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Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy

Henry H. Drummonds*

I. INTRODUCTION

The road forward for labor relations policy in the United States lies not in Washington, D.C., but in state capitols.¹ As the current debate over the Employee Free Choice Act (EFCA) reveals,² stifling

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1. Several scholars have challenged the appropriateness of the current broad labor law preemption doctrines marching under the New Deal-era banner of a uniform federal labor law policy. *E.g.*, Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Eileen Silverstein, *Against Preemption in Labor Law*, 24 CONN. L. REV. 1 (1991); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); Henry Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469 (1993) [hereinafter Drummonds, *Sister Sovereigns*]; Matthew W. Finkin, *Bridging the "Representation Gap"*, 3 U. PA. J. LAB. & EMP. L. 391, 407 (2001); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1599–1600 (2002) [hereinafter Estlund, *Ossification*]. More recently Paul Secunda proposes ways to fit state labor relations initiatives regarding captive audience issues into the existing doctrinal framework. Paul Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008); Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle Over Wal-Mart*, 92 MINN. L. REV. 1502 (2008). For a view from an economist's perspective, see Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, 58 LAB. & EMP. REL. ASS'N SERIES PROC. 125 (2006), available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/freeman.html>. To date, however, none of these calls for a larger state role has received substantial congressional, labor union, or management support, and no call for congressional authorization for a broader role by the states to help implement the Section 7 rights is advocated here.

2. Employee Free Choice Act, H.R. 1409, 111th Cong. § 4 (2009). Compare Stewart Acuff & Sheldon Friedman, *Union Choice Would Help A Faltering Economy*, Feb. 5 2008, <http://www.ourfuture.org/progressiveopinion/union-choice-would-help-faltering-economy>, with Nelson Cary, *The EFCA's Destruction of Workplace Democracy*, LAW360, Sept. 10, 2008, http://www.vorys.com/assets/attachments/COLUMBUS-10491815-v1-The_EFCAs_Destruction_of_Workplace

federal labor law orthodoxy grips the private sector union movement. Indeed private sector collective bargaining faces the vanishing point;³ to the ninety-two point four percent of private sector employees who hold their jobs outside the unionized sector, collective bargaining constitutes, at best, an abstraction.⁴ Ironically, public sector unions, governed largely by state law, flourish.⁵ Why

Democracy.PDF. Political considerations permeate the issue because unionized blue-collar workers more often vote for Democrats based on economic issues, while non-unionized blue-collar workers more often prefer Republicans based on social issues. *E.g.*, Peter L. Francia, *Voting on Values or Bread-and-Butter? Effects of Union Membership on the Politics of the Working Class*, 12 PERSPECTIVES ON WORK, Winter 2009, at 27.

3. While private sector unions now represent only a small fraction of the private sector workforce nationally in collective bargaining (see *infra* note 4), they serve other important interests: (1) they remain a potent lobbying force for worker-oriented legislation at the state and federal levels (for example, the Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006)); (2) they provide support in political campaigns to candidates more supportive of the interests of employees; and (3) as my colleague Juliet Stumpf points out, they reduce the information costs of employees learning about their rights under federal and state employment statutes. *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

4. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, *UNION MEMBERS IN 2008* 1 (2009), <http://www.bls.gov/news.release/pdf/union2.pdf>. From a high of thirty-five point one percent of private sector employment in the mid-1950s, union representation and membership has gradually declined, at times plateauing for a few years but then resuming the general downward decline to seven point six percent today. LEO TROY & NEIL SHEFLIN, *UNION SOURCEBOOK* (1985). The Service Employees International Union is an exception to the trend of declining membership; this union has adopted a strategy of avoiding NLRB processes and has encountered success in the “Justice for Janitors” campaign and in the organizing of nursing home and home health care workers. Justice for Janitors, <http://www.seiu.org/division/property-services/justice-for-janitors/> (last visited Sept. 4, 2009). Despite the decline in representation rates, polls indicate that a far higher percentage of American workers express a desire for union representation. For a general discussion and analysis of the “representation gap,” see RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

5. In sharp contrast, forty point seven percent of public sector employees are organized under state labor relations laws. *UNION MEMBERS IN 2008*, *supra* note 4. Note that union membership was thirty-six point eight percent in the public sector and seven point six percent in the private sector. *Id.* Membership numbers are lower than representation numbers because not all the represented are union members. Public employees are excluded from the NLRA. 29 U.S.C. § 152 (2006). State and local governmental employees, however, often bargain under state laws. *E.g.*, OR. REV. STAT. ANN. §§ 243.650–.782 (West 2003 & Supp. 2008); 5 ILL. COMP. STAT. ANN. 315/1–/25 (West 2005 & Supp. 2009); N. Y. CIV. SERV. LAW §§ 200–214 (McKinney 1999 & Supp. 2008). Federal employees bargain under another federal act, the Federal Labor-Management and Employee Relations Act, 5 U.S.C. §§ 7101–7106, 7115–7135 (2006).

do blue, pink, and white-collar public employees flock to unions while their counterparts in the private sector do not?

Private sector union membership varies widely from state to state and industry to industry. New York (twenty-four point three percent) and California (eighteen point four percent) contrast with much lower rates of unionization in the South, parts of the Midwest, and the Mountain states.⁶

Not surprisingly the twenty-one “Right to Work”⁷ states count among the lowest rates of membership.⁸ Despite this widely varying support for unionization in the states, judicially-created, broad federal labor relations preemption doctrines ensnarl all states in a stifling and exclusive, yet strikingly inconsistent, federal labor law regime.⁹

Part II reviews the need for reform of private sector labor relations law. Sixty years have passed since the last fundamental revision of private sector labor law occurred when the Republican Congress overrode President Truman’s veto and enacted the Taft–

6. UNION MEMBERS IN 2008, *supra* note 4, at 11 tbl. 5: New York at 24.3%, Hawaii 24.9%, California 18.4%, Illinois 16.6%, Washington 19.8%, New Jersey 18.3%, Connecticut 16.9%, Michigan 18.8%, Oregon 16.6%, and Pennsylvania 15.4% are the highest states in private sector union membership. *Id.* Overall private sector union membership rates, however, stood at 7.6%. Variance in rates of unionization also occurs by industry. *Id.* at tbl. 3. The highest industry numbers are transportation (22.4%), utilities (28.3%), and telecommunications (20.4%). *Id.*

7. ARCHIBALD COX ET AL., LABOR LAW, 1193 (14th ed. 2006). The “Right to Work” states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. *Id.* at p. 1193. *See infra* Part IV.

8. The five states with the lowest densities of union membership are: North Carolina (3.5%), Georgia (3.7%), South Carolina (3.9%), Virginia (4.1%), Texas (4.5%), and Louisiana (4.6%). UNION MEMBERS IN 2008, *supra* note 4, at tbl. 5. All are “Right to Work” states.

9. *See infra* Part IV. Between 1959 and 1985, the United States Supreme Court created three distinct strands of labor law preemption doctrine: (1) the *Garmon* doctrine under which conduct “arguably protected” by Section 7 of the National Labor Relations Act (29 U.S.C. §§ 151–169 (2006)), or “arguably” prohibited by Section 8 of that Act, cannot be regulated by the states (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)); (2) the *Machinists* doctrine under which states cannot interfere with “the free play of economic forces” impliedly guaranteed in the Act (*Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976)); and (3) Section 301 preemption under which state law individual rights claims, available to non-unionized employees, suffer preemption in the unionized sector if those claims in some way require the interpretation of a collective bargaining agreement (*Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)).

Hartley Act in 1947.¹⁰ Taft–Hartley, vociferously opposed by the unions of that time, rebalanced the national labor policy to make it less hospitable to unions in response to perceived abuses during and after World War II.¹¹

Today, new conditions exist. After more than a half-century, another fundamental rebalancing is needed to provide more robust protection for employees wishing to voice concerns to their employers as a group.¹² At the same time labor law must break out of the confining doctrinal boxes that impede private sector unions from developing new ways to represent employees in more democratic structures that attract support from women, minority employees, younger employees, and those in growing sectors of the economy such as information technology and health care jobs in nursing homes, assisted living centers, and home health.

Beyond the fate of private sector unions, the prevailing federal labor law orthodoxy carries broader public policy implications. Federal labor law, and the folklore surrounding union-management relations generally, cabins the potential for unions to help recreate a structural balance in the allocation of the wealth jointly created by managers, investors, and employees in twenty-first-century corporate life.¹³ Corporations and the wealth they create are not the personal fiefdoms of executives or hedge funds managers and investment bankers. Yet the times demand new thinking about the role of unions and the processes under which they operate. At the same time, collective bargaining offers a private ordering

10. Labor-Management Relations (Taft–Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at Labor Management Relations Act, 29 U.S.C. §§ 141–187 (2006)).

11. *E.g.*, Archibald Cox, *Some Aspects of the Labor Management Relations Act 1947*, 61 HARV. L. REV. 1 (1947); Donald H. Wollett, *Collective Bargaining, Public Policy and the NLRA of 1947*, 23 WASH. L. REV. 205 (1948). Thus only twelve years after the enactment of the New Deal Wagner Act (a.k.a. “National Labor Relations Act”) in 1935, the federal policy moved from one explicitly favoring collective bargaining to a position of “neutrality” balancing the interests of employees, unions, and employers in “the national labor policy.” *See also* Nelson Lichtenstein, *How Wal-Mart Fights Unions* 92 MINN. L. REV. 1462, 1465–66.

12. *E.g.*, Paul Trapani, *Old Presumptions Never Die: Rethinking the Steelworkers Trilogy’s Presumption of Arbitration in Deciding the Arbitrability of Side Letters*, 83 TUL. L. REV. 559, 560–61 (2008) (The labor market of the 1950s and 1960s was “very different from the one today . . . Unions are getting smaller and less capable of negotiating strong contracts for their members . . . [T]hese labor-market changes threaten to depose the collective labor system and destabilize labor-management relations.”). *See also* CHARLES B. CRAVER, *CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* (1993).

13. *See infra* Part II.B.

alternative to the increasing demands for direct governmental regulation of economic life in the Great Recession now afflicting the U.S. and world economies.¹⁴

As Part III shows, the needed new thinking, experimentation, and flexibility will most likely arise from a less centralized labor relations system. Not only does the current federal labor law fail to keep the promises it makes to employees,¹⁵ it further blocks efforts to enact reforms in the states. Although New Deal-era reformers were often prone to view the federal government as the protector of unions, as then Professor Scalia once observed, federalism is “a stick that can beat either dog.”¹⁶ As the current national debate over EFCA reveals, federal legislative initiatives in labor law come hard and require a kind of federal common denominator for new labor relations policies.¹⁷ While the fate of that Act remains at this writing undecided, a review of the ideas in play shows that, while some suggested amendments to the National Labor Relations Act (NLRA) may help to restore more balance in the national labor policy, the ideas under discussion will likely not suffice to reverse the long decline of the private sector unions as collective bargaining (as distinct from lobbying) agents of employees.

The current focus on federal level reform stands in sharp contrast to the broader field of employment law. In that broader area of workplace regulation, federal level support for change most often *follows* state and local level initiatives.¹⁸ Indeed shared state

14. *Id.*

15. *E.g.*, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises to Keep*]; see *infra* Part II.A.

16. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & PUB. POL'Y 19, 19 (1982).

17. Employee Free Choice Act, H.R. 1409, 111th Cong. (2009). The debate over EFCA dramatically illustrates the difficulty of reaching a compromise that generates enough support to pass in Congress. *E.g.*, Editorial, *The Imperfect Union Bill: Employer Intransigence Makes Finding Common Ground More Difficult*, WASH. POST, May 11, 2009, at A16; Mackenzie Carpenter, *Specter in Spotlight Again; Employee Free Choice Act Banks on Veteran Senator*, PITTSBURGH POST-GAZETTE, Mar. 15, 2009, at A5. As of this writing, the federal discussion has shifted from a focus on the “card check” proposal for gaining union representation rights in lieu of an election to the idea of “quickie” elections with some guarantee of more equal access for unions to the employees. See *infra* Part III.B.

18. See *infra* Part III.C. See generally Drummonds, *Sister Sovereigns*, *supra* note 1, at 489–509 (1993). Indeed, state level experimentation and innovation often are the prerequisites to federal level action. For example, long before the 1991 Civil Rights Act amended Title VII to provide compensatory and punitive damages remedies for sexual harassment and other forms of discrimination, such remedies were available under state statutory and common law. The leading role

and federal policy making constitutes the *dominant* model in the now vast field of employment law generally.¹⁹ Thus, small, medium-size, national, and global companies conform their human resources practices to varying state requirements in the area of status discrimination, wage and hour laws, occupational health and safety, maternity and family leave laws, privacy regulation, and wrongful discharge law.²⁰ The broad federal labor law preemption initiated by judges a half-century ago stands today as a relic of an earlier era when the law of the workplace is viewed as a whole.

Considered in a broader context, reexamination of the federalist balance in labor relations would continue an ongoing discussion dating to the Founders and continuing across many other areas of public policy today.²¹ These include the regulation of prescription drugs and medical devices, bank lending, greenhouse gas and automobile emission and mileage standards, immigration policy, and many others.²² After suffering the vice-

of state innovation has also been the case in other policy areas, such as auto emission and mileage standards, providing a broader federalist context for this discussion about labor law. *See infra* Part III.C.

19. Drummonds, *Sister Sovereigns*, *supra* note 1, at 489–509 (summarizing extensive discussion of examples in multiple areas of employment law: “[F]ar from being a marginal or interstitial aspect of our system of workplace governance, state law often plays a vital and ‘leading edge’ role”).

20. *Id.* *See infra* Part III.C.

21. *See generally* ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS (Jacob E. Cooke ed., 1961); reviewing ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008) (arguing that federalism should be seen as an empowering doctrine, not a doctrine imposing structural restraints on government); William H. Pryor Jr., *Federalism and Freedom: A Critical Review of Enhancing Government: Federalism for the 21st Century*, 83 TUL. L. REV. 585 (2008); Erwin Chemerinsky, *A Troubling Trend in Preemption Rulings*, 44 TRIAL 62 (2008); Adam Cohen, *What Ever Happened to (the Good Kind of) States’ Rights?*, N.Y. TIMES, May 23, 2008, at A24; Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117 (2008) (arguing that the Rehnquist Court’s jurisprudence aggressively enhanced state autonomy in decisions construing the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment, but tacked in the opposite direction in federal statutory preemption and dormant Commerce Clause cases); David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507 (2008).

22. Today, the federalism debate resonates across diverse policy areas. *E.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (FDA regulation does not preempt state law failure-to-warn tort claim for prescription drug); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (FDA regulation preempts products liability tort claim for medical device); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (state law tort claim for “light” cigarettes not preempted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (some but not all smoker’s tort claims against tobacco company preempted); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861

like grip of the broad federal preemption doctrines now prevailing, labor relations policy must become part of this larger federalism discussion.

Ironically, globalization erodes the power of the federal government to effectively regulate transnational corporate entities whose size and reach now often eclipse the reach of nation-states. Given the dynamics of globalization, with power and influence drifting upward toward national and international level actors, an adjustment of the federalist balance in labor relations, as in other areas of public policy, creates a countercurrent to this drift. Here we can learn from our neighbors in Canada and the European Union where labor relations policies from Ottawa and Brussels coexist with those of provincial governments and sub-union nation-states.

Part IV turns to the existing, uniquely broad federal labor law preemption doctrines that prevent the states from exercising the shared authority found in other areas of workplace law. Three distinct doctrines exist: the *Garmin* doctrine, the *Machinists* doctrine, and Section 301 preemption.²³ This discussion shows that federal labor relations law not only creates a legal environment inhospitable to collective bargaining,²⁴ but also simultaneously prevents reforms and experimentation at the state level.²⁵ Thus the

(2000) (state design defect claims for delay in standardizing use of automobile airbags preempted); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009) (lending practices). In the area of auto emissions and mileage standards, the Bush II administration resisted attempts by states like California, Oregon, and Washington to impose state level regulation. Michael Hiltzik, *Pushing Detroit Onto a Greener Road*, L.A. TIMES, Jan. 29, 2009, at C1; Stephan Power, *Obama's EPA Move Likely to Spur Fight*, WALL ST. J., Jan. 27, 2009, at A3; John M. Broder & Peter Baker, *Obama's Order Likely To Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1. President Obama recently resolved that issue by announcing new federal standards. *Id.* The federalism debate also permeates immigration policy. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008). President Obama recently directed federal agencies to review their regulations to undo the Bush II administration's policy of adopting "preemption" regulations. Theo Francis, *Obama Regulatory Review Could Spur Products Lawsuits*, BUSINESS W., May 20, 2009, http://www.businessweek.com/bwdaily/dnflash/content/may2009/db20090520_039748.htm.

For further contemporary discussion of general preemption issues, see Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008) and *The Supreme Court, 1997 Term—Leading Cases*, 122 HARV. L. REV. 405 (2008).

23. See *supra* note 9.

24. See *infra* Part II.A.

25. See *infra* Part IV.

states cannot adopt damages remedies for anti-union discrimination, implement “card check” and other innovative procedures for determining whether the union has established and maintained majority support, experiment with non-majority and non-exclusive representation of employees for those who desire union representation, regulate the permanent replacement of strikers or the offensive lockout, provide meaningful remedies for bad faith bargaining, or develop new processes, such as interest arbitration, for resolving first contract disputes or an alternative to the cumbersome and ineffective National Labor Relations Board (NLRB) process for the vindication of Section 7 rights.²⁶

The mesmerizing mantra of a “uniform” and “expertise based” federal labor relations policy led generations of judges, labor lawyers, and academics to support these broad federal preemption doctrines.²⁷ As shown below, these doctrines find support neither in the text of the Labor Management Relations Act (LMRA),²⁸ nor in any consistent view of federal policy, rights, and remedies.²⁹ These preemption doctrines generated controversy within the Supreme Court even when adopted decades ago; nothing in the federal labor policy compels their continuance in changed conditions today. Moreover, labor law preemption doctrine exists within a bodyguard of exceptions making it at once one of the most complex and indecipherable areas in all of employment law. As the authors of a leading casebook summarized: “No legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently . . . than that of the preemption of state law, and perhaps no other issue has been left in as much confusion.”³⁰ As in science, excessive complexity in legal doctrine signals a need for reconceptualization.³¹

26. See *infra* Part II.B.

27. Professor Michael Gottesman observed: “An entire generation of labor law academics focused their scholarship upon perfecting the system of collective bargaining created by the [NLRA] for ordering the legal relations between employers and employees.” Michael H. Gottesman, *Whither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2767–68 (1991) (reviewing PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1991)).

28. The 1947 Taft–Hartley Act adopted the Labor Management Relations Act, 29 U.S.C. §§ 141–187, and incorporated the 1935 National Labor Relations Act (sometimes referred to as the “Wagner Act”) within the new combined labor relations statute at 29 U.S.C. §§ 151–169.

29. See *infra* Part IV.

30. COX ET AL., *supra* note 7, at 1004.

31. Even fifteen years ago the Supreme Court, according to a Westlaw search, had decided more than ninety cases with substantial discussion of labor law preemption. Drummonds, *Sister Sovereigns*, *supra* note 1, at 560 n.509. As

In addition to the mass of exceptions and qualifications, other parts of the federal labor relations law create striking inconsistencies to the premises of broad federal preemption. These inconsistencies render the current law incoherent when viewed as an overall system. These include:

1. NLRA Section 14-b's provision permitting states to "reverse preempt" federal law on the fundamental issue of union security agreements via the option to adopt "right to work" laws;
2. the concurrent jurisdiction of the federal and state courts to enforce and interpret collective bargaining agreements and grievance arbitration;
3. the concurrent jurisdiction of federal and state courts to hear claims against unions for breach of the duty of fair representation;
4. the critical role of state property law in the "balancing" of Section 7 rights on issues like union access and restrictions on union solicitation in employer email systems and the like;
5. the concurrent jurisdiction of the federal and state courts to award damages against unions for recognitional picketing and secondary boycotts;
6. the exclusion of many employees from the embrace of the NLRA—including public employees, agricultural employees, and employees of many small businesses—leaving those employees to state regulation;
7. the ability of states to directly affect labor disputes by granting or withholding unemployment benefits to strikers and locked-out employees;
8. the further anomaly that states may directly regulate the terms and conditions of employment, even in unionized shops in "labor standards" legislation, but, inconsistently, may not take other actions said to interfere with the "free play of economic forces;" and
9. most ironically, the concurrent jurisdiction of federal and state courts to decide complex issues of federal labor law preemption.³²

Professor David Gregory put it, labor law preemption doctrine is "one of the more intricate structures of legal theory." David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 514 (1986).

