electric utility deregulation and government sponsored clean energy incentive programs. This history results in a fractured landscape where federal and state governments provide incentives to Independent Power Producers (IPPs) to develop renewables without corresponding incentives for utilities. The "tax subsidy bias in [the] IPP dominance" of renewables "ha[s] made regulated investor-owned utilities in the United States unable to profitably use [clean energy tax credit

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[73] *See* e.g. Gocke, *supra* note X; California PUC §769.2 (designating certain renewable electrical generation projects as public works subject to prevailing wage requirements); *see also* LAZAR *supra* note 67.
[74] Fed. Energy Regul. Comm'n, *FERC 101: The Federal Energy Regulatory Commission—An Overview* (2019), https://www.ferc.gov/sites/default/files/2020-07/ferc101.pdf
[75] *Id.*
[76] U.S. Dep't of Energy, *Siting of Large-Scale Renewable Energy Projects*, https://www.energy.gov/cmei/siting-large-scale-renewable-energy-projects
[77] *See e.g. FERC v. Mississippi*, 456 U.S. 742, 751–52 (1982)

incentives]."[78] Thus, most clean energy is developed, owned, and operated by non-utility firms.[79] Moreover, these clean energy firms tend to be far less unionized, as the sector's growth has been shaped by financialized ownership models focused on short-term returns with incentives to minimize labor and other costs.[80] Unlike fossil fuel or regulated utility companies, which often have guaranteed rates of return that make them less financially pressured and more able to maintain unionized, secure workforces, clean energy projects rely on temporary construction and contract labor, discouraging unionization and limiting worker power.[81]

a. ***Utility Markets and Unions Before Deregulation****.*

Prior to the 1980s, most U.S. investor-owned electric utilities operated as vertically integrated, regulated monopolies that owned generation, transmission, and distribution infrastructure.[82] Before deregulation accelerated in the 1980s and 1990s, electric utilities had relatively high union density compared to most private industries.[83] Union membership, primarily in the International Brotherhood of Electrical Workers (IBEW) and the Utility Workers Union of America (UWUA), was widespread, with estimates suggesting that roughly 30 to 50 percent of the electric utility workforce was unionized prior to restructuring, far above the private-sector average,

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[78] See Sarah Knuth. *Rentiers of the low-carbon economy? Renewable energy's extractive fiscal geographies.* ENVIRONMENT AND PLANNING A: ECONOMY AND SPACE, 55(6), 1548–1564. (2023)
[79] *Id.*
[80] *Id.*; see also William Boyd, *Decommodifying electricity*, S. CAL. L. REV., 97, 937. (2024); William Boyd, *The Tax Struggle and Renewable Power*, 79 TAX L. REV. 25 (2026).
[81] *See supra* note 39; *see also* Governors' Wind Energy Coalition, *Why Major Unions Are Wary of the Move to Wind and Solar Jobs*, https://governorswindenergycoalition.org/why-major-unions-are-wary-of-the-move-to-wind-and-solar-jobs. Note, however, as mentioned *infra* there is still an incentive to minimize labor costs as it is not included in the rate base upon which the utility gains their return. Arguably, in relation to electricity generators without a guaranteed rate of return, this pressure to cut costs is likely higher.
[82] Kathryne Cleary & Karen Palmer, *US Electricity Markets 101*, RES. FOR THE FUTURE (Mar. 3, 2020), https://www.rff.org/publications/explainers/us-electricity-markets-101/; Mary Harrington, *Renewable Energy's Progressive Halo*, UNHERD (May 5, 2023), https://unherd.com/2023/05/renewable-energys-progressive-halo/; Peter S. Goodman, *The Greening of America's Jobs Is Finally Beginning*, N.Y. TIMES (July 16, 2021), https://www.nytimes.com/2021/07/16/business/economy/green-energy-jobs-economy.html.
[83] Matt T. Huber, *Unbundling the Grid: Renewable Capital and the Demise of Electricity as a 'Public Utility' in the United States*, 56 DEV. & CHANGE (2025).

which had already fallen below 15 percent by the 1980s.[84] This relatively high density was in part sustained by a utility's guaranteed rate of return, which insulated utilities from competitive pressures and allowed labor costs to be passed on to consumers.[85] Union leaders also understood that rate regulation and the guaranteed rate of return protected workers.[86] The pre-deregulation electric utility industry combined stable employment, centralized bargaining, and limited market competition, all of which supported a strong and persistent union presence.[87]

b. Deregulation through Restructuring

In the latter half of the twentieth century, restructuring affected a broad swathe of regulated industries in the United States, including electric utilities.[88] By the 1970s, a confluence of forces had begun to erode public and political confidence in the traditional model of regulated utility monopolies. The oil embargoes and associated energy crises of that decade drove electricity prices sharply upward, while utilities, having exhausted the economies of scale that had long allowed them to deliver cheaper prices through overbuilding, could no longer keep electricity prices down for consumers.[89] Simultaneously, ideological movements critiquing 'overregulated' industries in

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[84] *Id.* Note, however, that the unionized utility workforce was shaped by decades of exclusion of people of color and women from employment in the sector and that energy infrastructure primarily created high-wage jobs for predominantly white men. *See* e.g. Nikki Luke, *Just Transition for All? Labor Organizing in the Energy Sector Beyond the Loss of "Jobs Property"*, 113 ANNALS AM. ASS'N GEOGRAPHERS 94 (2023).
[85] *Id.*
[86] Matthew T. Huber & Fred Stafford, *The Utility of Utilities*, DAMAGE MAG. (Apr. 2024), https://www.damagemag.com/p/the-utility-of-utilities.
[87] *See e.g.* Edwin W. Morehouse, *The Background of Labor Relations of Public Utilities*, 5 J. LAND & PUB. UTIL. ECON. 412 (1929). Morehouse; *c.f. Id.* Morehouse argued that limited market competition resulted in worse outcomes for bargaining because there was nowhere else for utility workers to go.
[88] William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014), as reprinted in 45 ENVTL. L. REP. 10788 (2015), available at http://scholar.law.colorado.edu/articles/62/; R. M. Johnson, *Unions and Deregulation: Some Lessons for Utilities*, 134 PUB. UTILS. FORTNIGHTLY, 16 (1996).
[89] *Id.*

the name of free markets gained significant traction and sold deregulation of the electricity sector as the way to bring down electricity prices.[90]

New environmental legislation, including the Clean Water Act and the Clean Air Act Amendments, imposed new compliance costs on fossil fuel generators and began to force regulators to grapple with the environmental consequences of electricity generation.[91] This focus on cleaning up the electricity system, combined with growing public concern about energy conservation and the environment, broadened the coalition interested in restructuring the electric utility sector. Together, free market advocates and environmentalists championed greater competition in electricity under the banner of environmental and social goals, namely lower prices for consumers and a greater emphasis on conservation and environmental impacts.[92] Their goal was to unbundle power generation from transmission and delivery (e.g. separating electricity production and retail), introduce competition in the generation (and later retail) side of electricity production, and simultaneously increase clean energy generation.

Federally, one of the most influential laws that enacted this vision was the Public Utility Regulatory Policy Act (PURPA). One of the most important effects of the law was to create a market for power from non-utility power producers. Before PURPA, only utilities could own and operate electric generating plants.[93] The Act also required utilities to purchase power from certain qualifying facilities including, importantly, renewable energy facilities at "avoided cost" rates.[94] States responded accordingly and enacted laws to deregulate their electricity industries and

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[90] *Id.*
[91] HIRSH, *supra* note 51.
[92] *Id*.
[93] Union of Concerned Scientists, *Public Utility Regulatory Policies Act*, https://www.ucs.org/resources/public-utility-regulatory-policy-act
[94] *Id.* An avoided cost is the cost the utility would otherwise incur to generate the same electricity itself.

amplify the effects of PURPA. California, for example, adopted generous contract provisions to compensate IPPs and other small generators pursuant to PURPA, which gave the nascent renewable power industry in that state a boost.[95] As discussed in Section II, the newer power generators that entered the market following restructuring, most commonly organized as IPPs, were structured differently from traditional utilities and operated under a distinct regulatory regime. Unlike traditional utilities, IPPs operate in competitive wholesale markets without guaranteed rates of return, creating substantially stronger incentives to minimize costs, maximize output, and grow profits through operational performance rather than through regulatory proceedings.[96] In 1992, building on the growing momentum towards a deregulated power sector, Congress passed the Energy Policy Act, which further encouraged wholesale power competition. This law, unlike PURPA, also facilitated state authorization of retail competition, where consumers could choose between different firms to buy their electricity from.[97] For example, Texas implemented Senate Bill 7, both allowing consumers to choose electricity providers and separating generation from transmission and distribution.[98] Moreover, the Act provided over $14 billion in tax incentives and loan guarantees for traditional and renewable energy production.[99]

c. The Impacts of Deregulation on Unions, Workers, and Beyond

Carl Wood, the deregulation coordinator for the UWUA, called deregulation of the sector "our NAFTA."[100] IBEW and UWUA consistently opposed electricity deregulation and