32. See *infra* Part IV.

Part V explores what a more decentralized labor relations regime might look like. The point is not that the author's ideas for labor law reform should be the only ones in play, but that there are many possibilities for reform not discussed in the EFCA debate. A more decentralized labor relations regime is far more likely to yield the experimentation, flexibility, and citizen involvement necessary for fundamental change.

If citizens in the states are to be empowered to make more labor relations policy through their state governments, reform must, anomalously, come from the federal Congress. This article, therefore, makes suggestions for what a 2009–2010 Labor Law Preemption Clarification Act might look like. These ideas represent only tentative suggestions. If the debate over labor law reform shifts, as advocated here, to how citizens in the states could play a greater role in labor relations policy, surely lawyers and academics alike will generate many potential paths to follow in a less centralized labor relations regime.

II. PRIVATE SECTOR UNIONS FACE THE VANISHING POINT WITHOUT LABOR LAW REFORM, YET UNIONS COULD HELP TO RESTORE STRUCTURAL CHECKS AND BALANCES IN THE PRIVATE ORDERING OF ECONOMIC WEALTH BY PROVIDING A MORE INSTITUTIONALIZED VOICE TO EMPLOYEES IN THE DECISIONS THAT AFFECT THEM AT WORK

This Part reviews why labor law needs reform. This need arises from both a negative and a positive argument.

The negative argument in Part II-A arises from the many deficiencies in the NLRA as it evolved during the past seventy-five years. These problems make a mockery of labor law's promise to allow fair opportunity for employees to choose unionization and create a structure for the determination of their wages, hours, and working conditions that gives them a collective voice. While the defects in the law do not alone explain the decline toward the vanishing point of the private sector unions as collective bargaining agents, they contribute to that decline. More importantly, today's new conditions require a rebalancing of labor law's conflicting interests. As shown below, many opportunities exist for a renewed and more robust labor law to fit today's changed work and changed employees. The EFCA debate, however, constitutes a far too restricted discussion of the potential for labor law revitalization.

The positive argument in Part II-B discusses the potential for labor law to empower today's employees to participate more equitably in corporate governance. The wealth generated and the

power wielded by corporate structures today do not belong alone to executive suite managers and investment bankers whose judgments now lie exposed as often fallible. Collective bargaining and new forms of employee involvement hold the potential for restructuring economic relationships to better balance the roles and voices of managers, investors, and employees whose joint efforts produce wealth.

A. The Many Deficiencies in Federal Labor Law Have Helped Drive Unions to the Vanishing Point as Collective Bargaining Representatives, and They Fail to Serve the Interests of Today's Changing Workforce

Many scholars argue that private sector labor law itself contributes to union decline.³³ Prominent labor leaders concur.³⁴ Far from protecting the right to organize, federal labor law—heralded by the New Deal generation as the labor relations' Magna Carta of its day—bit by bit, decision by decision, morphed in changed circumstances to impede collective bargaining. Its champions became not working people, union leaders, and their supporters, but lawyers, corporate executives, and lobbying groups representing American business. In Professor Estlund's apt terminology, federal labor law became ossified, unable to adjust to

33. E.g., Weiler, *Promises to Keep*, *supra* note 15; Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) [hereinafter Weiler, *Striking a New Balance*]; Paul C. Weiler, *Hard Times For Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991) [hereinafter Weiler, *Hard Times for Unions*], William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937 (1986); WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB* (2000); Estlund, *Ossification*, *supra* note 1; Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985).

34. Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871 (1987) (Mr. Trumka is currently the Secretary-Treasurer of the national AFL-CIO); *Kirkland Says Many Unions Avoiding NLRB*, 132 Lab. Rel. Rep. (BNA) 13 (1992) (reporting the then AFL-CIO President's complaint that the federal labor law often "forbid[s] [union supporters] from showing solidarity and direct union support"); *UE President Calls On Labor Leaders to Take a More Aggressive Stance*, 139 Lab. Rel. Rep. (BNA) 417 (1992) (reporting international union president's calls for "comprehensive labor law reform" or, absent reform, repeal of the New Deal-era labor relations statutes; "I would rather have no [labor] law at all than have the laws today that do nothing but stifle us").

changing circumstances; the brightest in a generation of scholars despaired.³⁵ Labor leaders declared their desire to return to the unregulated labor relations regime pre-dating the NLRA.³⁶ For the mass of employees, labor law simply shrank into irrelevance.

1. The Paradoxical Decline of Private Sector Unions While Public Sector Unions Flourish

Scholars often note the decline of private sector unionism, from a high of approximately forty percent in the non-agricultural workforce in the mid-1950s to only seven point six percent today.³⁷ Yet during the same period public sector unionism grew from virtually zero to more than thirty-five percent of public employees today.³⁸ Public employees are now five times more likely to be unionized than private sector employees.³⁹ Public employees, of course, are excluded from the LMRA. They organize, instead, largely under state and local enactments.⁴⁰

Why do teachers, firefighters, police officers, highway department workers, social agency workers, and courthouse employees flock to the public sector unions while their private sector counterparts do not? Scholars debate the causes of the decline in private sector unionism and offer many explanations:

35. Estlund, *Ossification*, *supra* note 1; Michael H. Gottesman, *In Despair: Starting Over Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59 (1993).

36. *See supra* note 34.

37. Weiler, *Hard Times For Unions*, *supra* note 33, at 1017; UNION MEMBERS IN 2008, *supra* note 4. Some reports put the percentage unionized at plus twelve percent, but this figure includes both private and public sector employees. *Id.*

38. THEODORE ST. ANTOINE ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 871 (11th ed. 2005) (public sector workforce thirty-six percent unionized in 2004).

39. UNION MEMBERS IN 2008, *supra* note 4.

40. *See supra* note 5. Some private sector workers also fall outside the coverage of the NLRA and are covered instead by state laws, for example, agricultural workers and employees of small businesses whose revenues fall under the NLRB's jurisdictional standards. National Labor Relations Act § 2(2)-(3), 29 U.S.C. § 152 (2)-(3) (2006). Farm workers, however, sometimes bargain under state laws. *E.g.*, CAL. LAB. CODE § 1140 (West 2003 & Supp. 2009); ARIZ. REV. STAT. ANN. § 23-1381 (LexisNexis 1995 & Supp. 2008); FLA. STAT. ANN. § 450.251 (West 2002). Small businesses often fall below the jurisdictional standards adopted by the NLRB pursuant to 29 U.S.C. § 164(c) (2006); these employees, too, sometimes bargain under state laws. *E.g.*, OR. REV. STAT. § 662.010 (West 2003 & Supp. 2008).

1. the shift from blue-collar manufacturing to white and pink-collar service (including information technology) jobs;⁴¹
2. increased competition from abroad in the globalized labor markets;⁴²
3. increased bureaucratization in unions;⁴³
4. persistent private sector managerial opposition to unions;⁴⁴ and
5. the rise of individual rights guaranteed in the evolving common law and many statutorily mandated terms and conditions of employment;⁴⁵ in this view, employees simply no longer need the collective bargaining protections afforded by unions, which fall victim to their own success in seeking such socially conferred protections for all employees.

41. Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681, 682–84 (1992) (decline stems from structural change in the economy, enhanced foreign competition, and increased employer opposition to unions).

42. *Id.* See generally Henry H. Drummonds, *Transnational Small and Emerging Businesses in a World of Nikes and Microsofts (A Retrospective Essay on the 1998 Lewis and Clark Forum and the Message of Seattle)*, 4 J. SMALL & EMERGING BUS. L. 249 (2000). See also the presentations at that forum by Professors Katherine Van Wezel Stone, Michael Gottesman, Robert Howe, Eugene Mihaly, George Priest, and Daniel Mitchell collected in 3 J. SMALL & EMERGING BUS L. (1999).

43. E.g., Troy, *supra* note 41, at 682–84; Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 630 (1990) (reviewing PAUL C. WEILER, *GOVERNING THE WORK-PLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990)).

44. See Steven Greenhouse, *Study Says Antiunion Tactics Are Becoming More Common*, N.Y. TIMES, May 19, 2009, at B5 (reporting on empirical study by Professor Kate Bronfenbrenner, Director of the Cornell University School of Industrial and Labor Relations; study used NLRB data and interviews to analyze more than 1000 union election campaigns, finding threats of plant closure and the like occurred in more than fifty percent, that sixty-three percent involved “captive audience” meetings in which employees were interrogated about union sympathies, and that employees were threatened in fifty-four percent with loss of jobs or cuts in wages and benefits); John Logan, *Consultants, Lawyers, and the “Union Free” Movement in the USA Since the 1970’s*, 33 IND. REL. L. J. 197 (2002); Weiler, *Promises to Keep*, *supra* note 15; Weiler, *Striking a New Balance*, *supra* note 33, at 357 (1983); Troy, *supra* note 41.

45. Drummonds, *Sister Sovereigns*, *supra* note 1, at 483, 489–509; Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10–12 (1988) (describing the shift from the model of collective bargaining to the model of socially-conferred individual rights); Joseph R. Grodin, *Past, Present, and Future in Wrongful Termination Law*, 6 LAB. LAW. 97 (1990) (noting that the shift to individual rights from private ordering via collective bargaining seems similar to the European model in which the government provides basic protections to workers by law).

It is suggested that, together these factors result in declining demand for unions among private sector employees.

Yet the success of the public sector unions suggests that some of these factors at least cannot alone explain the paradox between public and private sector unions. For example, many white and pink-collar public employees perform service jobs; teachers' unions now represent the largest union group.⁴⁶ Furthermore, public sector unions such as the NEA and AFSCME are not notably less bureaucratic than private sector unions like the UFCW or the Teamsters. Similarly, the individual rights regime embodied in protections like the status discrimination and family leave statutes, and common law torts like wrongful discharge, most often apply equally to private and public sector employees.

Globalization does seldom directly affect public employees, but neither does it directly affect many private sector employees—such as those in the construction, hospitality and restaurant industries, nursing home industry, domestic service, personal appearance and cosmetic service industries, and janitorial industries.⁴⁷ As former U.S. Secretary of Labor Robert Reich explained in 1991, global labor markets affect many employees, including both manufacturing employees and “symbolic analysts” (like computer software designers, financial services providers, and even lawyers).⁴⁸ But some services cannot be provided abroad, and the global labor markets affect such sectors only via immigration.⁴⁹ And, even if globalization affects a sector by introducing labor market competition from abroad, that logically increases, not decreases, the need for mechanisms for an employee voice in restructurings and the change that must inevitably come.

Unlike their private sector counterparts, public employees carry a powerful weapon with which to fight anti-union discrimination. When governmental employees obtain public employment they bring their rights to free speech and free association with them.⁵⁰ Union activity, advocacy, and membership fall within these protections, and 42 U.S.C. § 1983 provides a powerful remedy for violation of these rights, as a review of thousands of cases in the federal reporters will reveal.

46. The National Education Association now has 3.2 million members. National Education Association, <http://www.nea.org> (last visited Sept. 4, 2009).

47. *E.g.*, ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 171–240 (1991).

48. *Id.*

49. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

50. *E.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Different standards are, however, applied to public employee free speech. *Id.*

Let us briefly evaluate the ways Section 1983 confers advantages that deter anti-union retaliation and discrimination in the public sector. First, under Section 1983 individual managers who discriminate on the basis of union activity or affiliation in violation of the First Amendment face personal liability⁵¹—in sharp contrast to the NLRA, under which only employers can be held responsible for unfair labor practices.⁵² Second, Section 1983 allows plaintiffs to resort to courts without any requirement for exhaustion of administrative remedies—let alone *exclusive* reliance on administrative remedies as required under the NLRA.⁵³ Third, as a consequence—again in sharp contrast to the unfair labor practice process prescribed by the NLRA—plaintiffs and their attorneys control the decision of whether to pursue allegations of union discrimination; they are not relegated to an unreviewable discretionary judgment of NLRB officials about whether an allegation will be pursued to hearing.⁵⁴ Fourth, as a further consequence of initial access to the courts, Section 1983 provides plaintiffs’ attorneys with the ability to engage in discovery and to subpoena witnesses and documents—again important process rights usually not available to persons filing an NLRB charge unless and until the NLRB Regional Director or General Counsel orders issuance of a formal complaint. Fifth, Section 1983 grants public employees damages remedies, including compensatory, emotional distress, and punitive damages⁵⁵—once again in sharp contrast to the NLRA, which limits remedies to back pay (minus required mitigation earnings), “cease and desist” orders, and other similar equitable relief.⁵⁶ Sixth, under Section 1983, juries, rather than career NLRB administrative law judges, determine disputed issues of fact fairly.

Besides the existence of the powerful remedy for anti-union discrimination provided by Section 1983, other provisions in state law aid public sector unions. For example, in states making public

51. *E.g.*, *Alabama v. Pugh*, 438 U.S. 781 (1978) (state official but not the state may be sued under Section 1983).

52. National Labor Relations Act § 10, 29 U.S.C. § 160 (2006).

53. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

54. *NLRB v. United Food & Comm. Workers Union, Local 23*, 484 U.S. 112 (1987).

55. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (local governmental entity liability for compensatory damages and injunctive relief where official acts pursuant to policy or practice, or is one whose edicts can fairly be said to represent official policy); *Carey v. Piphus*, 435 U.S. 247 (1978) (compensatory damages include emotional distress damages); *Smith v. Wade*, 461 U.S. 30 (1983) (officials, but not entities, liable for punitive damages under Section 1983).

56. National Labor Relations Act § 10, 29 U.S.C. § 160 (2006).

employee strikes legal,⁵⁷ civil service laws and political constraints impede the use of permanent replacements.⁵⁸ When public employees cannot lawfully strike, some states offer interest arbitration of bargaining disputes; these provisions are common for police, firefighter, and correctional officer unions.⁵⁹ Finally, state procedures sometimes give public employees advantages over their private sector counterparts. For example, in Oregon, unions and employees charging employers with unfair labor practices prosecute their own cases, enjoy access to the subpoena power, cross-examine managers under oath, and have a right to a hearing for any issue of law or fact.⁶⁰

Non-legal factors also contribute to the widely divergent experience of unions in the public and private sectors over the last half-century. Public sector managers face political as well as legal accountability when they retaliate for union activity. School boards, city and county councilors and commissioners, mayors, and governors not only sit atop public bureaucracies, but they often face election campaigns in which public employee unions and their supporters may wield substantial influence. Additionally, many public managers simply do not resist unions to the degree prevalent in the private sector where “American Exceptionalism” finds expression in deeply imbedded cultural norms of resistance to unionization within private sector managerial and investment elites.⁶¹

2. Ineffective Remedies for Anti-Union Discrimination Make Such Discrimination a Rational Choice for Managers in the Private Sector

While ingrained hostility to unions and collective bargaining occurs more prevalently in the private sector, logically that generates a need for more, not less, effective remedies than those enjoyed by public sector employees. Yet ineffective remedies for anti-union discrimination and retaliation, as Professor Paul Weiler showed more than twenty-five years ago,⁶² stands out as a

57. *E.g.*, Oregon, OR. REV. STAT. ANN. § 242.726 (West 2003).

58. Compare the private sector law *infra* Part III.B.2.

59. *E.g.*, Oregon, OR. REV. STAT. ANN. §§ 243.742–56 (West 2003 & Supp. 2008).

60. OR. REV. STAT. ANN. §§ 243.650–782 (West 2003 & Supp. 2008).

61. Greenhouse, *supra* note 44; *see also* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971) (discussion of American Exceptionalism); Weiler, *Promises To Keep*, *supra* note 15; Weiler, *Hard Times for Unions*, *supra* note 33.

62. Weiler, *Promises to Keep*, *supra* note 15, at 1788–89.

hallmark of the NLRA. Many scholars since concurred.⁶³ Simply put, discrimination against employees who attempt to lead union organizing campaigns often makes sense to managers based on a simple cost-benefit-risk model.

In the current system such discrimination often escapes proof. The NLRB brings formal complaints to hearing in only a small percentage of the charges filed.⁶⁴ Where proof does exist, individual managers are not held accountable. Even more telling, toothless cease and desist and back pay remedies leave affected employees with little to show for challenging illegal discrimination through the NLRA; back pay is conditioned upon mitigation, and interim earnings are set off against any back pay awarded.⁶⁵ Even this is denied for undocumented workers (although labor law, in theory, applies to them).⁶⁶ Litigation of anti-union firings often takes years with no interlocutory relief.⁶⁷ For most reinstated employees life has moved on in the years of litigation, and they decline reinstatement. Furthermore, many who do accept reinstatement continue to suffer discrimination, and most wind up resigning within a year or two.⁶⁸ Contrast this feeble remedial scheme with the compensatory (including emotional distress) and punitive damages relief available to victims of other forms of employment discrimination.

Consider the effect on other employees. This system inevitably chills union support amongst many “streetwise” employees who witness or hear tales about the fate of employees who dare to take the lead. Most employees bear responsibilities to their families, do not wish to jeopardize their chances for promotions or future employment opportunities, or simply are focused on other aspects of life. The NLRB process takes years to obtain a judicially enforceable order via the civil contempt power; momentum toward unionization long dissipates before any consequences occur on the

63. See *supra* note 34.

64. For example, in 2004, 29,954 informal charges were closed (twenty-nine percent were withdrawn, often at the suggestion of NLRB officials, thirty-one percent were dismissed by the NLRB without formal complaint, thirty-six percent were settled or adjusted, and only two point three percent proceeded to formal complaint and hearing). COX ET AL., *supra* note 7, at 99.

65. See COX ET AL., *supra* note 7, at 263–73 (discussing severe delays, inadequate enforcement of reinstatement rights, and limited equitable back pay relief requiring deduction of mitigation income for illegal discrimination under the NLRA); ST. ANTOINE ET AL., *supra* note 38.

66. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

67. *Id.* at 271–73.

68. COX ET AL., *supra* note 7, at 266–67.

ground.⁶⁹ While management attorneys cannot ethically counsel violation of federal law, they have a duty to inform their clients not only of the law, but of the legal consequences for its violation. Only the most obtuse manager could fail to see the course of action often making the most sense to the bottom line. Even managers wishing in earnest to comply with labor law face an unequal competitive playing field vis-a-vis firms and managers who do not.

3. Other Failings of Federal Labor Law Create an Imbalance that Favors Managers Resisting Unions and Tilts the NLRB Elections Process in Favor of Employers

The NLRA promises much but delivers little. The “beating heart” of the NLRA lies in Section 7.⁷⁰ That provision, in theory, assures U.S. employees the right to organize in organizations of their own choosing, to bargain collectively with their employers over the terms and conditions of their employment, and to take concerted activity for mutual aid and protection.⁷¹ Since the 1947 Taft–Hartley Act, Section 7 also guarantees to employees the right to refrain from these Section 7 rights. All of the other provisions of the Act elaborate upon and define the contours of these rights. But federal labor law breaks these promises to employees in multiple ways. And, once again, even where the law imposes limits on employer action, the calculus of costs and benefits may make illegal action the lowest cost solution.

a. Threats, Lies, and Videotape

Beyond the failure to provide meaningful remedies for anti-union discrimination, consider the further problems of threats, lies, and videotape. While employers rightfully enjoy free speech protections under the NLRA,⁷² threats fall outside this protection. The distinction between a lawful “prediction” and an illegal “threat,” however, turns on a finely tuned analytical construct

69. NLRA orders are enforced by a petition to a U.S. court of appeals. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (2006).

70. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

71. *Id.*

72. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2006) provides: “The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”

created by the Supreme Court forty years ago;⁷³ that fine parsing of words makes sense perhaps to lawyers and judges in mahogany lined courtrooms, but it loses much of its value when viewed from the perspective of rank and file employees hearing legal “predictions” about closure of the workplace, loss of jobs, and other dire consequences of unionization.⁷⁴ Further, except in rare circumstances, NLRA law generally ignores lies in union election campaigns.⁷⁵ Labor law regulates surveillance of union activity but allows “polling” of employees with certain safeguards,⁷⁶ non-polling questioning,⁷⁷ and individual, small group, and mass “captive audience meetings” with supervisors and managers, at which anti-union views find expression.⁷⁸

Imagine, labor lawyers, students, and professors, that you were called to your dean’s or managing partner’s office to discuss his or her opposition to some organization you were considering supporting. Would you be willing, with all the demands of work, and, perhaps, the pressing need to cook a promised meal for the family or to attend your child’s soccer game, to risk your job, your promotional prospects, your next raise, and all of the assignments and other decisions that can make work life better or worse? Many of us would not. Alas, in the real world, this reaction occurs, perhaps, more often than not.

73. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (“[The employer] may even make a prediction as to the precise effects he [sic] believes unionization will have on his [sic] company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his [sic] control or to convey a management decision already arrived at to close the plant in case of unionization.”); *Crown Bolt, Inc. v. Wholesale Delivery Drivers, Salespersons, Indust. & Allied Workers, Local 848*, 343 N.L.R.B. 776 (2004) (three–two ruling by Bush II Board reversing longstanding NLRB precedent and holding that threats and other coercive statements will no longer be presumed disseminated within bargaining unit absent evidence to contrary).

74. *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Judge Learned Hand: “Words are not pebbles in alien juxtaposition What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.”).

75. *Midland Nat’l Life Ins. Co. v. Local 304A, United Food & Commercial Workers Union*, 263 N.L.R.B. 127 (1982).

76. *Int’l Union of Operating Eng’rs, Local 49 v. NLRB*, 353 F.2d 852 (D.C. Cir. 1965).

77. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Rossmore House v. Hotel Employees & Rest. Employees Union, Local 11*, 269 N.L.R.B. 1176 (1984).

78. *NLRB v. United Steelworkers of Am.*, 357 U.S. 357 (1958).

b. No Equal Access and No Equal Time

Such rules might do in a system fostering robust debate with unimpeded access by both sides to employees, but the NLRA, as interpreted by the Supreme Court half a century ago, denies the union any right of equal time with the employees.⁷⁹ Moreover, a Supreme Court majority in the *Lechmere Square* case⁸⁰ restricted union representatives' access to employer property in all but the most unusual circumstances.⁸¹ Although access in theory cannot be denied on a discriminatory basis,⁸² the NLRB majority appointed by President Bush II recently announced a loosening of the rule against discriminatory access.⁸³ That same 2007 decision also generally denied access through employer e-mail systems even though the employer generally permits employees to use the e-mail system for personal matters.⁸⁴ While employees may be free to discuss the New York Yankees or a television show like "American Idol" while doing their work, they can lawfully be forbidden from talking about a union unless on a break and away from the work area.⁸⁵

*c. The Fist in the Velvet Glove*⁸⁶

These rules apply before and during the period after a union files for an NLRB-sponsored election to decide if the employees wish to be represented by a union. The election process extends a minimum of six or seven weeks, and often much longer, potentially stretching for years with appeals.

It is as if, in a political election involving Republicans and Democrats, only the Democrats enjoy unfettered access to the electorate at work, on company e-mail, and in captive audience meetings with managers supporting Democrats. Even more importantly, to carry the analogy of political elections further, it is as if only the Democratic campaign managers hold power over the voters' jobs, compensation, promotions, and job security, and can legally delay even a victorious Republican from taking office for

79. *Id.*

80. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

81. *Id.*

82. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

83. *Guard Publ'g Co. v. Eugene Newspaper Guild*, 351 N.L.R.B. 1110 (2007).

84. *Id.*

85. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

86. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964).

months or years. Thus, as many scholars point out, NLRB elections fall far short of an equal contest.⁸⁷

d. The Linden Lumber Rule and Dana Corporation Rules: The American Belief in Fair Elections

During the first thirty years after enactment of the NLRA in 1935, unions often won representation rights by obtaining signatures from the majority of employees on authorization “cards” stating their desire for such representation. (We can return to the analogy of the political election process where signing cards often constitutes the method for registering with a political party.) Often the employers voluntarily “recognized” the union without any election, and the collective bargaining process desired by the employee majority began immediately. Indeed, for much of this period, unless the employer could show a good faith doubt that the union represented an uncoerced majority of the employees, labor law *required* voluntary recognition upon demand from the union demonstrating a majority via authorization cards.⁸⁸

For the past thirty-five years, however, the path to unionization increasingly was led through the NLRB election process discussed above rather than through voluntary recognition based on card majorities. While for a time Board law on the right of an employer to delay collective bargaining by refusing to recognize a union, even in the face of an overwhelming “card majority” in favor of representation, sometimes vacillated.⁸⁹ In the 1974 *Linden Lumber*

87. See Atleson, *supra* note 33; Brudney, *supra* note 33; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 324 n.15 (2005) [hereinafter Estlund, *Rebuilding the Law*] (“[T]his pessimism stems from the fact that the right to form a union is perhaps the most trampled upon and underenforced of employees’ legal rights.”); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351 (1990); Raja Raghunath, *Stacking the Deck: Privileging “Employer Free Choice” Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329 (2008) (the key to understanding the NLRB process is the “asymmetrical employer power” most often inherent in the employment relationship); Weiler, *Promises To Keep*, *supra* note 15.

88. *Joy Silk Mills, Inc. v. United Textile Workers of Am.*, 85 N.L.R.B. 1263 (1949); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592 (1969) (“The traditional approach utilized by the Board for many years has been known as the *Joy Silk* doctrine Under that rule, an employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he [sic] had a ‘good faith doubt’ as to the union’s majority status.”).

89. The “Nixon Board,” for example, permitted the employer to refuse recognition even absent a good faith doubt about the union’s majority support. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

case⁹⁰ a five–four majority of the Supreme Court enshrined that employer option in federal labor law. Since that time, employers far more often, and quite understandably, take the opportunity to refuse recognition in the face of union card majorities and force the union to file for an election, thus delaying collective bargaining for substantial periods. This provides time for employers to wage an anti-union campaign in the one-sided election process described above.⁹¹

In response to this reality, unions during the past ten to fifteen years increasingly sought ways to avoid the NLRB election process and the delays and opportunity for employee undue influence presented in that process. They sought “neutrality agreements” with employers, “labor peace” agreements, and “card check” agreements in advance of trying to obtain employee signatures on representation cards.⁹² Under these arrangements employers (perhaps threatened with consumer picketing or “corporate campaigns,” promised union cooperation on productivity or other issues, or the union’s pledge to forebear use of the strike or boycotts) contract in advance not to oppose unionization, or at least to accept a card showing of the union’s majority without resort to *Linden Lumber* elections.⁹³ Some

90. *Id.* Justices Stewart, White, Marshall, and Powell dissented, noting that Section 9(a) expressly states that the exclusive bargaining representative “shall be the union ‘designated or selected’ by a majority of the employees in an appropriate unit,” that legislative history did not support the majority’s rule requiring an election, and that Section 9(c)(1)(B) (giving employers the right to file their own NLRB election), on which the majority relied, was not intended to allow an employer merely to refuse recognition without filing an election petition. *Id.* at 311–17. National Labor Relations Act, § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) (2006) on its face directs the NLRB to hold an election upon receiving an employer election petition only where a “question of representation . . . exists.” Under the earlier Board law, a “question of representation” (known to practitioners of that earlier era as a “QCR”) could arise in various situations including a “good faith doubt” about the union’s majority status, or conflicting claims by rival unions.

91. Unions consistently lose more than half of such campaigns. Raghunath, *supra* note 87, at 334–35 n.27; Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 51–52 (2001) (unions won 45.64% of representation elections during a fifteen year study period). Not surprisingly, support for union representation typically declines during such campaigns. Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court’s Gissel Decision*, 79 NW. U. L. REV. 87 (1984).

92. See Henry H. Drummonds, *The Union Authorization Card Majority Debate*, 58 LAB. L.J. 217 (2007) [hereinafter Drummonds, *Union Authorization*]. Legitimate questions exist concerning whether the card majority process adequately protects employee free choice. See *infra* Part III.B.

93. See Brudney, *supra* note 33.

unions, especially the Service Employees International Union (SEIU), tasted success with these innovative techniques designed as they were to avoid anti-union campaigns by employers.⁹⁴

In 2007, however, the Bush II Board majority changed the rules in the *Dana Corporation* case.⁹⁵ That three-two decision⁹⁶ held that, even after voluntary recognition by an employer based upon a union's uncoerced card majority, the "recognition bar"⁹⁷ (to bar further contest of the union's majority status for a "reasonable time"⁹⁸) would not be in effect until the employees were allowed a forty-five day period to seek an election after formal notice of an employer's recognition of the union based on a card majority.⁹⁹

This reversed the Board's decades-old "recognition bar" doctrine.¹⁰⁰ That doctrine, and its sister doctrines, the election certification¹⁰¹ and contract bar doctrines,¹⁰² balance two labor relations policies that conflict: the need for stability in the bargaining relationship and the right of employee free choice guaranteed in Section 7. Under the new *Dana Corporation* rules,

94. The SEIU, unlike most of its sister unions, expanded its membership in the past ten years through such campaigns as "Justice for Janitors" and the organization of home health care workers in California, Oregon, and other states.

95. *Dana Corp. v. Int'l Union, United Auto., UAW.*, 351 N.L.R.B. 434 (2007). See generally Drummonds, *Union Authorization*, *supra* note 92, at 221–22.

96. Members Liebman and Walsh concurred in the result but dissented on the majority's reasoning and announcement of new rules for voluntary recognition situations. President Obama has nominated member Liebman to serve as the next Chair of the NLRB. Craig Becker, whose scholarship carefully explained the one-sided nature of NLRB elections, is President Obama's nominee to fill another Board seat.

97. Under the "recognition bar," the union was guaranteed representation rights for a "reasonable time." In one case under the "Clinton Board," time periods of five, ten, and eleven plus months were deemed within the "reasonable" bar period. *MGM Grand Hotel, Inc. v. Local Joint Executive Bd.*, 329 N.L.R.B. 464 (1999).

98. *Id.*

99. *Dana Corp.*, 351 N.L.R.B. 434.

100. *Id.* (Liebman and Walsh, dissenting in part).

101. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (2006) (one-year election bar from date of Board election); *Brooks v. NLRB*, 348 U.S. 96 (1954) (one-year "certification" bar from date of Board's certification of union in prior election).

102. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 290 n.12 (conclusive presumption of union's majority status during term of collective bargaining agreement, up to three years). To prevent perpetual bars to a challenge to a union's majority status via successive, back-to-back contracts, the "contract bar" does not apply during the thirty-day period beginning ninety days before contract expiration. This "window period" constitutes employees' only opportunity to seek to decertify a union, or change unions, during the period of collective bargaining agreements.

the process of bargaining with a stable bargaining representative is, under the best of circumstances, delayed for this forty-five day period (ignoring the period required to give the employees formal notice of the employer's recognition based on a card majority and any appeals of the election proceedings). Moreover, under the approach adopted by the *Dana Corporation* majority, a mere thirty percent of the employees can force an election, thus potentially delaying bargaining desired by a strong majority of the employees.¹⁰³

*e. Remedies for Violations of Election Rules by Employers
Impose No Penalties and Raise No Deterrent to Illegal Conduct*

Sometimes unions successfully win rulings that employer election conduct violates labor law prohibitions. But even weaker remedies exist for election conduct violations than the back pay remedy for anti-union retaliation and discrimination discussed above. A cease and desist order, accompanied by a required posting acknowledging an NLRB finding of violations, perhaps coming after many months and often years of litigation, demonstrates the impotence rather than the power of the NLRB remedial process. A "new election," which the NLRB sometimes orders after illegal employer conduct, long after employees first sought union representation, similarly fails to vindicate employee rights. Delay most often aids employers in the delicate situation of a new organizing campaign. It is not that employers are "evil." Rather, it is that an employer's quite business-like calculation of cost and benefit counsels, even if their lawyers are constrained by ethical considerations, that risking findings of illegal conduct in order to discourage or avoid unionization pays dividends. Federal labor law, and not the employers who take advantage of it, bears the responsibility for the present sad state of affairs in the American system of labor relations.

*4. Weaknesses in the Collective Bargaining Process Further
Contribute to the Decline of Collective Bargaining*

The second "beating heart" right in Section 7 of the NLRA constitutes the right to have good faith bargaining determine the

103. It seems likely that a new "Obama Board" majority will reverse the *Dana Corp.* ruling. But this merely demonstrates how "labor law" has become politicized, with doctrines shifting to and fro based on the political administration. See *infra* Part IV.B.

outcome of the bargaining process. The duty to bargain in good faith again presents employers with opportunities to delay.

a. The Remedial Scheme Lacks Teeth

Even where unions and employees successfully overcome all of these obstacles and collective bargaining ensues, the NLRA suffers inadequacy. Most importantly, no effective remedy for bad faith bargaining exists. Although Section 10(c) authorizes the Board to award “cease and desist” orders and “such affirmative action . . . as will effectuate the policies of this Act,”¹⁰⁴ a straightjacket imposed by the Supreme Court in the *H.K. Porter*¹⁰⁵ case curtails the Board’s discretion. That case disapproved of the Board awarding a disputed contract clause as a remedy for a refusal to bargain in good faith about that provision.¹⁰⁶ As a consequence, the NLRB fell into a pattern of often meaningless remedies: cease and desist orders years after the events in question due to the length of the unfair labor practice process, orders to post notices or otherwise notify the employees of the violation, and the like, rejecting more creative remedies.¹⁰⁷ In short, NLRB remedies for bad faith bargaining trigger the proverbial “slap on the wrist.”

Finally, beyond the lack of substance in the remedies for bad faith bargaining, the process itself entails delays of many months

104. 29 U.S.C. § 160(c) (2006).

105. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

106. *Id.* at 102 (a “dues check off” clause allowing the union to collect union dues through a payroll deduction authorized by the employee).

107. *See Ex-Cell-O Corp. v. Int’l Union, UAW.*, 185 N.L.R.B. 107 (1970) (After union won election in 1964, employer found guilty of unfair labor practices by administrative law judge in 1967. In 1970—six years after the election—a three–two majority rejected award of monetary losses suffered by the employees as the result of the employer’s illegal conduct as too speculative, citing *H.K. Porter Co.*, 397 U.S. 99.) “Punitive remedies” are not allowed. *Id.* *See also* *Tiidee Prods., Inc. v. Int’l Union of Elec., Radio & Mach. Workers*, 194 N.L.R.B. 1234 (1972). The “Clinton Board,” led by Professor William Gould, made efforts to innovate, which, at least for now, fell by the wayside during the “Bush II” years. *See Care Manor of Farmington, Inc. v. New Eng. Health Care Employees Union, Dist. 1199*, 318 N.L.R.B. 330 (1996) (award of union and Board’s costs of litigation after employer blatantly refused to bargain after certification). But other cases hold that attorneys’ fees cannot be awarded. *E.g.*, *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). Remedies for the Board and Union, of course, do nothing to help employees whose right to collective bargaining suffers delay or denial.

In one area, however, NLRA remedies do bite. Under the unilateral change doctrine, an employer making a change in working conditions unilaterally, without any bargaining, or without bargaining in good faith to impasse, may be liable to make the employees whole for any losses suffered as a result of the unilateral change. *NLRB v. Katz*, 369 U.S. 736 (1962).

or, frequently, years. All the while employees desiring collective representation must wait without losing faith in the process. With an increasingly mobile workforce, union support inevitably suffers erosion.

b. The Problem of Proof Further Makes the Duty to Bargain in Good Faith Problematic

Another problem arises from Congress' addition of Section 8-d to the Taft-Hartley Act.¹⁰⁸ That section states, among other provisions, that the duty to bargain collectively with a duly certified or recognized union representative "does not compel either party to agree to a proposal or [even] require the making of a concession."¹⁰⁹ Good faith bargaining about the terms and conditions of employment constitutes the only command of the statute.¹¹⁰ The Supreme Court assumes that economic self-help measures (strikes, slowdowns, lockouts, and unilateral implementation of the employer's proposals at "impasse"), or the threat thereof, drive the parties to compromise and reach agreement.¹¹¹ No requirement to take "rational" positions at the bargaining table exists.

This makes proof of bad faith in the bargaining process crucial. But subjective bad faith in the bargaining process often evades

108. 29 U.S.C. § 158(d) (2006).

109. *Id.* National Labor Relations Act Section 8(d) embodies a fundamental principle of the NLRA: it remains neutral on the terms and conditions of employment and instead imposes requirements designed to implement a bargaining system, not to control the outcome of that bargaining. Anomalously, however, the states retain freedom to directly regulate the terms and conditions of employment being bargained about and to impose minimum labor standards legislation on a state-by-state basis. *See, e.g., Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (mandated mental health coverage in an employer provided medical insurance plan not preempted by NLRA). *See infra* Part IV.B.

110. An early case defined the duty as "[an] obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). There have been many varying formulations by changing Boards and Courts of Appeals over the years.

111. *See, e.g., NLRB v. Int'l Union of Ins. Agents'*, 361 U.S. 477 (1960). (This case adopted the economic power model rather than the rational model for collective bargaining. Though the Court held that a union slowdown was not inconsistent with good faith bargaining in that case, it also noted that the slowdown and other forms of unconventional strike activity fall outside the protections of Section 7; such pressure tactics are neither protected nor prohibited by the Act with the result that the employees can lawfully be fired for engaging in such tactics.)

proof.¹¹² Thus the line between illegal “surface bargaining” and “dilatory tactics,” on the one hand, and lawful “hard bargaining,” on the other hand, remains an elusive one.¹¹³

c. The Employer Calculus of Risk and Benefit

These realities again tempt employers. Even though their lawyers cannot ethically counsel going through the motions to delay and frustrate the process, employers may very rationally make the calculation themselves that they risk little but may gain much by delaying the bargaining process via bad faith bargaining.

d. Problems with the Bargaining Process Are Especially Acute in First Contract Situations

Fragile relationships mark new bargaining relationships. Employers may still be skeptical and even hostile to the process. The union carries no demonstrated record to the employees in the new bargaining unit. Majorities of employees favoring collective bargaining may be soft. Although collective bargaining resolves the overwhelming majority of “successor” contracts in established relationships without strikes or other disruption,¹¹⁴ first contracts experience a noticeably higher failure rate—at least one-third of first contract negotiations (and that percentage rose to forty-four percent 2000–2004) fail to produce a collective bargaining agreement.¹¹⁵ But no effective remedy for bad faith bargaining exists in such situations. Without any past demonstration of the union’s effectiveness in improving their compensation, fringe benefits, hours or overtime pay rules, job security, grievance procedures, and other terms and conditions of employment, employees exhibit less solidarity and backing for the newly formed union. And again, quite understandably, this tempts employers who have lost elections and the appeals that typically follow.

112. Some requirements of the bargaining obligation involve objective elements, for example, the duty to reduce agreements to writing and the duty to meet at reasonable times and places. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2006). The subjective requirement of good faith remains, however, problematic from a proof perspective.

113. Thomas P. Brown, IV *Hard Bargaining: The Board Says No, the Courts Say Yes*, 8 EMP. REL. L.J. 37 (1982).

114. One study indicated that five point eight percent to seven point seven percent of *renewal* contract negotiations resulted in no agreement. Joel Cutcher-Gershenfeld et al., *How Do Labor and Management View Collective Bargaining?*, MONTHLY LAB. REV., Oct. 1998, at 23, 30.

115. From 2000–2004, first contract negotiations failed forty-four percent of the time. COX ET. AL., *supra* note 7, at 529 n.4.

Organizing new groups of employees, even those clearly wanting union representation, entails major risks of failure. Employees often grasp this reality.

*5. Problems with the Third Section 7 “Beating Heart” Right: The Federally Protected Right to Engage in “Concerted Activity for Mutual Aid and Protection”*¹¹⁶

We turn now to the last of the Section 7 “beating heart” rights under the NLRA. Here again labor law makes unkept promises.

*a. Permanent Replacement of Strikers Makes a Mockery of the Federally Protected “Right” to Engage in “Concerted Activity for Mutual Aid and Protection”*¹¹⁷

Union labor lawyers must sometimes explain to bargaining units facing a strike the law of permanent replacement of strikers.¹¹⁸ Imagine the following talk to a group of employees considering whether to strike:

You have an absolute right under federal labor law, if you so choose, to band together to strike in support of your union’s bargaining position with your employer. This right is guaranteed by Section 7 of the NLRA. You cannot lawfully be retaliated or discriminated against in any way because you choose to exercise this right. Such discrimination would be illegal under Sections 8(a)(1) and (a)(3) of the federal act. *However*, you can be permanently replaced while you are on strike. That means that if, before you cease striking, the employer hires other workers to permanently replace you and does not commit unfair labor

116. 29 U.S.C. § 157 (2006).

117. National Labor Relations Act §§ 7, 8(a)(1), 8(a)(3), 13, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 163 (2006).

118. The seminal case is *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938). There, in a case involving discrimination against strike leaders after a strike, clearly illegal, the Supreme Court, while affirming an NLRB ruling in favor of the leaders and reinstating them, rather casually declared in dictum:

Although § 13 provides, “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. *And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.*

Id. at 345–46 (emphasis added) (citation omitted).

practices over which you are striking,¹¹⁹ then the employer may keep the replacement workers in your place instead of reinstating you. You do have a right, even if permanently replaced, to go on a preferential rehiring list in the event of new vacancies after you make an unconditional offer or request to return to work (no strings attached).

Of course you know the typical response of employees: “Say what?”

The employer’s right to permanently replace strikers, without violating their federally protected right to strike, even when those strikers offer to return to work unconditionally (i.e., on the employer’s terms), stands as one of the most perplexing anomalies in labor law. Rarely used during the first decades of the NLRA, it became more popular and known after President Reagan successfully and permanently replaced striking air traffic controllers in 1981.¹²⁰

Though the doctrine stems from dictum in a Supreme Court case in 1938, when the NLRA was in its infancy,¹²¹ and further seems inconsistent with the express language of Section 13,¹²² a divided Supreme Court in 1989 reaffirmed the doctrine and extended it to allow employers to prefer strikers who abandon a strike before their fellow workers.¹²³ A bill to overrule the doctrine in Congress in the early 1990s passed the House of Representatives but failed in the Senate in the face of a threatened filibuster.¹²⁴

119. Employees who strike over an employer’s unfair labor practices do have a right to reinstatement upon their unconditional offer to return to work. *Collins & Aikman Corp. v. Textile Workers Union of Am.*, 165 N.L.R.B. 678 (1967).

120. Joseph A. McCartin, *Marking a Tragic Anniversary*, HIST. NEWS SERV., Aug. 3, 2001, <http://www.h-net.org/~hns/articles/2001/080301a.html>. One study showed that permanent replacement was used in fifteen to twenty percent of strikes during the 1970s and 1980s. Seth D. Harris, *Coase’s Paradox and the Inefficiencies of Permanent Replacement*, 80 WASH. U. L.Q. 1185, 1217 n.118 (2002). “Strikes involving permanent replacement workers tend to be ugly, emotional affairs. Deep and long-lasting cleavages in personal lives and communities can result.” *Id.* at 1221. Of course, because of *ex ante* effects on the parties’ assessment of their relative bargaining strength, the doctrine affects many more collective bargaining situations, weakening the union’s perceived power.

121. *MacKay Radio & Tel. Co.*, 304 U.S. at 345–46.

122. National Labor Relations Act § 13, 29 U.S.C. § 163 (2006).

123. *Trans World Airlines, Inc. v. Indep. Fed’n of Flight Attendants*, 489 U.S. 426 (1989) (“crossover” flight attendants, who abandoned strike before union and other flight attendants, did not have to be displaced to make place for striking flight attendants with more seniority at end of strike).

124. *COX ET. AL.*, *supra* note 7, at 587–88. President Clinton attempted to overturn the doctrine as to federal procurement contractors by Executive Order, but this attempt was struck down by the District Columbia Circuit Court of

While some countries forbid employers from operating at all during a strike, the use of temporary replacements to operate during strikes is less controversial in the United States. But the inclusion of permanent replacement in the panoply of employer options during bargaining disputes raises the stakes for employees contemplating a strike action; the strikers may not only lose the strike and be forced to accept the employer's terms, but they may de facto lose their jobs as well. Many employees express reluctance to take these risks. By the same token, employers wishing to rid themselves of a union may be tempted to force a bargaining dispute to impasse, daring the employees to strike, with the intention of replacing them permanently. Thus the permanent replacement doctrine affects not only the rights of the parties *after* a strike, but it triggers *ex ante* effects weakening a union's position as well.

b. The Power to Lockout Employees Both Defensively and Offensively During Bargaining Disputes

The first lockout situations approved under the NLRA occurred in situations where the employer acted defensively: to prevent the union from striking at a particularly damaging time, or in such a situation or manner, or to prevent "whipsaw" tactics in multi-employer bargaining units.¹²⁵ Soon enough, however, the right to lockout employees extended to offensive lockouts designed to economically pressure the union and employees to come to agreement in collective bargaining.¹²⁶ Thus the employer's options expanded to include the offensive use of lockouts in bargaining disputes (as well as permanent replacement of strikers,

Appeals in *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

125. *E.g.*, *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) (lockout to counter "whipsaw" union tactics, striking one employer in multiple-employer bargaining unit at a time while continuing work for other employers in multiple-employer group, held lawful); *Int'l Shoe Co. v. Local 198, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 93 N.L.R.B. 907 (1951) (lockout to avoid unprotected repetitive strike disruptions); *Duluth Bottling Ass'n v. Brewery & Soft Drink Workers' Union Local No. 133*, 48 N.L.R.B. 1335 (1943) (lockout to prevent spoilage of perishable goods during strike).

126. *See Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (reversing the NLRB's holding that a lockout was for the sole purpose of placing economic pressure on the employees and was thus illegal); *Harter Equip., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 280 N.L.R.B. 597 (1986) (temporary replacements authorized for lockout motivated solely by desire to put economic pressure on union to resolve bargaining dispute).

reinstatement preferences for employees who abandon a strike, and unilateral implementation of an employer's proposals after reaching a bargaining impasse where there is no strike or lockout).

c. Restrictions on Peaceful Union Picketing and Boycotts: The 10(L) Provision for Mandated Interlocutory Injunctive Relief Petitions and the Damages Remedies Under LMRA Section 303 for Illegal Secondary Boycotts

Only one provision in the LMRA provides for damages remedies, the Section 303¹²⁷ action for damages against unions engage in illegal, albeit peaceful, secondary boycotts.¹²⁸ Similarly, Section 10(l)¹²⁹ includes the only provision of the Act providing for *mandatory* interlocutory filings for injunctive relief in the federal district courts; this provision applies to both secondary boycotts and illegal recognition picketing.¹³⁰ While nothing in theory makes these provisions inappropriate, it is striking that these remedies, extraordinary given the general remedial scheme of the Act, apply only in actions *against* unions.

6. Summary of Imbalances in the NLRA and the LMRA

Thus, under current law, private sector unions cannot protect workers from anti-union discrimination, do not have equal access to employees considering whether to unionize, possess no effective legal remedies for failures to bargain in good faith, and find resort to economic pressure hindered by doctrines like permanent replacement of strikers, offensive employer lockouts, damages liability for secondary boycotts, and preferential injunctive relief for secondary boycotts and recognition picketing.

The discussion thus far has focused on the many weaknesses in federal labor law. These weaknesses are especially striking given the NLRA's professed policy goals:

It is hereby declared to be the policy of the United States [in order to protect commerce] . . . encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-

127. Labor Management Relations Act § 303, 29 U.S.C. § 187 (2006) (damages actions against unions engaging in secondary boycotts).

128. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006) (secondary boycotts).

129. 29 U.S.C. § 160(l) (2006).

130. National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (2006) (recognition picketing lasting longer than thirty days).

organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹³¹

But more positive reasons exist for favoring change and innovation in labor law.

B. The Potential of Labor Law Revitalization to Help to Create More Structural Balance in the Relationships Among Employees, Managers, and Investors

1. The Failure of Unfettered Free Markets

The Great Recession of 2008–2009 exposed the limits of unfettered free markets as a guiding ideology in economic arrangements.¹³² Americans at every social level struggle with the collapse of real estate markets, financial firms, lending, demand for the goods and services that small and other businesses provide, and the curtailment of job opportunities and work.

Bailouts of the financial industry by the federal government show that mechanisms for increasing rewards to investment bankers and hedge fund managers¹³³ failed to appropriately balance risks. Much of this risk now falls on taxpayers. A system that provides great benefits to decision-makers while transferring the risks of the activities involved to others falls far short of the free market capitalism espoused by neoclassical scholars.¹³⁴

This failed system benefited not only financial institutions and fund managers but the executive suite as well. During the past decades the compensation of CEOs, CFOs, and other top-level corporate managers increased dramatically in proportion to the average earnings of employees in those same corporations.¹³⁵

131. National Labor Relations Act § 1, 29 U.S.C. § 151 (2006).

132. The “dot com” bubble and scandals involving the Enron Corporation and other companies during the early 2000s taught a similar lesson and led directly to attempts at reform such as the Sarbanes–Oxley Act.

133. See Joe Nocera, *First, Let's Fix the Bonuses*, N.Y. TIMES, Feb. 21, 2009, at B1 (2008 bonuses on Wall Street totaled \$18.4 billion though the financial crisis resulted in losses in the fourth quarter alone of \$15.3 billion. Merrill Lynch, driven to a forced sale to the Bank of America to avoid bankruptcy, distributed \$3.6 billion in bonuses in the two days before the acquisition); Louise Story, *Just a Little Off the Top*, N.Y. TIMES, Mar. 25, 2009, at B1.

134. See, e.g., Joseph E. Stiglitz, *The End of Neo-Liberalism?*, PROJECT SYNDICATE, July 2008, <http://www.project-syndicate.org/commentary/stiglitz101>.

135. Self-dealing characterizes executive compensation. Compensation committees on Boards of Directors, consisting chiefly of other executives

American executives in Fortune 500 companies now earn 300–400 times the compensation of average employees; this stands in sharp contrast to the ratios prevailing in Japan and the European Union.¹³⁶ Moreover, the now prevalent swollen packages of today's executive officers dwarf the ratios common in the United States only a generation ago.¹³⁷ Many of the companies managed by these executive officers have fallen on hard times: bankruptcy, major restructurings involving the loss of many thousands of jobs, reductions in wages, salaries, and hours, and disruption of local communities and smaller businesses—to name a few of the effects.¹³⁸ The executive suite took high compensation but rarely shared in the direct human costs of flawed decision-making.

appointed most often with the support of the CEO, commission comparability studies from firms specializing in the study of executive compensation. Not surprisingly, this system led to the outsized compensation packages seen today. The problem has been present for more than twenty-five years. See GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES (1991) 27–28 (documenting declining inflation adjusted earnings for most American workers in the 1970s and 1980s, demonstrating that American executive salaries dramatically increased during the same period, and finding that U.S. CEO's earn far more, as a ratio of average worker pay, than their managerial counterparts in Japan and Europe); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907, 1909 n.6 (1993) (noting that hourly wages for average employees decreased since the 1970s). These trends, already established in the 1990s, continue today. See Elizabeth Gudrais, *Unequal America: Causes and Consequences of the Wide—and Growing—Gap Between Poor and Rich*, 110 HARV. MAG. 22 (July–Aug. 2008), available at <http://harvardmag.com/pdf/2008/07-pdfs/0708-22.pdf>. See also former U.S. Secretary of Labor Professor Robert Reich's recent speech as reported in the Miami Herald. Scott Andron, *Former Labor Secretary Robert Reich Critical of Stagnant Wages*, MIAMI HERALD, Feb. 12, 2009, at C1; Joseph Stiglitz, MARKETS AND MORALS *infra* note 141.

136. U.S. CEO salaries average around 400 times that of average worker pay. See *Politics and Economy: Executive Pay*, NOW ON PBS Jan. 20, 2006, <http://www.pbs.org/nw/politics/executivepay06.html> (last visited Sept. 4, 2009) (average pay for an American worker was \$27,000, compared to the average pay for an American CEO of \$11.8 million).

137. *Id.* For comparisons of CEO pay rates, including Japan, Europe and the United States, see Adam Choate et al., *CEO Pay Rates: U.S. vs. Foreign Nations*, (Nov. 17, 2005) (unpublished paper), www.cab.latech.edu/~mkroll/510_papers/fall_05/Group6.pdf (U.S. CEO's paid substantially more than foreign counterparts). See also Jeffrey Stinson, *More Critics*, USA TODAY, June 30, 2008, at 3B (comparing German, French, and British CEO pay to United States CEO pay).

138. See Hubert B. Herring, *BULLETIN BOARD: At the Top, Pay and Performance Are Often Far Apart*, N.Y. TIMES, Aug. 17, 2003, § 3, at 9 (reporting on result of study by executive pay expert Graef Crystal); Graef Crystal, *Gilead's Martin: Super Performance, the Right Incentives*, May 18,

At the same time, many distinguished economists believe that middle class wages and salaries (adjusted for inflation) have stagnated; while incomes rose, this resulted from the widespread growth of the “two earner” family and longer hours at work.¹³⁹ Middle managers, engineering and other professionals, and rank and file employees command less of the wealth generated by American business, and income disparities grow.¹⁴⁰ For the lowest half of the American workforce, real income (adjusted for inflation) has stagnated or decreased.¹⁴¹ This works not only as an

2009, http://graefcrystal.com/images/CRYS_REP_GILD_5_18_09.pdf (praising one company’s executive pay because it properly measured and compensated for executive performance in contrast to many of author’s other published reports on executive pay).

139. Andron, *supra* note 136 (“To hear former U.S. Labor Secretary Robert Reich tell it, huge as the current recession is, there’s a bigger problem facing America’s middle class: Wages have seen little real growth for decades In part to make up for this [many] more women entered the workforce. Then everyone started working longer hours. Then people increased borrowing.”) Secretary Reich is now a Professor at the University of California at Berkeley. *See also* Krugman, *infra* note 146. (Mr. Krugman won the Nobel Prize in economics in 2009); Stiglitz, *infra* note 141 (Mr. Stiglitz won the Nobel Prize in economics in 2001); Noonan, *infra* note 146; Elizabeth Warren, *The Middle Class on the Precipice: Rising Financial Risk for American Families*, 108 HARV. MAG. 28 (Jan.–Feb. 2006), available at <http://harvardmag.com/pdf/2006/01-pdfs/0106-28.pdf>. (Ms. Warren is a Professor at the Harvard Law School.)

Not all economists agree with this analysis. E.g., Stephen Rose, *The Myth of the Declining Middle Class*, STATS, June 2, 2008, http://stats.org/stories/2008/myth_decline_middle_june2_08.html (citing many works supporting the declining middle class theory, but arguing as follows: though Gross Domestic Product (GDP) per capita rose sixty-three percent between 1979 and 2007, while median household income rose, adjusted for inflation, only thirteen percent, the explanation is in changing “demographics” and the growth of “benefits” not shown in the statistics; when these factors are taken into account the growth for median middle class households has been thirty-three percent rather than thirteen percent; further the top half of the middle class did considerably better.) Still, even this alternative reading of the numbers makes clear that a disproportionate share of the GDP growth over the past three decades has gone to the highest income earners.

140. *See* Michel Fouquin, *Globalization and Its Impact on Jobs and Wages*, in OFFSHORING AND THE INTERNALIZATION OF EMPLOYMENT: A CHALLENGE FOR A FAIR GLOBALIZATION, at 49–50 (2006) (showing growing income disparity in the U.S.). As a consequence, CNN’s Lou Dobbs and other voices find a popular audience in their persistent critiques of the “fate of the middle class.” *See also* Joseph Stiglitz, *Markets and Morals*, ATLANTIC MONTHLY, Apr. 2006, at 44 (“The system has delivered enormous benefits for those at the top, but incomes at the bottom have stagnated, or even declined.”) [hereinafter Stiglitz, *MARKETS AND MORALS*].

141. *See* Richard B. Freeman, *Solving the New Inequality*, BOSTON REV., Dec. 1996–Jan. 1997, <http://bostonreview.net/BR21.6/freeman.html>.

increasing perception of inequity, but it also erodes purchasing power in the world's largest economy.¹⁴²

2. The Need for Structural Balancing of Economic Forces and the Contribution That a Revitalized Union Movement and Labor Law Can Make

The problems lie not in markets but in their imperfections. Human greed,¹⁴³ excessive optimism, information disparities, transaction costs, and “bounded rationality”¹⁴⁴ (often ignored or dismissed as unimportant by neoclassical scholars) require nuanced regulation in order for free markets to deliver their bounty to all sectors and social levels. The measure of any economic system lies not in an abstract theoretical purity but in its ability to broadly deliver an improved life for its citizens. Free markets work best to increase the wealth and well-being in a society when they are constrained by appropriate mechanisms for allocating reward and risk. The problem arises not from “evil” actors but in flawed structural arrangements. During the Second Gilded Age,¹⁴⁵ through

142. The erosion of middle and working class income and wealth has been disguised by the welcome entry of women into the workforce and asset bubbles in the “high tech” (especially dot com) and real estate industries. *See also* Kuttner, *infra* note 148.

143. The New York Times reported on May 30, 2009, that graduates of the Harvard Business School now take an oath not to be primarily motivated in their business careers by greed. While increased efforts to teach ethical concepts in business schools are noteworthy, history teaches that countervailing structures and institutionalized accountability more effectively control this natural human instinct. *See* Leslie Wayne, *A Promise to Be Ethical in an Era of Temptation*, N.Y. TIMES, May 30, 2009, at B1.

144. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (using the work of cognitive psychologists and behaviorists as a starting point for their argument for paternalistic default mechanisms subject to libertarian individual decisions to override the default rules).

145. Peggy Noonan, Op-Ed., *Rich Man, Poor Man*, WALL ST. J., July 28, 2007 (“We are living in the second great Gilded Age The gap between the rich and poor is great.”); Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, § 6, at 62 (“Yet you can’t understand what’s happening in America today without understanding the extent, causes and consequences of the vast increase in inequality that has taken place over the last three decades, and in particular the astonishing concentration of income and wealth in just a few hands. To make sense of the current wave of corporate scandal, you need to understand how the man in the gray flannel suit has been replaced by the imperial C.E.O. The concentration of income at the top is a key reason that the United States, for all its economic achievements, has more poverty and lower life expectancy than any other major advanced nation. Above all, the growing concentration of wealth has

which we have passed in recent years, these lessons were forgotten.