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[95] *Id*.
[96] Kovvali & Macey, *supra* note 52.
[97] Jim Rossi, *The Electrical Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768 (2002).
[98] M.K. Heiman, *Expectations for Renewable Energy Under Market Restructuring: The U.S. Experience*, 30 Energy Pol'y (2005), https://doi.org/10.1016/S0360-5442(05)00048-4.
[99] *Id.*
[100] Jane Slaughter, *Power Struggle: Unions Fight Electrical Deregulation*, LABOR NOTES (July 1999), https://labornotes.org/1999/07/power-struggle-unions-fight-electrical-deregulation.

restructuring, arguing that competition would erode unionized utility jobs, reduce wages, and harm consumers.[101] Other unions joined in and actively resisted deregulation, with many unions protesting and rallying against PUCs and state legislatures who advocated for deregulation.[102] The AFL-CIO, for example, argued that "[r]adical deregulation of the electric industry will result in significant job loss within the industry and in related industries and will cause an increase in electricity rates particularly for residential consumers."[103] AFSCME passed a resolution opposing deregulation, announcing that deregulation would lead to worse outcomes for consumers and workers due to "profiteering." [104]

These fears were borne out; the impact of deregulation on utility unions was devastating. States mandated the divestiture of generation assets from incumbent utilities, and utilities themselves voluntarily sold off generation plants as the industry restructured around competitive wholesale markets.[105] The resulting wave of consolidation reshuffled workforces and weakened existing collective bargaining agreements.[106] The transfer of generation assets to new private owners who bore no obligation to honor existing collective bargaining agreements rapidly dismantled unionized workforces that had taken decades to build. Union ranks in the sector

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[101] *Id.;* "The Utility Workers… opposed deregulation altogether," calling market systems harmful to consumers and workers alike

[102] *See e.g.* ERIC WOLFE, FIST FULL OF LIGHTNING: WORKERS, POWER AND THE INVENTION OF A UNION *263* (2016). IBEW CA "Six thousand workers will be gone. But we will still have winter storms. We will still have fires burning. We will still have earthquakes—all this with 6,000 fewer people to respond."

[103] Am. Fed'n of Labor & Cong. of Indus. Orgs., *Stability of the Electric Utility Industry*, https://aflcio.org/about/leadership/statements/stability-electric-utility-industry

[104] Am. Fed'n of State, Cnty. & Mun. Emps., *Electricity Deregulation*, 1998 Int'l Convention Res. No. 1, https://www.afscme.org/about/governance/conventions/resolutions-amendments/1998/resolutions/1-electricity-deregulation

[105] Chiung-Ying Cheng, *Two Essays on the Impact of Deregulation on Labor in the Electric Power Industry* (Ph.D. dissertation, Mich. State Univ. 2000).

[106] *Id.*

declined from 209,000 in 1995 to 175,000 in 2002.[107] Other studies estimate between a 27-37 percent decline in unionized employment in the electric utility sector after deregulation, whereas employment of nonunion workers did not show a significant change.[108] In California, almost 6,000 IBEW members who worked at Pacific Gas & Electric (PG&E) lost their jobs and over 1,400 workers from Southern California Edison were laid off.[109] Where workers did secure some protection, it often came in the form of what union organizers grimly termed "burial insurance", which were negotiated packages of severance pay, early retirement benefits, and retraining programs providing 24 to 30 months of transitional employment.[110] However, such protections varied dramatically by state, with California and Massachusetts securing legislative or commission-ordered protections while workers in Pennsylvania and Rhode Island were left largely without recourse.[111] In terms of compensation, research suggests that union workers in the electricity industry saw their wage premiums decline by 13 percent following deregulation, while nonunion workers experienced no comparable decline, indicating that deregulation specifically undermined the bargaining power that had historically allowed union members to command higher wages.[112]

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[107] Matthew T. Huber & Fred Stafford, *The Utility of Utilities*, DAMAGE MAG. (Apr. 2024), https://www.damagemag.com/p/the-utility-of-utilities.
[108] Jane Slaughter, *Deregulation Bites Back: California*, Labor Notes (Mar. 2001) https://labornotes.org/2001/03/deregulation-bites-back-california; *see also* Matthew S. Niederjohn, *Regulatory Reform and Labor Outcomes in the U.S. Electricity Sector*, 126 MONTHLY LAB. REV. 10 (2003) (finding that "employment dropped 29% in restructured states and 19% in other states since the peak in 1991…[t]hat 10% difference would have lowered cost by 0.7%, since labor costs represent only 7% of electricity cost").
[109] Slaughter, *supra* note 108.
[110] Joseph F. Schuler Jr., *The Union Label: Electric Restructuring's Hidden Side — Will Work Be Protected?* 135 PUB. UTILS. FORTNIGHTLY 17 (1997) https://www.proquest.com/docview/213231333?sourcetype=Trade%20Journals.
[111] *Id.*
[112] Cheng *supra* note 105.

Unions entered the restructured market at a profound disadvantage. They had no pre-existing relationships with the new power generators that had acquired divested assets, and were forced to rebuild union presence from scratch, waging new recognition campaigns with owners who had no history of collective bargaining and little incentive to welcome it.[113] Wages, conditions and rights on the job were often worse than those at the old utilities, where unions had spent decades building their bargaining power under the relative stability of the monopoly model. Jim Harrison, Director of Renewable Energy at the UWUA, described how union contracts at divested plants could be lost entirely, or if unions "already had a labor agreement with a utility for 40-plus years," those had to be "negotiat[ed] from scratch" with the IPPs who took over.[114] All PG&E facilities in California, for instance, had unions. But the company's subsidiary, USGen, while it used union labor in building new plants, historically has had no unions in the workforce that operated the plants. Nor did it intend to, according to USGen spokesperson Jack Hawks.[115] As a consequence, wages paid by USGen were considerably below those at PG&E.[116] Indeed, Wood lamented that workers "have been used to a protected environment" because "[t]he bottom line for our employers was never affected by how much they could squeeze us, because they were guaranteed a profit on top of their costs" but "[n]ow, their profits will be directly affected by how much they squeeze wages and benefits."[117]

The debate over PURPA reveals a sharp divide between climate and labor advocates, particularly in how they assess the legacy of deregulation. Environmental groups, such as the

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[113] Slaughter, *supra* note 108; David Bacon, *California's Disaster With Electrical Deregulation*, DAVID BACON (Jan. 9, 2001), https://dbacon.igc.org/PJust/02ElecDereg.htm
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

Union of Concerned Scientists, have praised PURPA as a landmark policy, calling it "the most effective single measure in promoting renewable energy."[118] While PURPA did encourage the growth of independent power producers, much of this expansion came not from wind or solar but from fossil fuel–based qualifying facilities that sold electricity directly to industrial users.[119] More broadly, the promise that competitive electricity markets would automatically drive a transition to cleaner energy was unfounded. Deregulated wholesale markets, structured around prioritizing the least-cost energy available, systematically favored the cheapest generation, which, in the 1990s to early 2000s meant fossil fuels rather than renewables.[120]

Moreover, deregulation proved harmful to consumers. For example, in California, following the state's restructuring under Assembly Bill 1890, wholesale electricity prices spiked by over 800 percent, rolling blackouts swept the state, and PG&E filed for bankruptcy.[121] The scale of the crisis was in part caused by the downsizing of the utility workforce. In losing utility workers, utilities also lost the institutional knowledge and maintenance capacity that those workers carried.[122] Almost 30 years later, Texas Winter Storm Uri revealed that deregulated grids were still ill-equipped to handle extreme weather events. When temperatures dropped to historic lows, approximately a third of the state's generating capacity failed, leaving more than four million Texans without power for days and resulting in over 200 deaths.[123] Investigations into the incident

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[118]Union of Concerned Scientists, *Public Utility Regulatory Policies Act*, https://www.ucs.org/resources/public-utility-regulatory-policy-act. "Third-party electricity providers therefore must look to savings in labor and administrative costs, or to management economies of scale, to offer lower prices to potential new customers.
[119] Slaughter, *supra* note 108.
[120] Severin Borenstein, *The Trouble With Electricity Markets: Understanding California's Restructuring Disaster*, 16 J. ECON. PERSPECTIVES 191 (2002); Paul L. Joskow, *California's Electricity Crisis*, 17 OXFORD REV. ECON. POLICY 365 (2001).
[121] *Id.*
[122] HIRSH, *supra* note 51; Bacon, *supra* note 113.
[123] Patrick Svitek, *Texas Winter Storm Death Toll: 246 People Killed*, TEX. TRIB. (Jan. 2, 2022), https://www.texastribune.org/2022/01/02/texas-winter-storm-final-death-toll-246/.

found that the deregulated market had failed to invest in winterization measures that a more heavily regulated system would likely have required.[124] As climate change makes extreme weather events more frequent and more severe, the stress placed on electricity infrastructure will only intensify. A deregulated grid, built on short-term contracts, thin reserve margins, and a contingent workforce stripped of the union representation that once provided both labor stability and institutional knowledge, is structurally ill-equipped to absorb those shocks. The costs of this system are borne by both the public, through increased costs and danger when the system fails, and workers who must respond to crises with weakened workplace protections and diminished pay.

IV. LABOR PREEMPTION

Given the trajectory of clean energy as predominantly non-union and heavily financialized, what then can be done to ensure that the continued future of the clean energy buildout is done with high-road labor standards? As Congress often sits at impasse and the administrative state is being dismantled, states seem the best poised to act on the issue. However, states are limited by preemption under the National Labor Relations Act (NLRA) in their ability to regulate the labor relations of private employees within their borders. This section, and the next, highlight the state of labor law preemption and potential paths forward, given these constraints.

Since the concern of this paper is primarily with the construction, ownership, and management of electricity generation, this paper primarily focuses on vertically integrated utilities in regulated states and Independent Power Producers (IPPs) in de-regulated states. More specifically, this paper focuses on investor-owned utilities (and not publicly owned utilities) whose

[124] Fed. Energy Regulatory Comm'n & N. Am. Elec. Reliability Corp., *The February 2021 Cold Weather Outages in Texas and the South Central United States* (Nov. 2021), https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and.

employees are regulated under the NLRA (rather than state labor law). Under the NLRA's preemption regime, federal law will override state or local regulation that is arguably protected or prohibited by the NLRA, under the name of *Garmon* preemption, or state law that operates within an area Congress intended to leave unregulated, under the name of *Machinists* preemption.[125] The few ways states can avoid preemption are to regulate under minimum labor standards, during times of "imminent harm," or to act as a market participant.[126] Thus, in the utility context, courts have found that states can only regulate utility employers to a limited degree and primarily only through minimum labor standards. Despite the hybrid public-private character of investor-owned utilities, state courts and legislatures rarely account for their unique form in their preemption analysis, instead treating utilities as purely private corporate actors and applying the same frameworks that would govern any ordinary private employer.

a. Current Status of Labor Preemption and Utilities

There are a few limited cases in which courts have considered NLRA preemption in the utility context. This section provides a general, non-exhaustive, overview of these cases. Generally, courts have drawn a further distinction between impermissible regulatory interference with

[125] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Committee*, 427 U.S. 132 (1976).
[126] *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (Boston Harbor),* 507 U.S. 218 (1993) (finding that when the state acts as a market participant they can be exempt from NLRA preemption); *See e.g. Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), (finding states may enjoin violent or intimidating picketing when "imminent harm" is present despite picketing being under the purview of the NLRA). Note however, this exception is especially narrow. *See* Scott, *supra* note 42; *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) (finding minimum labor standards are not necessarily preempted); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316 (1997); *see also Associated Builders & Contractors of Southern California, Inc. v. Nunn, 356 F.3d 979* (9th Cir. 2004) (finding requiring state-registered apprenticeship programs on public works projects not preempted); *c.f. Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) (finding that a county ordinance requiring prevailing wages on private construction projects was preempted)

collective bargaining and a narrower set of permissible state actions tied to wage standards, safety, and ratemaking authority.

i. Impermissible regulations

Courts have consistently held that states cannot enforce laws that interfere with the private rights of utility employees to join and form unions and participate in collective bargaining.[127] These include regulations that limit or interfere in a utility employee's ability to strike.[128] These also include other statutes or regulations that interfere with the collective bargaining process. For example, during deregulation, in *Commonwealth Edison Co. v. Int'l Bhd. of Elec. Workers, Loc. Union No. 15*, the court found that a state statute that made collective bargaining agreements binding against successor employers of the utility impermissibly interfered with collective bargaining and was preempted.[129] The state had implemented this law to protect workers at divested generating stations shortly after the state had deregulated its electricity system. Courts have discredited state arguments that utility employees' labor power must be circumscribed to protect electricity provision, reliability, and safety, by for example, striking down anti-strike laws for utility workers.[130]

ii. Permissible regulations

Some courts have held that states can regulate prevailing wages with utility contractors.[131] In *California Edison*, a California State Appellate Court held that a Public Utilities Commission rule mandating at least prevailing wages on all utility construction contracts was not preempted by

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[127] Scott, *supra* note 42.
[128] *Id.*; *see also Communications Workers of America, Local 5714 v. Reeb,* 520 N.E.2d 111 (Ind.App. 1 Dist.,1988) (finding a Utility Anti-Strike Act was preempted by the NLRA)
[129] 961 F. Supp. 1169 (N.D. Ill. 1997)
[130] *Reeb,* 520 N.E.2d at 115.
[131] *See S. California Edison Co. v. Pub. Utilities Com.,* 140 Cal. App. 4th 1085 (2006) ("California Edison")

the NLRA as the prevailing wage provision, although substantive, did not interfere with the process of collective bargaining.[132] Specifically, the court found neither *Garmon* nor *Machinists* preemption.[133] However, the court entirely disregarded the fact that the regulation pertained to a public utility and did not remark on the unique relationship between a public utility and the state.[134] The court instead focused on the authority that states have to ensure minimum labor standards for their workers.[135]

States can also regulate some aspects of utility employment if they relate to safety and can do so under a state's police power. However, traditionally, the NLRA has required "imminent harm," which has usually meant some form of violence, to find that state police powers preempt the NLRA.[136] In the utility context, the closest a court has come to expanding this view of safety is found in *Southern Union Gas Co. v. Rhode Island Div. of Public Utilities and Carriers*.[137] The court there found that the regulation of employee qualifications related to the handling of natural gas was not necessarily preempted as requirements were related to safety and were within the state's police powers to regulate.[138] The argument for intervening in utility labor relations under the name of safety has primarily been done during utility lockouts after bargaining has broken down. Although legislators in *Southern Union Gas Co.* invoked this argument to introduce a law that was indirectly supportive of the union's efforts, it is usually done to prevent strikes and

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id*.
[136] *Scott*, supra note 42.
[137] 306 F.Supp.2d 129 (D.R.I., 2004).
[138] *See also* WASH. ADMIN. CODE § 480-93-080 (2014) (covering welder and plastic joiner identification and qualification); But see Ultimately, the court was unable to resolve the case on summary judgment; on remand, the statute was held preempted by the Natural Gas Pipeline Safety Act, rather than the NLRA. See generally *S. Union Co. v. R.I. Pub. Util. Comm'n*, 2006 U.S. Dist. LEXIS 7726 (D.R.I. Feb. 10, 2006).

maintain constant service.[139] Thus, expanding or manipulating the state safety doctrine may cut against building union power.

In addition, courts have also allowed rate related adjustments that indirectly affect labor relations. They do so under the principle that rate determinations will inevitably affect the wages of utility workers but that such a connection is attenuated and does not qualify as a substantive interference in bargaining. In *Sw. Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, for example, the Arkansas' PUC was not preempted under the NLRA from adjusting downward the expenses a telephone utility could recover for wages and benefits that were bargained for by utility workers.[140] The utility had requested from the commission an increased rate that it claimed was attributable to the bargained-for wage increase.[141] The court, however, sided with the PUC and found its disallowance of what it thought was an unreasonably high wage did not interfere with the collective bargaining process as it did not control the terms of any particular agreement.[142] The court conceded that such an act may indirectly influence future bargaining but that was not a sufficient concern to warrant preemption.[143] Similarly, in *Flaherty v. Pub. Serv. Comm'n of N.Y.*, the court held that the PUC's settlement with a utility, including a 1 percent productivity adjustment, was not preempted by the NLRA even though it limited the amount of labor costs a utility could recover.[144]

b. The Market Participant Exception

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[139] *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).
[140] 824 F.2d 672 (8th Cir. 1987)
[141] Id.
[142] Id.
[143] Id.
[144] 1994 Dist. Lexis 11783 (S.D.N.Y. Aug. 23, 1994). Note, a productivity adjustment is a percentage-based adjustment of an agreed upon rate that assumes that a company should be able to produce the same (or more) output with fewer resources over time, so regulators reduce the costs the company is allowed to pass on to customers.