What do these observations have to do with labor law reform? Labor unions provide a countervailing force—wielded on behalf and with the participation of middle and working class employees—to the swollen power of executives and investment managers.¹⁴⁶ They provide more structural balance in the economy, and they do so without direct governmental regulation of the terms and conditions of employment.¹⁴⁷ Imagine the effect if a union bargaining on behalf of clerical workers (or production workers or software engineers) routinely cast compensation proposals for the represented employees as a percentage of CEO compensation for the three years past, or some similar measure. Or as recently demonstrated by the United Auto Workers, what if employees and unions played a greater role in corporate planning about restructuring of industries to adapt to new conditions? Or, if, under a reformed labor law, employees could routinely participate in corporate governance through work councils at the local, divisional, and company level?¹⁴⁸

More concretely, studies consistently show that employees represented by unions receive a premium wage for their work.¹⁴⁹

reshaped our political system: it is at the root both of a general shift to the right and of an extreme polarization of our politics . . . The New Gilded Age”).

146. See Philippe Waquet, *The Role of Labour Law For Industrial Restructuring*, in OFFSHORING AND THE INTERNATIONALIZATION OF EMPLOYMENT: A CHALLENGE FOR A FAIR GLOBALIZATION 179 (2006) (“Labour law . . . aims to enable workers to participate in the life and future of undertakings which are in operation thanks to their labour; it aims to ensure, without undermining management authority (which is actually more a responsibility), that workers have genuine guarantees.”).

147. See Robert B. Reich, *Does Labor Need More Clout?*, S.F. CHRON., Mar. 3, 2008, at B5. President Obama recently expressed his view that passing EFCA would help reduce income inequality, aid the middle class, and help the U.S. economy: “We need to level the playing field for workers and the unions that represent their interests, because we know you cannot have a strong middle class without a strong labor movement When workers are prospering, they buy products that make businesses prosper. We can be competitive and lean and mean and still create a situation where workers are thriving in this country.” Robert Kuttner, *President Obama Wants You to Join the Union*, HUFFINGTON POST, Feb. 1, 2009, http://www.huffingtonpost.com/Robert-kuttner/president-obama-wants-you_b_162975.html. See also David Madland & Karla Walter, *Unions Are Good for the Economy*, Feb. 18, 2009, http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html.

148. See EU Works Council Directive, *infra* note 194.

149. FREEMAN & MEDOFF, *supra* note 3, Chapter 3 (analyzing “The Union Wage Effect”), p.43.

The unions provide one means of reversing the growing income inequality in the United States.¹⁵⁰ Equally important, collective bargaining and other institutional frameworks for employee “voice” offer a mechanism for more shared power in America.¹⁵¹ Corporations involve managers, investors, and employees working together to create wealth. Economic structures should reflect this fact of life. A prosperous middle class generates demand for goods and services, stimulates investment and opportunities for businesses providing goods and services, and helps the overall economy.¹⁵² Unions can help restore this prosperity.

III. LABOR LAW REFORM THROUGH A LESS TRAVELED STATE ROAD

If public policy favors labor law reform, the scope of change needed will more likely originate from citizen action in the state Capitols—in Albany, Boston, Harrisburg, Columbus, Springfield, Madison, Lansing, Sacramento, Olympia, Denver, Baton Rouge, Tallahassee, and Austin—than from Washington D.C. History teaches that flexibility for state level experimentation and innovation consistently leads to federal level reform in the law of the American workplace.¹⁵³ This remains true today. What applies in the larger field of employment law applies to labor relations policy as well.

This Part contains three subparts: (A) a review of past efforts at labor law reform; (B) a review of EFCA proposals and discussion of how those proposals fail to address many fundamental issues ripe for labor law reform and innovation; and (C) a review of the leading role state law generally plays in the vast field of employment law.

150. See Freeman, *supra* note 185 (identifying five strategies for addressing rising income inequality in the United States, one of them, “[e]ncourag[ing] the growth of those citizen organizations with the clearest stake in improving the position of low-wage workers—namely unions.”). See also Michael J. Zimmer, *Escaping the Westphalian Trap: Unionism and Equality in China, Mexico, and the United States* (Revista Latinoamericana de Derecho Social, Working Paper No. 10, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478654.

151. Unions facilitate the “voice” of employees as well as increasing their compensation and improving their working conditions. *Id.*

152. See Kuttner, *supra* note 148; Reich, *supra* note 148.

153. See *infra* Part III.B. See generally Drummonds, *Sister Sovereigns*, *supra* note 1.

A. The History of Labor Law Reform Since the 1947 Taft–Hartley Act Illustrates the Difficulty of Reform at the Federal Level

Before turning to today’s debate about EFCA, some historical context will be useful. As with marriage, labor law reform efforts often begin with high hopes that are later dashed by unanticipated adversity.

Since the 1947 Taft–Harley Act,¹⁵⁴ unions at the Washington, D.C., level often fared poorly in debates over labor law reform. The 1959 Landrum–Griffith Act¹⁵⁵ continued the federal regulation of unions started in Taft–Hartley by limiting recognitional picketing,¹⁵⁶ revising the regulation of secondary boycotts,¹⁵⁷ and establishing the Labor Management Reporting and Disclosure Act (LMRDA) to regulate the internal affairs of unions.¹⁵⁸ In 1974 the amendments to the NLRA¹⁵⁹ expanded the jurisdiction of the federal labor relations regime to include health care institutions¹⁶⁰ and added NLRA Section 19 to provide protections for religious objectors to unions;¹⁶¹ the latter provisions were expanded in 1980.¹⁶²

Several attempts to make labor law more hospitable to collective bargaining failed over the past thirty-five years. In 1975, the “common situs” picketing bill¹⁶³ passed both houses of Congress but was vetoed by President Ford. In 1977, the “Labor Law Reform Act”¹⁶⁴ died for lack of enough votes to end a

154. 29 U.S.C. §§ 141–97 (2006). The 1947 Congress reacted to perceived abuses of union power during and after World War II and passed the Taft–Hartley Act over President Truman’s veto. See Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 (1947); Donald H. Wollett, *Collective Bargaining, Public Policy, and the National Labor Relations Act of 1947*, 23 WASH. L. REV. 205 (1948). Thus only twelve years after the enactment of the New Deal Wagner Act (a.k.a. National Labor Relations Act) in 1935, the federal policy moved from one explicitly favoring collective bargaining to a position of “neutrality” balancing the interests of employees, unions, and employers in “the national labor policy.” See also Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1465–66 (2008).

155. 73 Stat. 519 (1959).

156. National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (2006).

157. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006).

158. 29 U.S.C. §§ 401–531 (2006).

159. 88 Stat. 395 (1974).

160. National Labor Relations Act § 8(g), 29 U.S.C. § 158(g) (2006).

161. National Labor Relations Act, § 19, 29 U.S.C. § 169 (2006).

162. 94 Stat. 3452 (1980).

163. H.R. 5900, 94th Cong. (1975). The bill would have reversed *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951) and allowed construction unions to picket around an entire construction site even if their dispute was with a single subcontractor.

164. H.R. 8410, 95th Cong. (1977).

filibuster. (The bill would have, *inter alia*, strengthened remedies for anti-union discrimination, given unions more access to jobsites, and expedited election cases.) In 1994, a bill outlawing permanent striker replacement garnered majority support in both houses but again succumbed to a filibuster.¹⁶⁵ Finally, in 1997, the “Team Act”¹⁶⁶ (a bill opposed by organized labor for fear that it would allow a return to “company unions”) would have loosened restrictions on employer-sponsored employee committees but was vetoed by President Clinton.¹⁶⁷ None of these proposed enactments, however, involved the broad range of fundamental labor relations issues presented in the 2007–2009 debates over EFCA.

B. The EFCA Debate Illustrates the Need for More Labor Relations Policy Making in the States

EFCA raises three fundamental issues of labor relations policy:

1. what process should exist for unions to legitimately demonstrate their majority support among the employees;
2. what process should exist for resolving bargaining disputes other than such devices as strikes, permanent replacement of strikers, lockouts, slowdowns, and unilateral implementation of employer bargaining demands; and
3. whether employers should face stronger remedies when they commit unfair labor practices, such as anti-union activity discrimination, as they now face for racial, gender, religious, national origin, disabilities, and (often under state laws) sexual orientation discrimination.¹⁶⁸

The Act addresses these questions in three central provisions:

1. by providing for NLRB certification of a union as exclusive bargaining representative based on a “card check” showing the majority of employees signed cards stating they wish representation by the union;¹⁶⁹

165. 140 CONG. REC. S88524 (1994).

166. Teamwork for Employees and Managers Act of 1997, H.R. 634, 105th Cong. (1997).

167. *Clinton Vetoes TEAM Act Despite Pleas From Business For Passage*, 152 Lab. Rel. Rep. (BNA) 417, at D-19 (1997). *Electromation, Inc. v. NLRB*, 309 N.L.R.B. 990 (1992), *aff'd*, 35 F.3d 1148 (7th Cir. 1994) states the law in this area.

168. Henry H. Drummonds, *Beyond the Employee Free Choice Act Debate: Unleashing the States in Labor Management Relations Policy By Reforming Labor Law Preemption Doctrines Created by Judges A Half-Century Ago*, 19 CORNELL J.L. & PUB. POL’Y (forthcoming Jan. 2010) [hereinafter Drummonds, *Beyond the Free Choice Act Debate*].

169. Employee Free Choice Act, H.R. 800, 110th Cong. § 2 (2007) [hereinafter EFCA].

2. by providing for interest arbitration of first contract bargaining disputes;¹⁷⁰ and
3. by stiffening remedies for employer unfair labor practices with provisions for triple back pay awards and penalties up to \$20,000.¹⁷¹

As will be shown below, these proposals, while perhaps worthy as far as they go, fail to adequately address needed reforms in labor relations policy.¹⁷²

Although EFCA passed the U.S. House of Representatives in 2007,¹⁷³ enjoys support from President Obama,¹⁷⁴ and generates support from a majority in the U.S. Senate, the Chamber of Commerce and other business groups mounted a well-funded political campaign against it. In 2009, the House of Representatives deferred action until the issue finds resolution in the U.S. Senate. That body requires a “super-majority” of sixty votes to move a bill in the face of a threatened filibuster. Whether those votes can be generated remains in doubt. As set forth below, any bill commanding sixty votes in the Senate for cloture will likely require compromises.

1. “Card Check” or Other Provisions to Reduce Undue Employer Influence on Employees in the Process for Determining Whether a Union Represents a Majority

American labor law rests upon the assumption that the majority of employees in an appropriate bargaining unit choose freely to be represented. Once that majority status has been demonstrated, the employer must bargain in good faith regarding compensation issues, hours, and other terms and conditions of employment, such as job security and grievance and arbitration procedures.

170. *Id.* § 3.

171. *Id.* § 4.

172. It is interesting to note that Harvard Professor Paul Weiler suggested just these reforms a quarter century ago. Weiler, *Promises to Keep*, *supra* note 15; Weiler, *Striking a New Balance*, *supra* note 33. See also Paul Weiler, *GOVERNING THE WORKPLACE* (1990). This both reveals the perceptiveness of Professor Weiler’s scholarship and the poverty of new ideas in the federal debate today.

173. EFCA, H.R. 800, 110th Cong. (2007).

174. Kuttner, *supra* note 148. Many persons in the investment and business communities, who supported President Obama’s election campaign, oppose EFCA. E.g., John Libbert & Holly Rosenkrantz, *Billionaire Donors Split With Obama On Law That May Hurt Hotels*, BLOOMBERG NEWS, May 8, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6A3G.MZZqIw>.

a. “Card Check”

EFCA’s “card check” provision generated the most public discussion because it would have eliminated NLRB-conducted secret ballot elections to determine the majority’s wishes.¹⁷⁵ As explained above, the 1974 *Linden Lumber* case allowed an employer to force a union claiming representation rights to file for an NLRB conducted election, even where a strong majority of employees signed cards indicating they desired representation.¹⁷⁶ The unions proposed “card check” as a reasonable alternative to an election and one that would eliminate much delay.

The elections process and related appeals¹⁷⁷ delay the collective bargaining wanted by the majority (if, as at least often must be the case, their signatures on the union representation cards dependably indicate their wishes). One delay is in the election itself, which typically takes at least six to eight weeks after the union files an election petition. Further, where the employer allegedly has committed unfair labor practices after notice of an organizing campaign, the “blocking charge” doctrine¹⁷⁸ forces the union to a Hobson choice: at the union’s option the election process can be held in abeyance pending resolution of those unfair labor practice claims in the NLRB’s lengthy process for “ulp” claims (in order in theory for the coercive effect of the unfair labor practices on the employees to be dissipated through Board processes); yet this further significant delay can fatally affect the union’s often fragile majority, extending de facto the time for the employer to influence the workforce against unionization.

But the most significant opportunities for delay come *after* the election. Either side may appeal election rulings. Most significantly, where a union *wins* NLRB certification as the bargaining representative via an election, an employer who claims error in rulings by the NLRB Regional Director who conducts the election, or illegal conduct by the union affecting the election, *must*, in order to preserve those legal claims, refuse to bargain, inviting an unfair labor practice charge for refusal to bargain.¹⁷⁹

175. See *supra* note 178.

176. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

177. One delay is in the election itself, which typically takes at least six to eight weeks after the union files an election petition. But the most significant opportunities for delay come *after* the election when either side may appeal election rulings.

178. COX ET AL., *supra* note 7, at 275.

179. Either side can file objections to the result of an election triggering *administrative* review by the NLRB Regional Director, and in a few cases also obtain a “limited Board review” of the objections. *E.g.*, ROBERT A. GORMAN &

Not until the lengthy process for resolving that claim has been exhausted through a charge, formal complaint, an administrative law judge hearing, NLRB ruling, and an appeal to a United States Court of Appeals will the employer be under an enforceable judicial order to bargain.¹⁸⁰ Whether or not any of the claims raised are sustained, this cumbersome process delays implementation and often crushes the employees' originally expressed desire for a collective bargaining representative. Thus the system seems almost designed to present opportunities for delay.

Beyond the issue of delay, the union argument for card check contends that employers play with a "stacked deck" in NLRB elections, more akin to "elections" in Russia and other authoritarian states than to the American political elections that first spring to the mind's eye. Employers can severely restrict pro-union communications at work by employees (denying, for example, the use of company email even though generally allowed for personal matters), subject the employees to workplace "captive audience" anti-union speeches during the often lengthy election period, and all the while deny the union equal access to the employees.¹⁸¹ Moreover, the union argument for card check goes, in the absence of a meaningful remedial scheme in the NLRA, employers can harass and retaliate against pro-union workers and generally threaten and suggest dire consequences to unionization with impunity, making fair elections impossible.¹⁸² This stacked election deck, say the unions, explains why unions consistently lose about half of NLRB-conducted elections,¹⁸³ even though

MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 66 (2d ed. 2004) (citing statutes and regulations). But to obtain *judicial* review, an employer is required to "invite" an unfair labor practice bargaining charge by refusing to bargain; then raising the election issues in the subsequent ulp process, and then appealing to a U.S. court of appeal. *E.g.*, COX ET AL., *supra* note 7, at 315. This is because rulings in representation cases are not generally considered "final orders" subject to judicial review; only unfair labor practice rulings carry that status. AFL v. NLRB 308 U.S. 401 (1940).

180. 29 U.S.C. § 160(e)-(f) (2006).

181. See *supra* Part II.A.

182. *Id.*

183. COX ET AL., *supra* note 7, at 108. (Summarizing data from NLRB reports showing that since 1990 union success rates have fluctuated in the range of forty-seven to fifty-two percent.) Though unions experience a fifty percent success rate through the election process, their overall success rate in organizing campaigns is lower. That is because employers often find out about such campaigns before the union has gained enough employee support to seek an election. One estimate puts the overall success rate at one in twenty.

unions typically do not seek an election until a strong majority of employees have pledged their support, and polls consistently show a “representation gap,” with far more Americans supporting unionization than working in unionized workplaces.¹⁸⁴

Employers reject that theory. They argue that “card check” is inferior to secret ballot elections for testing employee sentiment for or against union representation. Employers observe that some employees might sign union cards under social pressure from other employees or the union. Further, employers argue, the elections process, including the employer’s campaign against the union, educates employees about the costs (i.e., union dues and initiation fees) and limitations of unionization (i.e., global labor markets, replacement of strikers, and no duty for an employer to agree to union proposals).

In the court of political and public opinion, the unions, as of this writing, appear to have lost this argument.¹⁸⁵ It goes against the grain of American culture to abandon an “election” process. Several key Senators announced their opposition to the “card check” provision, and attention shifted to other possible ways to level the election playing field, such as rules for more equal access and “quickie” elections.¹⁸⁶

Is the card majority process really superior to secret ballot elections in ascertaining the unfettered choice of the employees for or against union representation? Are the consistent votes *against* unions in over half of all NLRB elections really the product of an unfair election process and employer coercion? Or do employees, when they hear both sides of the argument, simply prefer not to unionize? Perhaps employees sign union cards out of embarrassment or because they feel pressure from other employees. Perhaps they decide they do not wish to pay union dues and initiation fees. Perhaps employees, when they think about it, conclude that unionization will *not* make them, or the goods and services they produce, more valuable in the global marketplaces.

184. FREEMAN & ROGERS, *supra* note 4, at 19–20 (analyzing Hart Research Surveys indicating that fifty-three percent of American workers said they favored union representation); Richard Freeman, *Do Workers Want Still Want More Unions? Yes, More Than Ever* (Economic Policy Institute, Briefing Paper No. 182, 2007), available at <http://www.sharedprosperity.org/bp182.html>.

185. Kris Maher, *Provisions to Ease Unionization Likely to Drop Out of Bill*, WALL ST. J., May 7, 2009, at A4.

186. Editorial, *The Imperfect Union Bill: Employer Intransigence Makes Finding Common Ground More Difficult*, WASH. POST, May 11, 2009 (“[O]ne attractive solution would be to speed up the time frame for holding union elections while allowing union organizers some access to employees in the workplace.”).

Which side is right in this great debate? This is not an easy question to answer. Perhaps more experimentation in the states could help answer the question. If fairer union election procedures (equal access, no captive audience speeches, and protection against union discrimination on par with the protections for other forms of discrimination) found support in nonpreempted state laws, we could be closer to a fact-based answer.

Even on the issue of “card check” the states offer flexible laboratories for experimentation.¹⁸⁷ The federal debate creates a false choice between representation elections and the more expeditious card check process. For today’s more educated workplace, the choice should be neither the employers’ nor the unions’, but rather the employees’. Again, we can learn from experience in the states. Some state public sector laws, for example Illinois and Oregon, already have “card check.”¹⁸⁸

In Oregon a public sector “card check” law was adopted in 2007. The Oregon Employment Relations Board must certify a union presenting a card majority in an appropriate bargaining unit. But the law dictates a two-week period for the employees to seek a representation election. After two years, unions filed eight “card check” certification elections (the Oregon public sector was already heavily unionized), and employees exercised their election option in three, with the union winning representation rights in two of the three elections held under that process.¹⁸⁹ Thus, in eight cases the union wound up with representation rights in seven, with five coming without the delay of an election.

One can imagine variations to this idea. For example, a “card check” process “window period” for an election might require,

187. Justice Brandeis stated in his dissent in *New State Ice Co.*:

[Humans are] weak and their judgment is at best fallible . . . There must be power in the States . . . to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

188. States that use the card check system include: Illinois (County of Du Page v. Ill. Labor Bd., 900 N.E.2d 1095 (2008) (public)); Oregon (OR. REV. STAT. ANN. § 243.682 (West 2003 & Supp. 2008) (public)); Massachusetts (MASS. GEN. LAWS ch. 150A, §§ 2, 5 (West 2004 & Supp. 2008)); Minnesota (MINN. STAT. ANN. § 179.16 (West 2006)); California (CAL. GOV’T CODE § 71636.3 (West Supp. 2009)) (public/judicial); New Hampshire (N.H. REV. STAT. ANN. § 273-A:1 (West 1999 & Supp. 2008)).