As the other exceptions to NLRA preemption are relatively narrow, the most promising pathway for expanded labor regulation is through the market participant exception.[145] This section provides an overview on the market participant exception and focuses on potentially relevant caselaw for the utility context. The NLRA market participant exception comes from *Boston Harbor*, a Supreme Court case that involved a state agency requiring project labor agreements for companies interested in contracting with the agency to clean up a port.[146] The Court reasoned that since the labor requirement was tailored to a specific project and since the state agency had a proprietary interest in efficient and timely project completion, such a requirement is not preempted.[147] In other words, the Court found that the government was not using a pretext to regulate labor and instead was acting essentially as any other private actor would, i.e., as a "market participant."[148] In the wake of *Boston Harbor*, however, the market participant exception has been generally applied narrowly.[149]

It is settled doctrine for the exception to apply that the government must participate in a market.[150] But courts have struggled to define exactly what that market is and whether the government can claim market participant status based on a "proprietary interest in the *functioning* of a market" rather than direct participation as a buyer, seller, or owner in a traditional market.[151]

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[145] Minimum labor standards have been held to include apprenticeship standards (*Dillingham,* 519 U.S. at 316), prevailing wages (Rondout Electric, Inc. v. New York State Department of Labor (335 F.3d 162 (2d Cir. 2003))), health benefits (*Metropolitan Life*, 471 U.S. at 724), and one-time severance payments (*Fort Halifax Packing Co. v Coyne*, 482 U.S. 1 (1987)). As mentioned *supra* note 133, the "imminent harm" or 'emergency exception' to the NLRA has been read very narrowly. See also *infra* for a discussion on why expanding this exception may have anti-union effects.
[146] *Boston Harbo*r, 507 U.S. at 232.
[147] *Boston Harbo*r, 507 U.S. at 232.
[148] *Id.* at 229.
[149] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States,* 124 HARV. L. REV. 1153 (2011)
[150] Louis Cholden-Brown, *Planes, Trains and Trucks: Applying the Market Participant Exception to the Government as Proprietary Owner of Hubs of Commerce*, 47 COLUM. J.L. & SOC. PROBS. 1 (2013).
[151] *Id.* (emphasis added)

This is relevant to the utility context as PUCs and other regulators operate as market-shapers who contract out their electricity needs to private corporations.[152] Thus, PUCs, and the state, have an interest in the functioning of the market.[153] Moreover, in vertically integrated states with a limited number of utilities operating in separate, but constrained, geographical ranges, and arguably where there is not a 'market' at all, how does this exception work? As courts have not directly addressed the market participant question as it relates to utilities and the NLRA, this section highlights market participant caselaw related to procurement and contracting that might shed light on this question.

In 1986, the Supreme Court in *Wisconsin v. Gould* held that a Wisconsin statute that prohibited contractors who had violated the NLRA three times within a five-year period from contracting with the state was preempted under the NLRA.[154] The Court reasoned that despite the state exercising its "spending power," the purpose of the rule was to enforce the requirements of the NLRA and that the law had no connection to a state's proprietary interest and was thus "tantamount to regulation."[155] In 1989, in *Golden State Transit Corp. v. City of Los Angeles*, the Supreme Court held that "a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process," despite claims that "it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises."[156]

Later, in 2008, the Supreme Court in *Chamber of Commerce v. Brown* held that California could not bar recipients of state funds from utilizing those funds to "assist, promote, or deter union

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[152] *See e.g.* Katharine Southard, *U.S. Electric Utilities: The First Public Private Partnerships?* 39 PUBLIC CONTRACT L.J. 395 (2010). Southard describes this dynamic as a "public private partnership" where the government is acting as a contractor.
[153] *Id.*
[154] 475 U.S. 282 (1986)
[155] *Id.*
[156] 493 U.S. 103 (1989).

organizing."[157] In its reasoning, the Court held that the statute was not "specifically tailored to one particular job" nor was it a "legitimate response to state procurement restraints or to local economic needs."[158] The Court further held that although California had a "legitimate proprietary interest in ensuring that state funds are spent in accordance with the purposes for which they [were] appropriated," the Court found this was not the objective of the statute in question.[159] Although California could "choos[e] to fund a program dedicated to advance certain permissible goals, it [was] not permissible for a State to use its spending power to advance an interest that. . . frustrates the comprehensive federal scheme established by" the NLRA.[160] The dissent noted that "the regulator/market participant distinction suggests a false dichotomy" as the opposite of market participant "is not necessarily regulator".[161] The dissent argued that since the bill did not "compel labor-related activity" it should not be preempted by the NLRA. In other words, the dissent more distinctly leaves room for a market participant exception for interests in the *functioning* of a market.

In applying these tests, most circuits, including the Second, Fifth, Sixth, and Ninth Circuits, apply a form of a two-part test which essentially asks: first, whether a state's action resembles a private purchaser seeking to efficiently obtain goods or services, and second, whether the action is narrowly focused enough to suggest its focus is a proprietary issue rather than advancing broad regulatory policy.[162] 'Efficient' in this test has been found to not "merely mean cheap" but rather "procurement that serves the state's purposes—which may include purposes other than saving

[157] 554 U.S. 60 (2008)
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Cholden-Brown, *supra* note 150.

money—just as private entities serve their purposes by taking into account factors other than price in their procurement decisions."[163] The Third Circuit, as exemplified in *Sage Hospitality*, discussed *infra*, uses a similar two-part framework focused on whether the state is acting like a private corporation or owner and whether the conditions are specifically tailored to that proprietary interest.[164] Circuits differ in how strictly both prongs must be met: the Second, Third, and Fifth Circuits generally require both prongs, while the Sixth and Ninth Circuits allow either prong to suffice.[165]

In *Air Transport Ass'n of America v. San Francisco* and *Airline Service Providers Ass'n v. Los Angeles World Airports ("LAWA"),* the Ninth Circuit upheld the City of Los Angeles' requirement that businesses hired by the airlines operating out of Los Angeles International Airport execute, among other requirements, labor peace agreements.[166] The court reasoned that this requirement was permissible because the city operated the airport, competed in the transportation market, and had a proprietary interest in labor peace.[167] The court distinguished this case from *Brown* since the provision in this case was isolated to addressing the needs of a *single* airport.[168]

The Third Circuit in *Hotel Employees & Restaurant Employees Union v. Sage Hospitality Resources*, upheld a labor neutrality condition as part of a tax increment financing (TIF) agreement between the City of Pittsburgh and a hotel developer.[169] Cities promote development through TIF by issuing bonds to finance redevelopment of a certain district. The bonds are secured in part by

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[163] *American Trucking Associations, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013).
[164] *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Reso*urces, 390 F.3d 206 (3d Cir. 2004).
[165] Cholden-Brown, *supra* note 150.
[166] 869 F.3d 751 (9th Cir. 2017).
[167] *Id.*
[168] *Id.*
[169] *Id.*

tax revenues generated from the expected increases in property values after the project is completed.[170] The court upheld the conditional TIF grant reasoning that the city's issuance of the TIF bonds gave the city a financial interest in the development project in the same way that any private entity financing a development through bonds would.[171] Additionally, the court found that the ordinance was not unduly broad and was specifically tailored to protect the city's proprietary interests in the tax-revenue-generating property.[172] Similarly, the Seventh Circuit in *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*, found that an Illinois statute that conditioned state subsidies for the construction or renovation of renewable-fuel facilities (primarily ethanol plants) on the recipient entering into a project labor agreement covering wages, benefits, and a no-strike clause was not preempted.[173] The court reasoned that a condition attached to a discretionary grant is categorically distinct from regulation, as any contractor or plant owner was free to decline the subsidy and forego the PLA requirement entirely, the state was not compelling any conduct in the broader labor market.[174]

By contrast, in 2013, the Sixth Circuit in *Michigan Building and Trades Council v. Snyder* held that a Michigan law prohibiting governmental entities from signing Project Labor Agreements with unions was not preempted as Michigan was acting as a market participant, not a regulator.[175] Despite the expansive scope of the law, where every governmental unit is affected, the court found that the legislation's statement of purpose that the law was intended to improve competition and

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[170] *Id.*
[171] *Id.* at
[172] *Id.*
[173] 431 F.3d 1004 (7th Cir. 2005)
[174] *Id.*
[175] 729 F.3d 572 (6th Cir. 2013)

efficiency was sufficient to show that the state's interests here were proprietary.[176] The court relied heavily on a 2002 D.C. Circuit case called *Building and Construction Trades Department v. Allbaugh*, which involved a ban on PLAs for federally funded projects where the court also held that the ban was proprietary.[177]

Although the market participant exception has been applied more expansively to permit anti-union PLA bans, the doctrine overall remains narrow, particularly when invoked in support of labor beyond a single project. The critical question courts ask is whether the state is acting to manage a specific proprietary interest as a market participant or is instead using its spending power to regulate labor conditions more broadly, with the latter typically falling outside the exception's reach. Courts tend to uphold labor-related conditions only when they are tightly tied to a discrete project or asset and resemble ordinary private contracting choices. This leaves uncertainty in contexts like utilities, where the line between market participation and market structuring is especially blurred. The next sections highlight options for states to use the existing framework to regulate with high-road labor standards.

V. PATHS FORWARD: OPTIONS WITHIN THE EXISTING PREEMPTION REGIME

If the goal is to build more clean energy and to build support from unions and workers, the clean energy buildout must guarantee highroad labor standards.[178] Given the constraints of labor law in the utility and electricity sector as well as the history of the clean energy buildout, interventions to guarantee improved labor standards are those that target the electricity generator

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[177] 295 F.3d 28 (D.C. Cir. 2002).

[178] See e.g. Trachtman, S., Inal, I., & Meckling, J. (2025). *Building winning climate coalitions: Evidence from US states*. ENERGY POLICY, 203, 114628

and owner at the point of construction and continued operation. The goal, ultimately, would be to implement policies that promote unionization, including card-check, neutrality agreements, mandated PLAs, and/or direct employment of union labor for construction and operation of generation facilities.

There are a few possible paths forward to bring labor and climate together in renewable energy construction and generation. The options most likely to face the fewest challenges within the existing legal-labor regime are to adopt prevailing wage rules, encourage (rather than mandate) Project Labor Agreements (PLAs), encourage Community Workforce Agreements, and implement apprenticeship and workforce-development programs.[179] However, can more be done? Can state PUCs *mandate* utilities use PLAs? The focus of this section (and the next) is to explore options for leveraging existing legal doctrine to expand the scope of permissible labor regulation under the market participant exception. This section's focus is on options that fall more closely within the existing market participant exception.

a. Procurement

The clearest application of the market participant exception is when the state acts in its procurement capacity. *Boston Harbor*, and its application, has largely established that a government entity purchasing goods or services (e.g. acting in its procurement capacity) in the marketplace may attach labor conditions to its contracts without triggering preemption. This principle can extend to the range of procurement mechanisms states use in the clean energy context

[179] *See e.g.* U.S. Dep't of the Treasury, *Project Labor Agreements: A Best Practice for Clean Energy Projects Seeking to Meet IRA Wage and Apprenticeship Standards*, https://home.treasury.gov/news/featured-stories/project-labor-agreements-a-best-practice-for-clean-energy-projects-seeking-to-meet-ira-wage-and-apprenticeship-standards; Deedee Fitzpatrick & Hannah Sachs, *Labour Leading on Climate: Advancing High-Quality Unions Jobs in the Emerging U.S. Clean Energy Sector*, 4 GLOB. LAB. RTS. REP. 58 (2025).

such as competitive solicitations. In these transactions, the state is acting as a *buyer* rather than a regulator and can condition its purchase on PLAs, wage requirements, and workforce development requirements.[180]

The New York offshore wind buildout offers a compelling proof of concept for this procurement strategy. The New York State Energy Research and Development Authority (NYSERDA) procures renewable energy credits (RECs) from generation facilities through annual competitive solicitations, placing it squarely in the role of a market participant with a direct proprietary interest in the "expeditious and high-quality construction and operation" of those facilities.[181] With this market participant hook, unions and coalitions successfully advocated for the state to require PLAs in state-procured utility-scale offshore wind projects, and the state Public Service Commission adopted a PLA requirement in its administrative rulemaking establishing the offshore wind standard and procurement framework stating that PLAs may be "valuable" when project efficiency is at stake.[182] States pursuing similar clean energy buildouts, with similar REC structures, can therefore look to NYSERDA's model as a template for attaching high-road labor standards to procurement without running afoul of the NLRA preemption doctrine. Both prongs of the two-part market participant test are readily satisfied here: a state agency competitively procuring renewable energy credits acts precisely as any private energy buyer would in selecting among competing suppliers and conditioning its purchase on terms that serve its interest in reliable, high-quality project delivery, satisfying the first prong; and because the labor conditions attach

[180] Cholden-Brown *supra*, note 150.
[181] Deedee Fitzpatrick & Hannah Sachs, *Labour Leading on Climate: Advancing High-Quality Unions Jobs in the Emerging U.S. Clean Energy Sector*, 4 GLOB. LAB. RTS. REP. 58 (2025).
[182] *Id.*; *see also* Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement, N.Y. PUB. SERV. COMM'N Case 18-E-0071, 50 (2018).

only to the specific procurement contract rather than to the broader labor market, the second prong is satisfied as well.[183] Note, however, REC markets exist only in deregulated states soliciting from IPPs; thus, this mechanism would only work in a deregulated state where a state agency is participating in a market with multiple power producers.

b. Property

Another basis from which to use the market participant exception arises when the state acts as an owner and operator of property on which private commercial activity occurs. In *LAWA*, the Ninth Circuit held that Los Angeles, as the owner and operator of an airport, was not preempted in requiring labor peace agreements as a condition of contracting with the airport.[184] The key to the court's reasoning was that Los Angeles was not attempting to regulate labor relations across the economy but rather, only at this one airport.[185] Instead, it was setting the terms under which private parties could access and operate on property the city owned, in the same way any private landlord or property owner could do.[186] In the clean energy context, this may arise primarily when the state leases land it owns or controls to clean solar and wind projects. When a state land board or energy authority leases state trust land to a renewable energy developer, it occupies a similar position as the City of Los Angeles in *LAWA*. It is a property owner granting access to its asset and entitled to set the terms of that access; conditioning that access on labor standards would satisfy both prongs of the market participant test. A state conditioning a renewable energy ground lease on the developer's commitment to use a PLA for construction, maintain prevailing wages, or enter into a labor peace agreement with any union representing site workers is not regulating the broader labor

[183] *See* discussion *supra*, Section IV.
[184] 873 F.3d at 1076.
[185] *Id.*
[186] *Id.*

market. The Bureau of Land Management has already adopted this logic at the federal level, establishing incentives for renewable energy projects developed with union labor in its renewable energy leasing framework, reasoning that such conditions promote responsible and productive construction and minimize potential construction delays.[187] To push back on legal challenges to such an intervention, supporters could rely on *Allbaugh* and reason that the state corollary to an existing federal law should be treated the same way for NLRA preemption purposes.[188]

c. Financing

States also act as market participants when they deploy financing mechanisms to support clean energy development, including tax increment financing, green bank lending, bond financing, and direct grants or subsidies, and may attach labor conditions to that financial support without triggering NLRA preemption as evinced in *Sage Hospitality*.[189] A state green bank or grant-making authority that conditions its financing on labor standards acts as any private lender or investor would in protecting the value of its financial stake, thereby satisfying the proprietary component of the market participant test. Moreover, because labor conditions are tied to a specific financing agreement and the project it supports rather than to the broader renewable energy labor market, the second prong's requirement of narrow focus is equally met.[190]

Two existing state programs illustrate how the lender and financing rationale maps onto the clean energy context. The Connecticut Green Bank, established by the Connecticut General Assembly in 2011 as the nation's first green bank, has deployed over $3.11 billion in capital for

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[187] Bureau of Land Mgmt., *Rights-of-Way, Leasing, and Operations for Renewable Energy*, 89 Fed. Reg. 35634 (May 1, 2024), https://www.federalregister.gov/documents/2024/05/01/2024-08099/rights-of-way-leasing-and-operations-for-renewable-energy.
[188] *Building & Construction Trades Department, AFL-CIO v. Allbaugh,* 295 F.3d 28 (D.C. Cir. 2002).
[189] *Sage Hospitality* 390 F.3d at 297.
[190] *See* discussion, *supra* Section IV.

clean energy projects across the state, acting as a direct lender with a concrete proprietary interest in each project's performance and repayment which places it squarely in the *Sage* framework.[191] Illinois offers a parallel example through its Climate and Equitable Jobs Act (CEJA), under which the Illinois Department of Commerce and Economic Opportunity administers grant programs including the Equitable Energy Future Grant Program, which provides upfront capital for renewable energy and energy efficiency projects, with up to $34 million allocated annually.[192] When Illinois disburses those capital grants to renewable energy developers, it steps into the role of a financial stakeholder with a direct proprietary interest in project completion and thus acts as a market participant with the ability to enforce higher-road labor standards.