189. Telephone Interview with Paul Gamson, Chair of the Oregon Employment Relations Board (May 27, 2009).

since more than fifty percent of the employees already have signed cards asking for union representation, that an election request also be supported by at least fifty percent of the employees.¹⁹⁰

Another approach builds on the idea that a representation election should be an option for employees, not employers. This approach would recognize “card check” majorities for certification purposes where two conditions exist: (1) the signing employees receive clear notice of their secret ballot election rights; and (2) the employees clearly and unmistakably waive that right in a declaration on the union authorization card, stating that they desire immediate representation by the union and do not wish to wait for an NLRB secret ballot election. Today’s younger workforces require less paternalism in the law than workers of an earlier era. When employees clearly and unmistakably indicate their desire to proceed to representation without an election, those wishes should be honored in our law.

The argument here is not that any of these approaches is the “correct” one. Rather the argument is that several imaginable approaches would be consistent with the fundamental Section 7 rights of employees to make the decision for or against union representation. Any of them would better protect Section 7 rights than the existing system. But federal orthodoxy, even if modified in some way by a compromise on EFCA, forecloses the states from playing the role in labor relations law that they play in other areas of employment law: to shape the law to local preferences consistent with federal minimum standards, to experiment with new approaches for new times, and to provide a measure of empowerment and autonomy to citizens in the states over issues vital to their future. Experience, not logic, ultimately informs and drives the law.¹⁹¹ We would have far more experience upon which to make judgments about federal policy if the states were permitted the flexibility to experiment, consistent with federal minimum standards.

190. In *Dana Corp.*, 351 N.L.R.B. 434 (2007), a three–two majority of the “Bush II” Board reversed longstanding Board precedent and conditioned the “recognition bar” to challenges to a union’s majority status for a “reasonable time” upon a forty-five day window allowing thirty percent of the employees to force an election; the NLRB General Counsel (also appointed by President George W. Bush) argued unsuccessfully for at least fifty percent support for an election.

191. Oliver Wendell Holmes, *THE COMMON LAW* 1 (Little, Brown, and Co. 1881).

b. Other Ways to Implement Employee Free Choice

Further, the entire federal “card check” debate suffers from too much conventional thinking about labor law. The workforce today is not our mothers’ and grandfathers’ workforce. To build a labor law more responsive to today’s younger and more diverse employees requires “thinking outside the box.”¹⁹² When ninety-two percent of the private sector, non-agricultural workforce labors in non-union workplaces, what can be done, besides making it less burdensome for employees to choose conventional union representation, to serve the interests of these employees?

Let us illustrate with just a few of the ideas that, in a more decentralized system of labor relations law, might take hold in the states. First, for mid-size and larger employers, a state might experiment with “work councils” similar to those common in the European Union.¹⁹³ Some state laws already require, for example, workplace safety committees. An expanded role for work councils at the workplace, division, and company level might allow some of the “voice” sought in the conventional collective bargaining regime. This could be implemented in non-union employers. Imagine, for example, such institutions for Starbucks and Wal-Mart employees at the regional level. “Work councils” could contribute ideas of employees to corporate decision-making across a range of issues (i.e., sustainable business practices, green energy and waste disposal issues, and human resources policies). Further, they would provide a statement in the law that employees are more than cogs in a production machine, that their voices at work are valued, and, paraphrasing the words of the Clayton Act of 1914 (and still part of the United States Code today), that the labor of a human being is not merely an article of commerce.¹⁹⁴

Second, why should each *individual* employee’s right to union representation depend on the wishes of the majority? Can a system of *non-exclusive union representation* of individuals who so desire

192. Here the writer claims no original ideas but rather borrows from the rich body of scholarship suggesting new conceptual approaches for the labor law.

193. EU “Works Council” Directive, 94/45, art. 1, 1994 O.J. (L 254) 2 (EC) (on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees). For a description of the interrelationship between nation-state laws and EU Directives in the labor relations area, see JAMES B. ATLESON, *INTERNATIONAL LABOR LAW* 347–55 (2008). Under current law, Section 8(a)(2) might preempt some innovative approaches in this area.

194. 15 U.S.C. § 17 (2006) (“The labor of a human being is not a commodity or article in commerce.”).

it in non-union workplaces coexist with exclusive representation in workplaces where a majority desires conventional union representation?¹⁹⁵

Third, when the NLRB law vacillates on issues like “Weingarten” rights¹⁹⁶ in the non-union sector on the basis of the political administration,¹⁹⁷ why cannot the states decide that issue? Section 7 rights generally apply in non-union shops, including the right to engage in concerted activity,¹⁹⁸ and it is at least *consistent* with NLRB Section 7 rights to allow non-union employees faced with investigatory interviews to insist on the presence of a fellow employee “for mutual aid and protection.”

Now let us venture into some uncharted waters. The NLRA system places inordinate focus on whether the union commands majority support at one point in time (when a union seeks recognition or certification). But, labor law then indulges a fiction—the union is “presumed” to enjoy continuing majority status indefinitely. This presumption is irrebuttable at times: during the “contract” bar period, except for the thirty-day period starting ninety days before contract expiration,¹⁹⁹ during the one-year “election” and “certification” bars,²⁰⁰ and during the “recognition bar” for a “reasonable period.”²⁰¹ The presumption becomes rebuttable at other times.²⁰² These doctrines rest on the need to

195. Christine N. O’Brien, *When Union Members in a Members-Only Non-Majority Union (MONMU) Want Weingarten Rights: How High Will the Blue Eagle Fly?* 10 U. PA. J. BUS. & EMP. L. 599 (2008); Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True’s Review Essay on the Blue Eagle at Work, and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179 (2006) (book review); Clyde Summers, *Unions Without a Majority—A Black Hole?* 66 CHI.-KENT L. REV. 531 (1990). Several unions have also supported the idea of non-majority representation. Steven Greenhouse, *Seven Unions Ask Labor Board To Order Employers to Bargain*, N.Y. TIMES, Aug. 15, 2007, at A14.

196. NLRB v. Weingarten, 420 U.S. 251 (1975).

197. *E.g.*, IBM Corp., 341 N.L.R.B. 1288 (2007) (Bush II Board three-two majority overrules Clinton Board ruling in *Epilepsy Foundation*, 331 N.L.R.B. 676 (2000) and returns to Reagan Board rule in *E.I. DuPont De Nemours v. Slaughter*, 289 N.L.R.B. 627 (1988), that *Weingarten* does not apply in non-union workplaces).

198. NLRB v. Wash. Aluminum, 370 U.S. 9 (1962).

199. *E.g.*, *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996) (contract bars election even though majority of employees allegedly withdrew support from union less than twenty-four hours after union telegraphed acceptance of employer’s contract offer).

200. *E.g.*, *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); 29 U.S.C. § 159 (c)(3) (2006).

201. *E.g.*, *Dana Corp. v. Int’l Union, UAW*, 351 NLRB 434 (2007).

202. This presumption is irrebuttable at times: during the “contract” bar period, except for the thirty-day period starting ninety days before contract expiration,

balance the employees' free choice rights to reject or change representation with the need for stability in bargaining relationships.²⁰³ Even when common sense suggests that the union has lost majority support, for example, where strikers have been replaced by permanent replacements, the NLRB makes no presumption that the majority disfavors the union.²⁰⁴

Again, thinking outside the box of conventional labor law, one can imagine a different system to serve the twin policies of stability in bargaining relationships and employee free choice. For example, unions could be *required* to stand for reelection as a bargaining agent periodically, just as are members of Congress and judges in many states. Keeping in mind the need for stability, a good time during which to trigger such a requirement would be in the period immediately after a collective bargaining agreement has been concluded.²⁰⁵ Another idea would be a requirement for union representation elections periodically in *non-union* workplaces.²⁰⁶ Section 7 free choice would be promoted, and the ninety-two percent of the workforce for whom "unions" sound vaguely like

during the one-year "certification bar," and during the "recognition bar" for a "reasonable period." The presumption becomes rebuttable at other times.

203. *E.g., Brooks*, 348 U.S. at 96, 100. ("A union should be given ample time for carrying on its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.")

204. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (Scalia, J., dissenting) (commenting on the counterintuitive nature of the "no presumption" rule for striker replacements).

205. The author was a union lawyer long enough to know that this will be anathema to traditional unionists. But period reaffirmation of the majority's mandate for representation would through time make unions stronger in their representational roles. And, if in a fair elections process with equal access, e-mail availability, text messaging, and the like, unions cannot win such elections, by what normative claim do they have a right to further bargaining rights? Innovative technology could also make such periodic elections more feasible from a cost and administrative standpoint.

206. But which union might stand for election? Several solutions to this problem seem possible. First, experts like the officers of the NLRB or state labor boards might designate an appropriate union. Second, the election might be held in the abstract with NGOs (perhaps formed for this purpose by the AFL-CIO or other labor groups) making the case for unionization; under this approach employees would first decide the basic issue and then in a second round process select from unions seeking representation rights. Would union resources be stretched? Perhaps so. But again solutions can be imagined. In order to promote the goal of employee empowerment in the new workplaces of the twenty-first century, the state or federal government might subsidize groups making the case for unionization. Or technology might allow unions to effectively deliver their message to the non-union workplace at a fraction of the cost of traditional campaigns.

creatures of an earlier time would become more aware of the possibilities of unions. Moreover, whether the workplace became unionized or not, such a system would empower employees by recognizing their rightful voice in the workplace decisions that affect them and in the bounty produced in corporations by the joint efforts of employees, managers, and investors.

2. Changes for the Bargaining Process

a. Interest Arbitration for First Contract Disputes

EFCA proposes interest arbitration²⁰⁷ as a mechanism for resolving bargaining disputes over the terms of first contracts.²⁰⁸ This would constitute a major change in the philosophy of collective bargaining enshrined in national labor law. Again the states could contribute to finding solutions to the problems presented.

As the Supreme Court has often noted, the New Deal era federal labor relations statutes embedded private ordering as a fundamental premise of our labor law. “Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.”²⁰⁹

The interest arbitration provision of EFCA would at once change this private ordering premise and leave it intact. It would change private ordering by requiring a neutral third party to resolve a bargaining dispute in first contract situations—the resulting contract would be the product of the third party’s choice instead of both of the parties to the contract. At the same time the government would not be directly involved in establishing the terms of the contract, and the interest arbitration process would apply only in newly established bargaining relationships with subsequent contract negotiations reverting to the unfettered private ordering model.

207. Interest arbitration differs from grievance arbitration. In grievance arbitration, common under collective bargaining contracts, an arbitrator chosen by the union and employer resolves disputes over the meaning or application of an existing collective bargaining contract. In contrast, interest arbitration resolves disputes over what a not yet existing contract should say; in essence, the interest arbitrator writes the contract in areas where the parties cannot reach agreement at the bargaining table. JOSEPH R. GRODIN & JUNE WEISBERGER, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* (4th ed. 1993).

208. EFCA, H.R. 800, 110th Cong. § 3 (2007).

209. *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 488 (1960). *See also* *Local 24 Int’l Bhd. of Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

While this provision has thus far received less attention in the debate about EFCA, recent developments suggest its destiny will be more controversial.²¹⁰ A shift in emphasis by opponents of EFCA to the interest arbitration provision would not be surprising. Such provisions generate controversy whenever they are suggested; for example, interest arbitration constitutes a major goal of the United Farm Workers Union but is stoutly resisted by agri-business.²¹¹

As shown above, current remedies for bad faith bargaining under the NLRA reek with inadequacy.²¹² Section 8-d, added by the Taft–Hartley Act in 1947, explicitly disavows any obligation to agree to any bargaining proposal, or even to make a concession.²¹³ While the law requires an honest attempt to reach agreement, proving bad faith presents a challenge. More importantly the remedy when such proof exists consists of a “slap on the wrist”—a cease and desist order and posting of notices acknowledging the NLRB’s ruling.²¹⁴ The litigation process takes many months and often years. First contract situations, with union support often fragile (since the union appears impotent to employees during the

210. Editorial, *Blinding Arbitration: A Union Compromise On Card Check Deserves a Much Closer Look*, WALL ST. J., May 29, 2009, at A14. The Washington Post recently quoted the “Coalition for a Democratic Workforce, composed of 580 organizations including the U.S. Chamber of Commerce and the National Association of Manufacturers,” as follows: “Let us be clear and frank on this matter; there can be no acceptable ‘compromise’ on any issue of labor law reform” As reported in the Post, the Coalition refuses to “acknowledge any flaw in the existing process.” Editorial, *Imperfect Union Bill: Employer Intransigence Makes Finding Common Ground More Difficult*, WASH. POST, May 11, 2009, at A16.

211. The National Labor Relations Act excludes agricultural employment. 29 U.S.C. § 152(3) (2006). Farm workers, however, bargain under state laws. *E.g.*, CAL. LAB. CODE §§ 1140–1140.4 (West 2003 & Supp. 2009); ARIZ. REV. STAT. §§ 23-1381–1395 (LexisNexis 1995 & Supp. 2009); FLA. STAT. ANN. § 450.251 (West 2002).

212. *See supra* Part II.A.

213. National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (2009).

214. The NLRB has experimented with certain other remedies with limited success. *E.g.*, *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972) (ordering the employer in a case of flagrant violation: (1) to pay the Board’s and Union’s costs of litigation, (2) to mail a copy of the Board notice of the employer’s unlawful failure to bargain to each employee, (3) to give the union access to company bulletin boards, and (4) to supply the union with an updated list of employee names and addresses), *aff’d in part*, *Int’l Union of Elec., Radio, & Mach. Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974) (the court of appeals declined to enforce the portion of the order requiring reimbursement of the Board’s litigation expenses); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) (declining to adopt a “compensatory remedy” in failure to bargain cases); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (disapproving the Board’s remedy of awarding a disputed contract clause).

long delay for unfair labor practice litigation), provide an especially tempting occasion for an employer to make the cost-benefit calculation that stalling may pay. Yet—even if only for first contract disputes—the employer objection that interest arbitration conflicts with the basic policy premise of the NLRA (private ordering via freely agreed contracts) resonates deeply with the American tradition.

Whatever the outcome of the debate about interest arbitration of first contract, the states again provide lessons for any federal initiative. Arbitration of police, firefighter, and other public safety officer contracts provides many states with substantial experience in interest arbitration.²¹⁵ Several types of interest arbitration proceedings are possible. As explained in another article:

Supposing that interest arbitration for first contracts is the option chosen, what particular interest arbitration procedure would work best? One process would be for the parties to present all of their positions to the arbitrator and allow the arbitrator to write contract language using her best judgment (“item arbitration”). A second process would be to have each party present their own proposal for each disputed subject and have the arbitrator choose one of the parties’ proposals for each subject (“final offer by item arbitration”). A third process would be to have each party present the entire package of their contract offers to the arbitrator and require the arbitrator to choose one package or the other (“final offer package arbitration”).²¹⁶

The pressures and bargaining strategies of the parties vary depending on the type of interest arbitration chosen. Final offer package arbitration makes it risky to arbitrate and encourages the parties to make every possible attempt to reach their own contract rather than taking a chance with the arbitrator; thus, the more outlandish a party’s bargaining proposal seems, the less chance it has of prevailing in the final offer package situation. Item arbitration allows the parties more flexibility since they do not risk losing the entire contract proposal, and the arbitrator may write a compromise for the contract award; on the other hand, this form of interest arbitration may cause the parties to be “bullish,” making few concessions in the negotiations process in anticipation of the probable compromise result of the arbitrator.

215. *E.g.*, OR. REV. STAT. § 243.742 (West 2003 & Supp. 2008).

216. Drummonds, *Beyond the Employee Free Choice Act Debate*, *supra* note 169.

EFCA remains silent on these questions. Many state labor relations laws, particularly for public safety employees like police officers, firefighters, and correctional officers, already provide for interest arbitration.²¹⁷ Moreover, interest arbitration constitutes a major goal of the United Farm Workers Union in the agricultural sector, also governed by state law.

b. Interest Arbitration as a Remedy for Bad Faith Bargaining

Another initiative that a state might pioneer would be mandating interest arbitration, at the option of the union, where employers bargain in bad faith. This would directly address the lack of effective remedy problem for enforcing the duty to bargain in good faith. Further, it would respond to the “freedom of contract” objection to first contract interest arbitration because employers would only face such situations when they violate their obligations under the law. We can here draw a useful analogy to judicial orders for a gender or race-conscious hiring remedy in a case involving a past pattern and practice of employment discrimination under Title VII of the Civil Rights Act.²¹⁸

c. Permanent Replacement of Strikers

A free-ranging policy discussion about the NLRA bargaining process presents other issues not raised in EFCA. Many have suggested that permanent replacement of strikers, which has been the law since the 1938 *MacKay*²¹⁹ case, tips the balance too far in favor of employers.²²⁰ Besides permanent replacement of strikers,

217. E.g., Editorial, *Blinding Arbitration: A Union Compromise on Card Check Deserves a Much Closer Look*, WALL ST. J., May 29, 2009, at A14 (“Michigan has used binding arbitration for 40 years for police officers, and firefighters . . .”); OR. REV. STAT. § 243.742 (West 2003 & Supp. 2008).

218. 42 U.S.C. 2000e (2006); E.g., *Local 28 of the Sheet Metal Workers Int’l Soc’y v. EEOC*, 478 U.S. 421, 445 (1986) (judge awarded racially conscious relief for egregious racial discrimination).

219. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938). Though the NLRA is silent on permanent replacement and affirmatively gives employees a statutory right to engage in “concerted activity for mutual aid and protection,” this seminal case, decided just three years after the original enactment of the NLRA, rather casually assumed a right of permanent replacement in dictum; the holding of the case was that an employer could not pick and choose who to bring back to work on the basis of their support for a strike. See generally National Labor Relations Act §7, 29 U.S.C. §§ 157–158 (2006). James Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

220. The literature on these points is vast. Perhaps the starting point for the critique stated in the text is Paul Weiler, *Striking New Balance; Freedom of*

employers already enjoy a number of options in a bargaining dispute:

1. unilateral implementation of the employer's proposed terms in the event the employees keep working;
2. continued operation with temporary replacements if the employees strike;
3. "waiting the employees out" by shutting down the employer's business during a strike; and
4. offensive and defensive lockouts of the employees to force an unwanted loss of income on them and pressure the union to come to terms.²²¹

Permanent replacement gives the employer still another option.

Strikes bring pressure on both the employer and employees to find a path to settlement.²²² Important *ex ante* effects emanate from the mere possibility of a strike: since strikes are most often undesirable on both sides of the bargaining table, the parties find incentive to strive to find contract terms to which they can both

Contract and the Prospects For Union Representation, 98 HARV. L. REV. 351 (1984). There have been many others. *E.g.*, William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 328 (2008); Joseph P. Norelli, *Permanent Replacements: Time for a New Look*, 24 LAB. LAW. 97 (2008); Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103 (2001); JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14* (1998); William B. Gould IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 198–205 (1993); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992).

221. *E.g.*, *Am. Ship Bldg. v. NLRB*, 380 U.S. 300 (1965).

222. The possibility of a "lose, lose" strike propels the parties toward moderation and the search for common ground in contract bargaining in order to avoid a strike. COX ET AL., *supra* note 7, at 506; *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 489 (1960) (reversing NLRB's ruling that a union's slowdown during bargaining was inconsistent with the duty to bargain in good faith) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [federal labor laws] have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.").

agree.²²³ Once a strike begins, as noted above, the employer may lawfully continue to operate with temporary replacement workers, but that often involves training and productivity costs. An employer may face undesirable terms in the price of settlement but calculate that continued strike losses outweigh the benefits of continued resistance. On the union's side, the employees must do without a paycheck and in most states are not eligible for unemployment insurance benefits.²²⁴ Similar to employers, the employees and union may "lose" a strike; employees individually or collectively (via the union) abandon strikes if the costs (loss of income and perhaps loss of medical insurance, etc.) outweigh the perceived benefits of continued striking.

Permanent strike replacement changes this calculus of costs and benefits.²²⁵ Permanent replacement crosses a line, making the consequence of losing for the employees involved not just acceptance of the employer's terms but also de facto loss of their jobs.²²⁶ After President Reagan successfully and permanently replaced more than 10,000 striking air traffic controllers in 1981, the use and threat of permanent replacements in strike situations became more common.²²⁷ This means that even if the employees and union are willing to end their strike, the employer is not obligated to return them to work if no vacancies exist because permanent replacements have been hired or because employees who crossed the picket line have preference over those who honored the strike to the bitter end.²²⁸

One possibility for restoring more of a balance of power in the bargaining impasse situation would be to eliminate permanent replacement. In 1991 the Democratic House of Representatives passed the Workplace Fairness Act, which would have banned the

223. Other than in first contract situations, the parties eventually reach agreement on collective bargaining contracts in the great majority of cases. *See supra* note 115. In first contract situations, however, the success rate after a union is certified or recognized as the exclusive bargaining agent hovers between sixty-seven and fifty-six percent. *See supra* note 116.

224. *N.Y. Tel. Co. v. N.Y. Dep't of Labor*, 440 U.S. 519, 534 (1979) ("Unlike most States, New York has concluded that the community in the security of persons directly affected by a strike outweighs the interest in avoiding any impact on a particular labor dispute.").

225. *See supra* note 223.

226. *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

227. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 440-41 (2002); Joseph A. McCartin, *Marking a Tragic Anniversary*, HIST. NEWS SERV., Aug. 3, 2001.

228. *Trans World Airlines*, 489 U.S. 426.

permanent replacement of strikers in most situations. The bill died in the Senate under threat of a filibuster.²²⁹ President Clinton then proclaimed that employers party to governmental procurement contracts could lose their contracts if they utilized permanent replacement in their labor relations. The District of Columbia Court of Appeals struck down this Executive Order as inconsistent with NLRA doctrine.²³⁰ Whether eliminating permanent replacement of strikers constitutes the best way to try to rebalance the remedies for resolving bargaining disputes is again fairly debatable. Experimentation and flexibility in the states would help to provide more of a basis for judgment at the federal level.

3. Proposal for Enhancing the Remedy Provisions of the NLRA

The third fundamental issue raised by EFCA addresses the remedy scheme for unfair labor practices.²³¹ The Act proposes three changes, and these, thus far, generate the least controversy.

a. Interlocutory Injunctive Relief

First, EFCA strengthens provisions for expedited interlocutory injunctive relief for illegal employer discrimination (or restraint, interference, or coercion) during union organizing campaigns and first contract negotiations.²³² It seeks to accomplish this by expanding the reach of Section 10(l)²³³ of the NLRA to include those unfair labor practices.²³⁴ Section 10(l) requires priority investigation of certain unfair labor practice charges and further provides that “[i]f . . . reasonable cause [exists] to believe that such charge is true” the Regional Director “shall” seek in federal district court “appropriate injunctive relief pending the final adjudication of the Board.”²³⁵ Since the 1947 Taft–Hartley Act, Section 10(l) has applied only to unfair labor practice complaints against unions.²³⁶ This provision, therefore, merely opens an avenue of relief long available to employers.

229. COX ET AL., *supra* note 7, at 587–88.

230. Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (Executive Order contrary to the NLRA as interpreted in NLRB v. McKay Radio & Tel. Co., 304 U.S. 333 (1938)).

231. EFCA, H.R. 1409, 111th Cong. § 4 (2009).

232. *Id.* § 4(a).

233. National Labor Relations Act § 10(l), 29 U.S.C. § 160(l) (2006).

234. EFCA, H.R. 1409, § 4(a).

235. National Labor Relations Act § 10(l), 29 U.S.C. 160(l) (2006).

236. *Id.* Currently, Section 10(l) applies to charges of illegal union secondary boycotts (National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006))

On a practical level this change would create a mechanism for employees fired or discriminated against because of their support of a union to be reinstated during the lengthy NLRB unfair labor practice process.²³⁷ This could significantly change the dynamics of organizing campaigns by providing a way for the union to demonstrate that it can protect its supporters from harassment and retaliation.

Still, it depends on the resources available to the NLRB because Section 10(l) enforcement occurs through a judicial request by the Regional Director. Whether Board funding will be increased to allow federal officers to seek such interlocutory injunctive relief in the mass of cases remains problematic, however, given the ebb and flow of NLRB funding during Democratic and Republican administrations. And, a potential loophole exists in that the duty to seek interlocutory relief is triggered only upon a finding that “reasonable cause” exists to issue a formal complaint; those judgments are not reviewable by the courts.²³⁸ Here again more authority for state officers, union attorneys, or private attorneys representing the employee to seek these injunctions would be entirely consistent with the policies of the Act. Thus, once more the EFCA provision offers a truncated vision of what might be possible in a more decentralized federal labor relations regime.

b. Back Pay

A second remedy change in EFCA provides for triple back pay awards for willful anti-union discrimination, interference, or coercion during an organizing campaign or first contract negotiation.²³⁹ While this provision strengthens remedies for anti-

and recognitional picketing (National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (2006)).

237. National Labor Relations Act § 10(j), 29 U.S.C. § 160(j) (2009) has long authorized requests for injunctive relief for unfair labor practices not covered by Section 10(l). But these provisions are discretionary, not mandatory as in Section 10(l), and require action by the Board in Washington, D.C., not action by the Regional Director charged with investigating a charge. In fiscal year 2008, 22,497 unfair labor practices charges were filed and formal complaints were issued in 1,108 cases (Id. at p. 8, Chart 6-A). Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 73. In these cases, preliminary Section 10(j) injunctive relief was sought by the NLRB in eighteen cases. (Id. at p.53.).

238. *NLRB v. United Food & Comm. Workers Union, Local 23*, 484 U.S. 112 (1987).

239. EFCA, H.R. 1409, § 4(b)(1).

union discrimination during and after union organizing campaigns, it does not cover anti-union actions in other situations. Most importantly, it falls far short of the compensatory damages, including emotional distress and punitive damages, available for almost all other forms of discrimination. Back pay must be reduced by interim earnings, and reasonable efforts to mitigate back pay losses by seeking other work are required under NLRB case law.²⁴⁰ Therefore, even triple back pay awards may not be sufficient to change the calculus of costs and benefits for illegal action.

Why should anti-union discrimination be considered less worthy of emotional distress and punitive damages than other forms of discrimination? Again EFCA only begins a discussion. Nothing requires—except the outdated judicially-manufactured labor law preemption doctrines discussed in the next section of this paper—that such remedies await a political consensus in Washington, D.C. State discrimination laws and public policy wrongful discharge actions²⁴¹ could easily provide such remedies. Additionally, with such state law remedies, private attorneys would find incentive to police anti-union discrimination through the civil justice system. As with other forms of discrimination, enforcement and vindication of the civil right to be free of anti-union discrimination would no longer depend on pre-hearing, pre-discovery, non-reviewable discretionary judgments of federal administrative officers.

240. COX ET AL., *supra* note 7, at 265; NLRB v. *Midwestern Pers. Servs.*, 508 F.3d 418 (7th Cir. 2007). In several recent decisions of the Bush II Board majority, the requirements for mitigation efforts by employees victimized by anti-union discrimination, and the rule that interim earnings during the unfair labor practice process must be deducted from back pay, were modified to make recovery of back pay more difficult. *E.g.*, *Grosvenor Orlando Assocs.*, 350 N.L.R.B. 1197 (2007) (three–two decision holding that employees fired for discriminatory reasons must begin a search for new work within two weeks of their illegal discharge even where strike is ongoing and employees picketed during period prior to their job search; Board also split two–one in holding the employees job searches were inadequate.); *St. George Warehouse*, 351 N.L.R.B. 961 (2007) (three–two majority of Bush II Board placed burden of production of reasonable mitigation efforts on Counsel representing employee interests where employer produces evidence of substantially equivalent jobs in relevant geographical area, shifting prior Board law as dissenters pointed out.); *Anheuser-Busch, Inc.*, 351 N.L.R.B. 644 (2007) (three–two decision denying back pay to sixteen employees discharged illegally after employer unlawfully installed surveillance cameras without prior bargaining with union).

241. 42 U.S.C. § 2000e-7 (2006); *e.g.*, *Holien v. Sears & Roebuck*, 689 P.2d 1292 (Or. 1984) (providing tort remedy for wrongful discharge where plaintiff was discharged for resisting sexual harassment); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

Many dedicated officers and attorneys devote their lives to working within the NLRB. This Article intends no disparagement of their important work. But agencies through time are subject to capture by the interests they seek to regulate; further, they can be starved for resources during political administrations hostile to their purposes. We do not rely exclusively on the Food and Drug Administration, Environmental Protection Agency, or Equal Employment Opportunity Commission to protect our food and prescription drugs, our environment, or our civil rights, though the work of those agencies is exceedingly important and valued. Neither should we place exclusive reliance on administrative officers in labor relations law. But labor law preemption doctrines, not originating from the Congress, force that reliance.²⁴²

c. The Civil Penalty Provision in EFCA

Finally, EFCA would create a civil penalty capped at \$20,000 for employer discrimination, restraint, or coercion during a union organizing campaign and before completion of first contract negotiations.²⁴³ While civil penalties serve significant compliance interests for smaller businesses, why should this provision be limited to union organizing situations? Moreover, such a penalty, even if levied to the maximum, only doubtfully would provide significant deterrence for employers of any size. They would mean little to the victims of unlawful anti-union discrimination; they would not compensate for emotional distress or include punitive damages, as in other types of discrimination cases. Indeed, in many situations a \$20,000 fine, even assuming the maximum was levied, would be far less than the amount of probable employer attorneys' fees for defending the unfair labor practice charge; such fines will change the calculation of the costs and benefits of illegal conduct, but in many cases only at the margin.

*C. The General Rule in the Broad Field of Employment Law
Illustrates the Value of Shared State and Federal Policy Making*

Like the little house in the country gradually surrounded by urban development in a growing metropolis, vast areas of

242. The administration of President George W. Bush did attempt to adopt administrative regulations asserting that state torts were preempted with respect to failure to warn claims involving prescription drugs approved by the Food and Drug Administration (FDA); the Supreme Court rejected the argument in the context of the "FDA Preamble" in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

243. EFCA, H.R. 1409, § 4(b)(2).

“employment law” sprung up during the past fifty years to surround labor relations policy, with most workplace regulation now under a shared state-federal model.²⁴⁴ The uniquely broad labor law preemption doctrines of another era fall out of step with this larger pattern in the American law of the workplace. Briefly consider some examples.

1. Status Discrimination

Status discrimination stands as an area uniquely important for federal prohibition as a matter of fundamental civil and human rights. Yet, contrary to the perception of many, Title VII of the 1964 Civil Right Act²⁴⁵ did not initiate the regulation of employment discrimination in the United States.²⁴⁶ A substantial number of states made racial discrimination in employment unlawful years before the landmark 1964 federal enactment.²⁴⁷ And this pattern—state level reforms preceding the required consensus for federal level reform—permeates the law of employment discrimination. In the gender discrimination area, for example, states provided common law damages remedies and jury

244. *E.g.*, Drummonds, *Sister Sovereigns*, *supra* note 1, at 489–509.

245. 42 U.S.C. §§ 2000e–2000e17 (2006).

246. Of course there were earlier federal discrimination enactments. Most notably, 42 U.S.C. § 1981, originally enacted in 1866, bars racial discrimination (broadly defined) and allows uncapped damages and jury trials. But Section 1981 was largely forgotten after the Civil War era and not “re-discovered” as an employment discrimination statute by the Supreme Court until *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); Comment, *Developments in the Law: Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 35–69 (1980) (reviewing Section 1981’s legislative history). Section 1981 applies to some forms of discrimination beyond the modern concept of race discrimination. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (“If [plaintiff] . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on his place of origin, or his religion, he will have made out [his 1981 case].”). But after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and prior to the 1991 Civil Rights Act overturning that case, Section 1981 did not reach racial harassment or other discrimination during the term of employment as opposed to hiring. Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(b) (2006)). Another pre-1964 federal discrimination enactment was the 1963 Equal Pay Act, 29 U.S.C. § 206(d) (2006), but this statute reached only gender pay discrimination and, thus far, has been far from effective.

247. *E.g.*, Drummonds, *Sister Sovereigns*, *supra* note 1, at 496; Note, *The Right to Equal Treatment: Administrative Enforcement of Anti-Discrimination Legislation*, 74 HARV. L. REV. 526 (1961). Title 42 U.S.C. § 1981, originally enacted in 1866, provides for uncapped damages and jury trials for racial discrimination. For example, Minnesota’s statute dates to 1955. *Bahr v. Capella Univers.*, 765 N.W.2d 428, 433 (Minn. Ct. App. 2009).

trials for sexual harassment both before and after the 1991 Civil Rights Act²⁴⁸ provided such remedies under federal discrimination law.²⁴⁹ Even today many states provide *uncapped* compensatory and punitive damages for intentional employment discrimination (or they provide caps higher than those in the federal law); Title VII damages remain capped at \$50,000 for smaller businesses and \$300,000 for even the largest corporations.²⁵⁰ The pioneering of these jury trial and compensatory remedies in the states marked significant milestones in the ongoing effort to build a society free of such discrimination and laid the groundwork for federal reform. For this reason, Congress wisely preserved both existing and future state law remedies in the discrimination area²⁵¹ (and indeed required resort to state administrative remedies as a pre-requisite to federal Title VII remedies).²⁵²

The leading-edge role of state law continues in the employment discrimination area today. “About half the states and the District of Columbia, and numerous cities have enacted law prohibiting discrimination in private employment on the basis of sexual

248. 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071-99.

249. *E.g.*, *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992) (in egregious sexual harassment case plaintiff wins back and front pay against employer in the amount of \$58,284 under Title VII, and compensatory damages of \$250,000, and punitive damages of \$1,055,001 for state law battery, intentional infliction of emotional distress, false imprisonment, and privacy claims, including \$1,000,000 against the individual harasser-manager); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 552 (N.H. 1974) (contract remedy for breach of oral employment contract where employee was maliciously fired after refusing sexual advances); *Tate v. Browning Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992) (plaintiff awarded compensatory damages for state tort of wrongful discharge in violation of public policy in race discrimination case); *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1299-1300 (Or. 1984) (wrongful discharge in violation of public policy tort action allowed for retaliation for resisting sexual harassment).

250. Compare OR. REV. STAT. ANN. § 659A.885 (West 2003 & Supp. 2009), and CAL. GOV'T CODE § 12970 (a)(3) (West 2005) (damages are capped at \$150,000), and TEX. LAB. CODE ANN. § 21.2585 (Vernon 2006 & Supp. 2009) (there is a cap on damages in this statute), with 42 U.S.C. § 1981a(b)(3) (2006) (capping Title VII damages at \$50,000 to \$300,000 depending on the size of the employer as measured by the number of employees). However, federal law provides uncapped damages for racial discrimination under Section 1981.

251. 42 U.S.C. § 2000e-7 (2006) (“Nothing in this [subchapter] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by the present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this [subchapter].”).

252. Title VII, § 706 (c)-(e), 42 U.S.C. § 2000e-5 (c)-(e) (2006).

orientation.”²⁵³ Congress still debates whether to explicitly cover this form of employment discrimination in Title VII.²⁵⁴

State law remedies in the discrimination area may also differ in proof standards and employer liability for supervisory harassment. Two recent decisions in New York illustrate this point. The Southern District for New York held this year that the New York City Human Rights Law (NYCHRL) imposes strict liability for supervisory sexual harassment;²⁵⁵ the court rejected the *Faragher–Burlington* two-prong affirmative defense for employer liability under Title VII.²⁵⁶ Meanwhile a decision of the Appellate Division in New York arguably lowered the standard for proof of hostile environment sexual harassment from the federal “severe and pervasive” standard to a “treated less well” standard under the NYCHRL.²⁵⁷ These cases are merely illustrative of the many cases applying differing proof or doctrinal standards, often more favorable to plaintiffs, under the state discrimination statutes.²⁵⁸

2. State Wage and Hour Regulation

Beyond the shared state-federal authority over issues of status discrimination, states establish minimum wage and overtime pay requirements within federal minimum standards under the Fair Labor Standards Act (FLSA).²⁵⁹ State minimum wage laws preceded federal legislation by a quarter century.²⁶⁰ Today, while the federal minimum wage rests at \$7.25,²⁶¹ the state minimum

253. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW CASES AND MATERIALS* 386 n.5 (6th ed. 2007).

254. Whitehouse.gov, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Sept. 4, 2009) (discussing the Employment Non-Discrimination Act (ENDA)).

255. *Zakrzewska v. New Sch.*, 598 F. Supp. 2d 426 (S.D.N.Y. 2009).

256. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

257. *Williams v. N.Y. City Hous. Auth.*, 872 N.Y.S.2d 27 (N.Y. App. Div. 2009).

258. *E.g.*, *Henderson v. Jantzen, Inc.*, 79 Or. App. 654 (Or. Ct. App. 1986), *rev'd*, 303 Or. 477 (Or. 1987).

259. 29 U.S.C. § 218 (2006).

260. Fifteen states plus the District of Columbia and Puerto Rico adopted minimum wage legislation by 1923—fifteen years before the federal FLSA was enacted. David Neumark et. al., *Minimum Wage Legislation: Questioning the Paradigm*, 92 MINN. L. REV. 1296, 1298 (2008).

261. 29 U.S.C. § 206 (a)(1)(C) (2006). Prior to July 24, 2008, the federal minimum wage stood at \$5.85 per hour (\$11,700 per year assuming fifty-four-hour work weeks); on that date the federal minimum wage rose to \$6.55 where it remained until July 2009. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *CHARACTERISTICS OF MINIMUM WAGE WORKERS 2008* (2009),

wage is \$7.15 in New York,²⁶² \$8.00 in California,²⁶³ \$8.00 in Illinois,²⁶⁴ \$7.21 in Florida,²⁶⁵ and \$8.40 in Oregon.²⁶⁶ Even as minimum wage laws raise fair questions of public policy (do they reduce the number of jobs at the margin?),²⁶⁷ the states make the policy decision whether to go beyond the federal minimum. Millions of employees at the bottom of the economic hierarchy benefit directly, and millions more relatively low-wage workers benefit indirectly, by the “push” effects of higher minimums. This illustrates another important advantage of a shared federalist balance in the law of the workplace. Citizens in the states can shape standards to local conditions and preferences.

Similarly, legislation of work hours permits tailoring to local conditions. While the FLSA requires (with many exceptions) premium overtime pay for work over forty hours per week,²⁶⁸ state laws can provide for overtime pay after eight hours a day²⁶⁹ or cap work hours altogether in certain occupations.²⁷⁰

All of these state wage and hour rules apply to local, national, and transnational firms and businesses. Thus, in the wage and hour area, just as with status discrimination, those entities must manage their human resources departments to comply with differing standards in the states.

As in the status discrimination area, Congress expressly made shared state-federal authority over wage and hour issues explicit in the FLSA.²⁷¹ Labor relations law cries out for a similar expression of congressional intent.

<http://www.bls.gov/cps/minwage2008.pdf>. According to the Department of Labor, Wage and Hour Division, fourteen states had minimums exceeding the federal minimum as of October 2009. Wage and Hour Division, *Minimum Wage Laws in the States-Oct. 1, 2009* (<http://dol.gov/esa/minwage/america.htm>)

262. N.Y. LAB. LAW § 652 (McKinney 2002 & Supp. 2009).

263. CAL. LAB. CODE § 1182.12 (West Supp. 2009).

264. 820 ILL. COMP. STAT. ANN. 105/4 (2008 & Supp. 2009).

265. FLA. STAT. ANN. § 448.110 (West Supp. 2009).

266. OR. REV. STAT. ANN. § 653.025 (West 2003 & Supp. 2008).

267. Neumark et. al., *supra* note 262.

268. 29 U.S.C. § 207 (2006).

269. For example, California requires overtime pay for most workers after eight hours of work rather than the federal standard for most workers of overtime pay after forty hours of work. United States Department of Labor, *Wage and Hour Division*, (2009) available at www.dol.gov/esa/minwage/america.htm.