VI. CONTESTED PATHS FORWARD: OPTIONS BEYOND EXISTING DOCTRINE

Beyond the aforementioned ways that states could act as market participants in the utility context, there are two more speculative but potentially fruitful avenues for expanding state authority to integrate high road labor standards. Both require courts or legislatures to recognize broader state interests in the utility sector than existing doctrine currently acknowledges. The first asks whether the state's unique role in creating, sustaining, and supervising the utility monopoly confers on the state a proprietary interest in the utility market structure itself, rather than merely a regulatory one. The second asks whether the NLRA market participant exception should be interpreted with the same breadth as its progenitor, the market participant exception under the Dormant Commerce Clause. This section explores the extent to which each argument finds

[191] Conn. Green Bank, *About Us*, https://www.ctgreenbank.com/about-us/.
[192] Ill. Dep't of Commerce & Econ. Opportunity, *Governor Pritzker Announces $57 Million in Grant Awards Through the Climate and Equitable Jobs Act*, https://www.ileda.org/index.php?option=com_dailyplanetblog&view=entry&year=2025&month=07&day=29&id=73:governor-pritzker-announces-57-million-in-grant-awards-through-the-climate-and-equitable-jobs-act.

purchase in existing doctrine and where each pushes beyond what courts have so far been willing to recognize.

a. Finding Broader Proprietary Interests

The California PUC, when defending a prevailing wage law for utility workers (that was ultimately upheld under the doctrine of prevailing wages), argued that it derived authority for its actions from its constitutional mandate to prevent utilities from passing on unreasonable costs to ratepayers and "broad grant of authority to regulate utility practices."[193] The PUC invoked its statutory mandate to ensure the wellbeing of utility employees and the general public as justification for its authority to enact prevailing wages. The PUC specifically noted that utilities are "hybrid entities" and conduct their affairs more like those of a governmental entity and argued that even if other cases limiting prevailing wage laws were good law in some jurisdictions, it was inapplicable to them as utilities are not "totally private" as those covered by the regulation in those cases.[194] Most significantly for present purposes, in a subsequent order denying rehearing, the PUC explicitly characterized itself as a "market participant" on the ground that it acted on behalf of ratepayers who bear the cost of utility construction and oversee utilities' construction expenditures and was thus exempt from *Garmon* preemption.[195] Although these arguments were ultimately not adopted by the state court that decided the matter on other grounds, they illustrate the intuition, shared by at least one major state regulator, that the state's deep structural involvement in the utility sector goes beyond ordinary regulation and begins to shade into something more proprietary.[196]

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[193] *In re Order Instituting Rulemaking*, 2004 WL 3053891 (Cal.P.U.C.,2004) (citing to *General Telephone Co. v. PUC*, 34 Cal.3d 817, 824 (1983)).
[194] *Id.*
[195] *In re Order Instituting Rulemaking,* 2005 WL 1130341 (Cal.P.U.C., 2005).
[196] *See S. California Edison Co. v. Pub. Utilities Com*., 140 Cal. App. 4th 1085 (2006) ("*California Edison*").

The theoretical basis for this intuition lies in the hybrid nature of public utilities themselves. Historically, utilities have been characterized as private property "affected with" or "clothed with the public interest," a characterization that courts have used to justify regulatory authority that would be constitutionally impermissible for ordinary private enterprises.[197] However, despite this characterization, states do not have any formal property interest in public utilities. The Court in *Munn,* which provided the first articulation of this concept, declared that even though 'publicly affected' entities had obligations to the public, the Court was not "attempt[ing] to compel these owners to grant the public an interest in their property."[198] This distinction, that states are not owners, but regulators of utilities, has persisted.[199] In other words, although a public utility company is 'affected' by the public interest, its private owners maintain a property interest that is protected by judicial review.[200] This property interest exists both in terms of rates and exclusivity of operating area.[201] Consequently, utility companies can challenge state regulation that sets rates too low or interferes with their monopoly as unconstitutional takings.[202] The question this section explores is whether that distinction is as clean as courts have assumed, and whether the state's role in creating and sustaining the utility monopoly might support a broader proprietary claim than

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[197] *Munn v. Illinois*, 94 US 113 (1877).
[198] *Id.* at 133. Note here, that the Court cites to an English treatise *De Portibus Maris*, which argued that property devoted to a use in which the public has an interest, in effect, grants the public an interest in that use, but ultimately the Court declines to agree that the public gains an interest in the utility, and instead found only that the state can regulate the utility.
[199] *See State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (U.S. 1923) ("while the state may regulate…reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (finding that, although a utility company's assets are "employed by the public interest," they are still "owned and operated by private investors"); Joshua C. Macey & Brian Richardson, *The Public Law of Utilities*, 42 Yale J. on Reg. 179 (2025).
[200] *Duquesne Light Co.,* 488 U.S. at 306.
[201] *Id*.; City of *Selma v. Dallas Cnty*., 964 So.2d 12 (Ala., 2007).
[202] *Id.*

existing doctrine recognizes. Two potential sources of such a claim are worth examining: the state's grant of monopoly status, and municipal franchise agreements.

i. Grant of Monopoly?

Public utilities gain their monopoly status primarily through obtaining certificates of public convenience or necessity (a "certificate") from the state PUC and/or through franchise agreements with municipalities.[203] Historically, a utility required a primary franchise or equivalent from the state and a secondary franchise from the municipality, permitting the utility's use of streets.[204] Under such a framework, the municipality exercised exclusive control over the utilities.[205] Today, although some states still require that utilities obtain a valid franchise agreement before gaining a certificate from the state, PUCs and state-level authorities play a greater role in utility regulation and municipal franchising.[206] State legislatures, for example, dictate the framework for municipal franchise agreements and often outline the scope of what can and cannot be included in an agreement.[207] Courts have held that state power to grant franchises to operate a public utility is an exercise of the *legislative* function of the state as a sovereign.[208] The state can then delegate that authority to state agencies, like PUCs, or municipalities.[209]

Some courts have conceptualized a certificate of public necessity "in the nature of personal privilege or license" and since it can be revoked or amended, that it does not rise to a property

[203] Springstein, *supra* note 1.
[204] *Id.* at 251. Note, the primary franchise was required of any corporation wishing to operate within a state's borders.
[205] *Id.*
[206] *Id.*; see e.g. *GTE Movil Net of California Limited Partnership v. City and County of San Francisco*, 440 F. Supp.2d 1097, 1099 (N.D. Cal., 2006)
[207] *See e.g.* Cal. Code Regs. Tit 1 § 6201 (2024) (regulating municipal utility franchising in California).
[208] *Greater Wilmington Transp. Authority v. Kline*, 285 A.2d 819 (Del. Supr. Ct. 1971).
[209] *Id.*

right.[210] Granting a certificate, like granting a franchise, is the state acting in its *governmental*, rather than proprietary capacity. [211] Once granted, however, a utility can acquire an "interest" in the certificate though such interests are not absolute.[212] Some courts have held that if the certificate confers some form of exclusive service rights, or the state directly grants a franchise, the certificates can also confer property rights to the utility that must be protected by due process.[213] For example, in *Western Colorado Power Co.*, the court held that PUC certificates that granted a utility the right to serve in "precisely defined areas" conferred a property interest to the utility such that another utility could not be granted a certificate to operate in those areas without due process.[214] However, these cases are silent on what types of rights, if any, are conferred to the government via the certification process. Moreover, since the government is acting in its legislative/governmental capacity in granting these monopolies, it is unlikely that a court would be willing to find a proprietary interest for the state or municipality sufficient to evade NLRA preemption.

ii. Franchise Agreements?

Franchise agreements are contracts between utilities and cities or counties that set expectations between a city and a utility company, including how it constructs, operates and maintains equipment, and the utility's right of way to build and maintain infrastructure.[215] Often

[210] *Kline*, 285 A.2d at 823; *See Quantum Pipeline Co. v. Illinois Com. Comm'n*, 204 Ill. App. 3d 310 (Ill. App. 3 Dist., 1999); *Black Hawk Motor Transit Co. v. Illinois Commerce Commission*, 398 Ill. 542 (Ill. 1948).
[211] Payne, *supra* note 12.
[212] Springstein, *supra* note 1.
[213] *See e.g. Western Colorado Power Co. v. Public Utilities Commission*, 163 Colo. 61 (Colo. 1967) (finding insofar as any of public utility's prior certificates of convenience and necessity granted the utility rights to serve in precisely defined areas, such rights were property rights which could not be taken except by due process of law).
[214] *Id*.
[215] Cook, *supra* note 63; *see e.g.* Fla. Sup. Ct. Records & Briefs Project, *Amicus Curiae Brief*, Case No. SC02-2272 (Fla. 2003), https://library.law.fsu.edu/Digital-Collections/flsupct/dockets/sc02-2272/02-2272amicus3.pdf

cities demand a franchise fee as part of their franchise agreement.[216] Usually, franchise fees levied on the utility are passed on directly to customers such that the utility collects the fee and pays the city directly.[217] As mentioned above, franchise agreements can create monopolies when they grant a utility the ability to operate exclusively within an area.[218] These franchise agreements are contractual in nature.[219] In *Burns v. City of Seattle*, the court held that a grant of a franchise to a utility is a governmental function, but the power of a municipality to form and *own* an electric utility is a proprietary power.[220] Courts have found that the franchise agreement between the municipality and the public utility conferred a property right as to customers served by the utility which could not be taken without due process, but have not yet discussed whether states or municipalities also derive such an interest.[221]

Indeed, since utilities often pass on their franchise fees to their customers, and the state is charged with regulating customer rates, there is a possible argument that the state has a direct interest in these agreements.[222] Importantly, franchise fees often make up a meaningful portion of a locality's budget.[223] Given state and municipal interests in these fees and the fact that they are contracts tied to granting a privilege, rather than a broad regulatory cost, they arguably operate more similar to a proprietary activity than a purely regulatory activity. However, in *Golden State*

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[216] *Id.; but see Burns v. City of Seattle,* 161 Wash.2d 129 (Wash.,2007) (Washington prohibits franchise fees).
[217] Cook, *supra* note 63.
[218] *New Orleans Gas-light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U.S. 650 (U.S. 1885) (characterizing a state grant of monopoly as an exclusive franchise); *City of Groton v. Yankee Gas Services Co.*, 224 Conn. 675 (Conn., 1993) (similarly characterizing exclusive monopolies as state-granted franchises)
[219] *See e.g. Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089, 1096 (Del.Supr., 1990) ("[A] franchise constitutes a contractual relationship between the sovereign grantor and a public utility grantee").
[220] 161 Wash.2d 129 (Wash.,2007); *see also City of Selma v. Dallas Cnty.*, 964 So.2d 12 (Ala., 2007). Note, the court was speaking directly to *publicly owned* utilities rather than public utilities that are privately owned.
[221] *Delmarva Power & Light Co.,* 575 A.2d at 1098.
[222] See e.g. arguments put forth by the California PUC, *infra* Section VI.
[223] Jonathan Gerth, *Franchise Fees: An Important and Sometimes Untapped Source of Local Government Revenue*, Int'l City/County Mgmt. Ass'n (ICMA), https://icma.org/blog-posts/franchise-fees-important-and-sometimes-untapped-source-local-government-revenue.

Transit Corp., the Court rejected the characterization of a franchise condition as proprietary where it effectively intruded into collective bargaining.[224] Although there is some basis for distinguishing utility franchise agreements from the taxicab license at issue in *Golden State*, as utility franchise agreements are long-term, contractually negotiated instruments that grant exclusive rights of way and generate substantial, ongoing municipal revenue (rather than just a license to operate), the force of that distinction depends heavily on how broadly courts are willing to read the market participant exception in the NLRA context. The case law most supportive of characterizing such fee-generating contractual arrangements as proprietary comes predominantly from the Dormant Commerce Clause rather than from NLRA preemption doctrine.

b. Expanding the Market Participant Exception

One potentially fruitful avenue for expanding state latitude is to argue that the NLRA market participant exception should be interpreted with the same breadth as the market participant exception under the Dormant Commerce Clause (DCC). Indeed, the market participant exception is not exclusive to NLRA preemption as courts have applied it under the DCC for nearly fifty years. Notably, Justice Blackmun's opinion in *Boston Harbor* made explicit that the NLRA version was directly derived from the DCC's version.[225] Yet despite their shared origin, courts do not apply the market participant exception coherently across the two doctrines. The NLRA's version has been read far more narrowly and reflects a judicial choice to construct an expansive preemption doctrine upon a statute that contains no express preemption provision and was enacted to protect, not limit, workers' rights.[226] Despite their divergence, in applying the NLRA's market participant doctrine,

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[224] 475 U.S. at 610.
[225] *Boston Harbor*, 507 U.S. at 231-32 (citing *White v. Massachusetts Council of Construction Employers,* 460 U.S. 204 (1983) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)).
[226] Jordan Cozby, *Federalism's Labor-Law Exception*, 135 YALE L. J. 2318 (2026).

courts have always borrowed from the DCC, even well past *Boston Harbor*. For example, the Ninth and Sixth Circuits have imported the '*Cardinal Towing*' efficiency test into their NLRA market participant analysis, even though *Cardinal Towing* was a Fifth Circuit interstate transportation and dormant commerce clause case that imported *Boston Harbor* to its analysis.[227]

The gap between the two doctrines is most visible when comparing analogous fact patterns across doctrines. In *White v. Massachusetts Council of Construction Employers*, the Supreme Court upheld Boston's executive order requiring that at least half of all workers on city-funded construction projects be Boston residents, reasoning simply that the city was acting as a purchaser of construction services and could set the terms of that purchase and did not require the city to have an efficiency rationale or a requirement that the condition be tailored to a single discrete project.[228] Had the same requirement been challenged under the NLRA, it would almost certainly have failed under *Brown*, which requires that labor conditions be specifically tailored to a particular project and motivated by a concrete proprietary interest rather than broader labor policy goals, and a blanket hiring requirement applicable across all city-funded construction would struggle to satisfy either prong.[229] Similarly, in *Reeves, Inc.*, the Court upheld South Dakota's preference for in-state buyers at its state-owned cement plant during a shortage, requiring no showing of efficiency or project-specific rationale and finding instead that the state's status as a proprietor was sufficient.[230] Under the NLRA framework, a state enterprise that broadly preferred union contractors across its operations, without tying that preference to the efficiency needs of a specific

[227] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999).
[228] 460 U.S. 204, 208 (1983).
[229] 554 U.S. 60, 72 (2008).
[230] *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

project, would face serious preemption risk under *Gould.*[231] Critically for the franchise fee context, the Eighth Circuit in *Chance Management v. South Dakota* held that a state's use of a licensing scheme rather than a contract does not automatically place the state outside the market participant doctrine, reasoning that "the state, like any private gaming company, is free to choose those with whom it will deal, be it through licensure or contract."[232] This case suggests that a state or municipality conditioning a utility franchise on labor standards could argue that it is acting as a proprietor managing access to a specific and valuable privilege it owns, namely the exclusive right to use public rights-of-way, rather than as a regulator imposing conditions on an entire industry, and that the contractual or licensing form of that arrangement should not be dispositive of whether the market participant exception applies.

VII. PATH DEPENDENCE? LIMITATIONS OF THE CURRENT MODEL

The elaborate legal maneuvering required to leverage the market participant exception, where states must search for proprietary footholds in procurement conditions, financing terms, property leases, and subsidy agreements, reveals a deeper structural problem with relying on the exception as the primary vehicle for integrating labor standards into the clean energy transition. This section highlights the limits of operating within the existing labor regime and private utility provisioning model.

a. Limits to the Market Participant Exception

The market participant exception is currently limited in its scope and reach. It can only operate where the state has a cognizable proprietary interest, it cannot reach purely private transactions between utilities and their contractors, and it remains vulnerable to judicial narrowing

[231] 475 U.S. 282 (1986).
[232] *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1113 (8th Cir. 1996).

of the kind that has characterized the NLRA preemption doctrine more broadly. Moreover, the market participant exception is a double-edged sword. The same doctrinal framework that permits states to attach pro-labor conditions to their proprietary activities equally permits states to attach anti-labor conditions, and the expansion of the exception that would benefit workers in high-road states could just as readily be wielded by low-road states to entrench anti-union requirements in their own procurement and contracting regimes.[233] Any argument for a broader market participant exception must therefore reckon with the possibility that a more permissive doctrine cuts in both directions, and that the gains for workers in some jurisdictions could be offset by losses in others.

b. Limits to Private Provisioning of Electricity

A deeper problem, however, lies with the private model of electricity provision itself. As Professor William Boyd has argued, efforts to privatize and restructure electricity have struggled with persistent problems of market power, chronic underinvestment, high prices, and an inability to support renewable energy at scale, and the clean energy buildout, if carried out through the same privatized and financialized model, risks replicating those failures while foreclosing the most direct path to guaranteeing labor standards.[234] Under the current model, the very effort to integrate high-road labor standards risks further entrenching the marketization of an essential service. In New York's REC market, in order to attach labor conditions to renewable energy development, the state must first construct a market for renewable energy credits and then participate in that market as a buyer, thereby deepening the market logic that underlies the very problem that prevents implementing improved labor conditions in the first place.

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[233] *But see* Benjamin I. Sachs & John Fry, *Is Labor Preemption Good for Labor?,* 110 MINN. L. REV. 1587 (2026). Available at: https://scholarship.law.umn.edu/minnlrev/vol110/iss4/4 (finding that there are many more private workers in Blue states who may benefit from evading preemption than private workers in Red states.)
[234] William Boyd, *Decommodifying Electricity*, 97 S. CAL. L. REV. 101 (2024).

Alternatively, the most straightforward mechanism for guaranteeing high-road labor standards in the clean energy sector would be public ownership of generation and transmission infrastructure, which would subject the workforce directly to state control and avoid the elaborate proprietary workarounds that the market participant doctrine requires.[235] However, building public renewables or nationalizing existing utilities often comes into tension with labor. Public power campaigns can run directly into the problem that public employees in many states are covered by state labor law rather than the NLRA, which often restricts or prohibits the right to strike and limits the scope of collective bargaining.[236] In Maine, for example, IBEW Local 15 resisted a campaign that would have consolidated two private utilities into a statewide consumer cooperative as the union would lose the right to strike if the utility were under state ownership.[237] Thus, any serious policy discourse about public ownership of energy infrastructure must grapple with the tradeoffs it presents for the workers who would be affected by the change in ownership.

These challenges, however, are not insurmountable. The private utility model is itself becoming an increasingly precarious home for the labor standards that power sector workers have historically enjoyed. Investor-owned utilities, for example, face persistent shareholder pressure to increase profits through rate hikes and cost-cutting, and the accelerating entry of private equity into the utility sector, particularly in renewables, threatens to intensify that pressure dramatically, with predictable consequences for wages, benefits, and the ratio of directly employed to contracted

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[235] *See e.g.* Johanna Bozuwa, Sarah Knuth, Grayson Flood, Patrick Robbins & Olúfẹmi O. Táíwò, *Building Public Renewables in the United States*, CLIMATE & COMMUNITY INSTITUTE (2023), https://climateandcommunity.org/wp-content/uploads/2023/12/23_03_28_energy-2.pdf.

[236] C.M. Lewis, *Public Utility Campaigns Have a Labor Problem*, STRIKEWAVE (July 28, 2021), https://www.thestrikewave.com/editorials/public-utility-campaigns-have-a-labor-problem.

[237] *See e.g.* Stephen Singer, *Two Maine Unions Oppose Public Utility, Citing Change in Worker Rights*, PORTLAND PRESS HERALD (Sept. 22, 2023), https://www.pressherald.com/2023/09/22/two-maine-unions-oppose-public-utility-citing-change-in-worker-rights/; Sandeep Vaheesan, *Building the Electrostate*, N.Y. REV. BOOKS (Feb. 26, 2026), https://www.nybooks.com/online/2026/02/26/building-the-electrostate-public-power-new-deal/.

workers.[238] Advocates of public ownership must therefore address these tensions head-on if they hope to bring labor along.

c. Building Power outside of the State

Labor has already demonstrated the capacity to win high-road labor standards entirely outside of state facilitation through its own economic and organizing power.[239] In Wisconsin in 2024, five construction unions, including IBEW and the North Central States Regional Council of Carpenters, reached a landmark agreement with four of the state's largest utilities, including Alliant Energy and WEC Energy Group.[240] The utilities pledged to employ local union workers under competitive labor standards for renewable energy projects covering more than ten gigawatts of new solar, wind, and battery storage. The United Steelworkers (USW) negotiated project labor agreements with Orsted, one of the world's largest offshore wind developers, covering construction of its U.S. offshore wind portfolio and establishing prevailing wages, apprenticeship ratios, and local hiring commitments.[241] The UAW's Empower Solar campaign similarly targeted residential and commercial solar installation companies, winning union recognition and collective bargaining agreements at several firms and demonstrating that organizing in the distributed solar sector, long considered resistant to unionization due to its fragmented workforce, is achievable.[242] Together, these examples suggest that while the legal framework explored in this paper remains an important

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[238] Derek Seidman*, As Electricity Bills Rise, Activists Are Demanding Public Control of Utilities,* TRUTHOUT (Jan. 2, 2026*),* https://truthout.org/articles/as-electricity-bills-rise-activists-are-demanding-public-control-of-utilities/.
[239] *See e.g.* tripartite model discussed in Sachs, *supra* note 40.
[240] *Wisconsin Utilities Pledge to Use IBEW, Other Unions for Renewable Projects*, INT'L BHD. ELEC. WORKERS (July 25, 2024), https://www.ibewapp.org/media-center/Articles/24Daily/2407/240725_Wisconsin.
[241] Clean Grid Alliance, *Labor Unions and Clean Energy Go Hand in Hand*, https://cleangridalliance.org/blog/241/labor-unions-and-clean-energy-go-hand-in-hand (Aug. 21, 2025).
[242] United Auto Workers, *EmPower Solar*, https://uaw.org/tag/empower-solar.

tool for states seeking to embed labor standards in the clean energy transition, it is ultimately a complement to, rather than a substitute for, the organized power of workers themselves.

VIII. CONCLUSION

The unionization gap between fossil fuel utilities and renewable energy developers is not a market accident. It is the institutional inheritance of deregulation that dismantled the regulatory architecture sustaining utility unionism, tax credit structures that handed the renewable buildout to competitive firms with every incentive to minimize labor costs, and narrow judicial interpretations that circumscribed how states and municipalities can support unions and workers. The privatized, financialized model that resulted from these choices was never designed to serve workers, and the elaborate legal maneuvering this paper has traced is itself a symptom of that original design failure rooted in the private provisioning of a basic service. However, given the stakes of both climate change and the weakening of the labor movement, building a coalition that reinforces the alignment between labor and climate movements rather than their differences is imperative.

The central doctrinal conclusion of this paper is that although the market participant exception is narrow, it is not empty, and states and municipalities have room to act within the current legal landscape. Drawing from examples across the country, when states act as buyers of renewable energy credits, as owners of land on which clean energy projects are sited, or as lenders and financial stakeholders through green banks and direct financing, they acquire proprietary interests that existing case law recognizes as sufficient to support enacting meaningful labor conditions beyond minimum labor standards. NYSERDA's offshore wind procurement model, the ground lease framework developed by analogy to *LAWA*, and the financing rationale of *Sage Hospitality* together sketch a coherent and legally defensible state strategy that does not require new legislation or judicial innovation and is available to states with the political will to deploy it.

More contested arguments rooted in the PUC's hybrid character, franchise agreements, and the possibility of borrowing breadth from the Dormant Commerce Clause's more permissive market participant doctrine offer additional, if uncertain, avenues.

The limits of this framework, however, are real and should be acknowledged. Expanding state latitude cuts in both directions: the same tools that allow a pro-labor state to condition procurement on union standards equally allow a hostile state to suppress organizing. More fundamentally, the need to search for oblique proprietary footholds just to attach basic labor standards to essential infrastructure is itself a symptom of a privatized utility model that was never designed with workers in mind. Public ownership models and cooperative structures would create more direct pathways to labor standards and reduce the need for the kind of doctrinal maneuvering this paper has traced. These alternatives come with their own complications, particularly for workers who would transition from private sector NLRA coverage to more restrictive public sector labor law, and again, worker concerns must be integrated alongside climate ones.

Finally, the Wisconsin utility agreement, the Orsted-USW project labor agreements, and the UAW's Empower Solar campaign are useful reminders that the legal frameworks examined in this paper are tools to complement, not replace, the organizing capacity of workers themselves. Doctrine expands the terrain on which organizing is possible.

The options for states are limited. They are not zero. And given the urgency of building the political coalition that durable climate policy requires, pursuing every available foothold, while simultaneously demanding the structural changes that would make such maneuvering unnecessary, is imperative.