270. *E.g.*, OR. REV. STAT. ANN. § 652.010 (West 2003 & Supp. 2008) (maximum ten-hour day in certain occupations).

271. 29 U.S.C. § 218 (2006) (“No provision of this Act . . . shall excuse noncompliance with any . . . State law or municipal ordinance establishing a minimum wage higher . . . or a maximum workweek lower [than the federal

3. Occupational Health and Injury

The prevention and treatment of occupational injury and disease involves major costs for employees and employers alike.²⁷² Yet workers' compensation generally falls under state law.²⁷³ The "no fault" statutes were pioneered in the states during the Progressive Era²⁷⁴ and continue today as the primary remedy for workplace injury. In fact these state statutes provided the model for the later enactment of federal no fault compensation statutes in areas of unique federal concern.²⁷⁵ State tort law remedies (under exceptions to the generally exclusive remedies of the workers' compensation statutes) also mirror remedies for workers in areas of unique federal concern, such as the damages suits provided under federal law for railroad workers and sailors.²⁷⁶ Additionally, "[some] states innovated with these workers' compensation systems and expanded them to include occupational disease, most famously asbestos related disease. Congress expressly preserved these state compensation claims in the OSHA Act."²⁷⁷

Beyond compensation issues, workplace injury and occupational disease *prevention* illustrates another model of shared federal and state authority. The federal Occupational Safety and Health Act (OSHA) regulates workplace safety through a system of detailed federal standards enforceable by federal inspectors through citations, fines and penalties, and abatement orders.²⁷⁸

standards], and no provision of this Act relating to the employment of child labor shall justify noncompliance with any . . . State law or municipal ordinance establishing a higher standard . . .").

272. Drummonds, *Sister Sovereigns*, *supra* note 1, at 493.

273. See generally Arthur Larson, *The Nature and Origins of Workmen's [sic] Compensation*, 37 CORNELL L. Q. 206 (1952). Federal statutes, however, cover certain categories of workers: federal civil service employees (Federal Employees Compensation Act, 5 U.S.C. §§ 8101–8193 (2006)), miners (Black Lung Benefits Amendments of 1981, 30 U.S.C. §§ 901–945), longshoremens [sic] (Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901–950 (2006)), railroad workers (Federal Employers Liability Act, 45 U.S.C. §§ 51–60 (2006)), and sailors (Merchant Marine, aka "Jones," Act, 46 U.S.C. § 30104 (2006)).

274. Larson, *supra* note 273.

275. See *infra* note 283. Compensation suits by railroad workers and sailors, however, require proof of negligence (railroad workers (Federal Employers Liability Act, 45 U.S.C. §§ 51–60 (2006)); sailors (Merchant Marine, a.k.a. "Jones," Act, 46 U.S.C. § 30104 (2006))).

276. Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51–60 (2006), and Jones Act, 46 U.S.C. § 30104 (2006).

277. Drummonds, *Beyond the Free Choice Act Debate*, *supra* note 169; Occupational Safety and Health Act § 4(b)(4), 29 U.S.C. § 633(b)(4) (2006).

278. Occupational Safety and Health Act, 29 U.S.C. §§ 655, 658–659 (2006).

Once again the federal regime stops far short of exclusive occupation of the field. States may regulate workplace safety matters in areas where no federal standard exists.²⁷⁹ More significantly, OSHA Section 18²⁸⁰ permits the states to “reverse preempt”²⁸¹ the federal standards and enforcement scheme by submitting a more protective state plan for approval by the Secretary of Labor. Approximately half the states currently operate under such state plans, enforcing their own standard through their own enforcement system.²⁸²

4. Family, Parental, and Medical Leave

The same pattern of federalist sharing applies to maternity, family, parental, and medical leave laws. When the Supreme Court declared in 1976 that discrimination against pregnant women did not involve sex discrimination,²⁸³ many states refused to follow this holding under their own statutes.²⁸⁴ Although Congress reversed the Supreme Court’s ruling in the 1978 Pregnancy Discrimination Act (PDA),²⁸⁵ the episode illustrates another important advantage of shared state and federal authority—a safeguard against cribbed federal interpretation of protective policies. Further, although the PDA required only that women receive pregnancy leave equal to equivalent disabilities, the states promptly enacted additional parental and family leave laws granting women—and men—unpaid leave to care for children, parents, or other sick family members.²⁸⁶ Many state leave statutes thus preceded the federal Family Medical Leave Act of 1993.²⁸⁷

279. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 117 (1992). (Four Justices in this five–four decision would have permitted state standards even in areas of OSHA regulation.)

280. 29 U.S.C. § 667 (2006).

281. This phrase is the author’s.

282. OSHA, *Factsheet on State Job*, available at http://www.osha.gov/oschDoc/data_General_Facts/factsheet-statejob.pdf.

283. *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976).

284. *E.g.*, *Castellano v. Linden Bd. of Educ.*, 386 A.2d 396, 402 (N.J. Super. Ct. 1978), *aff’d in relevant part*, 400 A.2d 1182 (N.J. 1979); *Anderson v. Upper Bucks County Area Vocational Technical Sch.*, 373 A.2d 126, 132 (Pa. Commw. Ct. 1977); *Goodyear Tire & Rubber Co.*, 273 N.W.2d 786, 800 (Wis. Ct. App. 1978); *see also Brooklyn Union Gas Co. v. N. Y. State Human Rights Appeal Bd.*, 359 N.E.2d 393, 396 (N.Y. 2006).

285. 42 U.S.C. § 2000e(k) (2006).

286. *E.g.*, *Cal. Fed. Sav. & Loan Ass’n v. Guerro*, 479 U.S. 272 (1987) (rejecting a federal preemption claim against a California statute providing for four months unpaid leave for pregnancy, thus allowing a state to go beyond the PDA’s requirement of equal treatment); OR. REV. STAT. ANN. §§ 659.010–121, 360–370, 560–570 (Butterworth 1989 & Supp. 1991); Drummonds, *Sister*

More recently, several states pioneered *paid* leave for employees. Again following these pioneering state laws, a federal paid leave bill has now been introduced in the Congress.²⁸⁸

Leave laws carry special significance as U.S. workers—both women and men—struggle to meet the often conflicting demands of work and family. Our law does not permit national and global business to insist on a federal orthodoxy in this area, shutting off experimentation and innovation in the states.²⁸⁹ Labor relations law demands the same freedoms for citizens in the states.

5. *Privacy in the Workplace*

Technology also presents other challenges to U.S. workers today: drug testing, electronic monitoring, employer regulation of the private lives of employees, employer access to employee e-mail, and the like. Federal law failed to address many of these issues for most U.S. employees (drug testing, workplace polygraphs, genetic testing) until long after state regulation showed the way.²⁹⁰ States ventured into other regulatory waters as well.

Sovereigns, *supra* note 1, at 503; Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

287. Family Medical Leave Act of 1993, 107 Stat. 6, 29 U.S.C. § 2601 (2006).

288. *E.g.*, California (Paid Family & Medical Insurance Act of 2005); New Jersey (NJ STAT. ANN. §§ 43:21–27 (West 2004)); *Bill Would Mandate Paid Vacation for U.S. Workers*, Law 360 (May 22, 2009) (sponsor of proposal states that twenty-nine percent of U.S. workers get no vacation while more than 100 nations, including all EU countries, have laws providing for paid vacation; another bill reintroduced to provide paid sick leave).

289. The FMLA expressly allows “[s]tate and local law that provides greater family or medical leave rights than the rights established under this Act” 29 U.S.C. § 2651(b).

290. Public employee drug testing, however, is regulated in certain situations by the Fourth and Fourteenth Amendments to the U.S. Constitution. *Nat’l Treasury Employees Union v. Von Raba*, 489 U.S. 656 (1989). *See also O’Connor v. Ortega*, 480 U.S. 709 (1987) (searches of public employee desks, office, and file cabinets protected by Constitution where employee has reasonable expectation of privacy); *see also Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (accident drug testing of railroad workers permitted by federal statute). States have regulated drug testing for many years via statutes and state constitutional provisions. Drummonds, *Sister Sovereigns*, *supra* note 1, at 504–05 nn.191–92.

The federal Polygraph Protection Act, (29 U.S.C. §§ 2000–2009 (1988)), was preceded by many state statutes. Drummonds, *Sister Sovereigns*, *supra* note 1, at 505 n.196 (citing state statutes and cases). In total, eighteen states regulated polygraphs before the federal statute was passed. MARK ROTHSTEIN ET AL., *CASES AND MATERIALS ON EMPLOYMENT LAW* 143 (2d ed. 1991).

While “supervisory monitoring goes back as far as the pyramids . . . what you have [as early as 1989] is a new capacity to use that supervisory monitoring made possible by computers.”²⁹¹ While Congress as yet has not enacted federal legislation, the states long ago began adopting regulatory provisions in this area.²⁹²

6. *Wrongful Discharge*

Although many other areas might be cited, let us conclude this review of the vital role played by state law in the workplace with a look at job security. Professor Clyde Summers long ago noted that private sector employees—unlike public employees protected by civil service and unionized employees protected by “just cause” clauses typical in union contracts—fall under the employment-at-will rule in the U.S.²⁹³ Yet one of the greatest upheavals in the law of the twentieth-century workplace occurred with the erosion of that rule via common law exceptions carved out by doctrines like public policy wrongful discharge, breach of implied contract terms, breach of the covenant of good faith and fair dealing, and so forth. Much of that upheaval occurred exclusively through state law.²⁹⁴ Again, whether local, national, or transnational, employers adapted their practices to these varying state developments, thus restricting the most fundamental of employer prerogatives.

7. *Summary*

This review shows that federal and state regulations most often go hand in hand. The states most often play a leading-edge role in status discrimination, wage and hour laws, compensation and

The same pattern holds with protections against genetic testing. Drummonds, *Sister Sovereigns*, *supra* note 1, at 505 n.197 (citing state statutes); only in 2008 was a federal law in this area adopted. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 920 (codified as amended in scattered sections of 29 U.S.C.).

291. *Columbia Professor Contends Monitoring Does Not Breach Employee Privacy Rights*, 44 Daily Lab. Rep. (BNA), Mar. 8, 1989, at A7 (cited in Drummonds, *Sister Sovereigns*, *supra* note 1, at 506 n.198).

292. Drummonds, *Sister Sovereigns*, *supra* note 1, at 506 n.205.

293. Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for A Statute*, 62 VA. L. REV. 481 (1976). *See also* Lawrence Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

294. *E.g.*, Cornelius Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719 (1991).

prevention of occupational injury and disease, leave laws, privacy, and the law of wrongful discharge. Why is it that labor relations law in the twenty-first century cannot follow this clearly dominant model of shared state and federal policy making?

IV. THE RATIONALES CREATED BY JUDGES FOR THE THREE BROAD LABOR LAW PREEMPTION DOCTRINES FAIL TO PERSUADE EVEN IN THEIR OWN TERMS BECAUSE THEIR PREMISES IN TODAY'S CONDITIONS ARE FLAWED, AND EXCEPTIONS AND INCONSISTENCIES MAKE THEM INCOHERENT

This Part examines the three labor law preemption doctrines on their own terms. All of the doctrines rest upon “implied” preemption theory.²⁹⁵ To paraphrase Chief Justice Rehnquist’s complaint long ago, these doctrines grew from “acorns of sensible decision” into a “mighty oak” reaching ever outward, now grown

295. As the Supreme Court cases often explain, three general types of preemption doctrine exist: (1) express preemption by the Congress; (2) pervasive federal governmental regulation which occupies an entire “field;” and (3) implied “conflicts” preemption. *E.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). This framework, however, sheds little light on the cases. *Drummonds, Sister Sovereigns*, *supra* note 1, at 529 (noting that “field” preemption can be either express or implied, citing cases; *English*, 496 U.S. at 79–80 n.5 (“field pre-emption may be understood as a species of conflict pre-emption.”); *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88 (1992) (Four-Justice plurality applied implied conflicts preemption analysis, Justice Kennedy treated the case as involving express preemption, and the four dissenters characterized the plurality approach as involving both “purpose-conflict” doctrine, and “federal occupation of a field . . .”).

Conflicts preemption is of two types: (1) conflicts arising from impossibility of complying with both state and federal law simultaneously (generally not controversial); and (2) conflicts from state law that “stand[] as an obstacle[s]” to the full attainment of congressional objectives as divined by the courts. *Gade*, 505 U.S. at 98; *Fla. Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142–43 (1963). The second type of conflicts preemption, “obstacle preemption,” gives the courts almost unbridled discretion. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (Thomas, J., concurring); *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). Labor law preemption doctrine fits into this later category. *E.g.*, 520 S. Mich. Ave. Assocs. Ltd. v. Shannon, 549 F.3d 1119, 1125 (7th Cir. 2008) (“[T]he issue facing us is one of implied preemption”).

In theory, implied “obstacle preemption” falls under the “clear statement” doctrine, requiring a “clear and manifest” or “clear and unambiguous” indication of congressional intent to preempt state law. As will be seen, much of labor law preemption doctrine ignores this general presumption against implied preemption clearly part of the broader law of preemption. *Drummonds, Sister Sovereigns*, *supra* note 1, at 530–31; *Estlund, Ossification*, *supra* note 1, at 1599–1600; *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 146–152 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236–37 (1947); *Cipplone v. Leggett Group, Inc.*, 505 U.S. 504, 516 (1992).

beyond all usefulness²⁹⁶—except as a shield from the reform of labor law to more meaningfully implement the ideal of employee free choice through initiatives by citizens and legislators in the states. As many commentators, and indeed several of the Justices, acknowledge,²⁹⁷ Congress remains silent after fifty years of judicially-created preemption doctrine. Yet preemption in theory rests upon congressional intent. Judges, not Senators and Congressmen, create and continue to extend the doctrines that displace state authority.²⁹⁸

First, this Part will review the *Garmon* doctrine and show that both its “primary agency jurisdiction” and “uniform national labor policy” rationales were hotly debated even in their inception and simply fly in the face of reality in present conditions.²⁹⁹ Second, it will examine the *Machinists* doctrine and show that its “free play of economic forces” rationale rests upon implied “rights” not found in the text of the NLRA (piling an implied preemption doctrine on an “implied right”) and suffers a striking inconsistency with other vital parts of labor law.³⁰⁰ Finally, it will show that “[S]ection 301” preemption, while arising from a valid policy concern about the preferred interpretation of collective bargaining agreements by arbitrators, does not justify depriving unionized employees of individual state statutory and common law rights that their non-unionized cousins enjoy, and, in any event, could be fully accommodated by a deferral or exhaustion doctrine rather than a preemption doctrine.³⁰¹

An additional general point must be made about claims that “the national labor policy” requires exclusive federal law making in the labor relations area. The claim is not true. NLRA Section 14-B³⁰² already authorizes a state option on the fundamental issue

296. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting).

297. E.g., *Id.* at 622 (Rehnquist, J. dissenting) (“From the acorns of [two earlier] sensible decisions has grown the mighty oak of this Court’s labor preemption doctrine, which sweeps ever outward, though still totally uninformed by any express directive from Congress.”).

298. See discussion *supra* notes 25–29.

299. See *infra* Part IV.A.; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

300. See *infra* Part IV.B.; *Int’l Assoc. of Machinists v. Street*, 367 U.S. 740 (1961).

301. See *infra* Part IV.C, see *supra* note 9 and accompanying text.

302. 29 U.S.C. § 164(b) (2006). Twenty-one states have the “right to work” laws authorized by Section 14(b), “most of them in the more agricultural states of the south and Midwest.” COX ET AL., *supra* note 7, at 1193. For a list of these states, see *supra* note 7. Agricultural employees’ collective bargaining rights, moreover, are determined by state law.

of union security—whether all members of a unionized bargaining unit must contribute financially to the costs of representation in order to prevent “free rider” problems.³⁰³ Additionally, some federal labor law analyses, for example, questions regarding a union’s access to employees on employer property, depend upon a balancing of state law property rights.³⁰⁴ Thus, for example, California may allow union organizers access to a shopping center while other states may not—as a matter of state, not federal, law.³⁰⁵ Finally, under the many exceptions to labor law preemption doctrines announced during the past half-century, states decide many issues arising from, and can often affect the balance of power in, labor disputes.³⁰⁶

A. The Garmon Doctrine’s Rationales Suffer from Fatal Flaws and Inconsistencies in Today’s Conditions

*Garmon*³⁰⁷ sprang from the New Dealers’ faith in federal administrative agencies. When Justice Frankfurter wrote the *Garmon* majority’s decision in 1959, his focus was on the rights of unions under the NLRA, then only a quarter century old, and on his long-seated distrust of judicial policy making in the labor relations area.³⁰⁸ His seminal opinion became the foundation for

303. The term in this context is the Supreme Court’s *Machinists*, 367 U.S. at 761; see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (public sector) and *Marquez v. Screen-Actors Guild*, 525 U.S. 33 (1998) (NLRA).

304. *E.g.*, *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

305. *E.g.*, *Glendale Assoc., Ltd. v. NLRB*, 347 F.3d 1145 (9th Cir. 2003).

306. See *infra* Part IV.A.2.c; see *infra* notes 364–76 and accompanying text.

307. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* involved two California unions’ picketing of a lumber yard. Depending on its purpose, the picketing could either have been protected by Section 8(b) (if to coerce the employees and lumber yard to unionize even though a majority of the employees disfavored unionization). The California Supreme Court sustained a state trial court injunction and \$1,000 damages award on the ground that the NLRB had declined jurisdiction over the case. In *Garmon I*, 353 U.S. 26 (1957), the Supreme Court reversed that ruling, holding that the NLRB’s refusal of jurisdiction did not leave the state with power over a dispute from which state power would otherwise be preempted. The California Supreme Court on remand sustained the \$1,000 fine against the union, reasoning that while the NLRB could issue a cease and desist order to stop the picketing, that agency lacked any statutory authority under the NLRA to award damages. The Supreme Court in *Garmon II* [the case now known as “*Garmon*”], 359 U.S. 236 (1958), found the California judgment preempted.

308. See FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930). In 1932, just before President Franklin Roosevelt took office, Congress passed the Norris–LaGuardia Anti-Injunction Act, ch. 90, 47 Stat. 70 (1932), (codified as amended at 29 U.S.C. §§ 101–15 (2006)). That enactment was

labor law preemption doctrine. Even so, four Justices of that day refused to join his opinion, deeming Frankfurter's preemption doctrine far too broad.³⁰⁹ Moreover, Justice Frankfurter freely acknowledged in *Garmon* that it was he, not the Congress, who was creating the broad preemption doctrine that he narrowly convinced a majority of the Court to join.³¹⁰ Thus, right from the start, the *Garmon* doctrine stood on a disputed rationale, and one that generated controversy, even in that day, among the Justices. However, it is not the result reached by Justice Frankfurter in the 1959 dispute about the unions' picketing at a California lumber yard that concerns us today, but rather the reasoning and doctrinal framework announced in that decision.

*1. Garmon's "Arguably Protected" or "Arguably Prohibited" Test and the Two Rationales Supporting It*³¹¹

The doctrine created by the Frankfurter majority exuded an appealing simplicity: "When an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."³¹² The *Garmon* "arguably

designed to keep federal judges out of labor disputes by severely curtailing their jurisdiction and powers. Frankfurter and Greene's book provided much of the intellectual rationale for the enactment. Frankfurter, a former Dean of the Harvard Law School, shared with Harvard Professor Archibald Cox a profound faith in federal administrative agencies and broad federal preemption, and Cox's views were influential in Supreme Court preemption and other labor law rulings. Drummonds, *Sister Sovereigns*, *supra* note 1, at 515 n.265, 562 n.517 (citing Cox's articles, cases adopting his ideas [often with express attribution], and academic acknowledgement of Cox's giant-like contributions to labor law).

309. *Garmon*, 359 U.S. at 249. Justice Harlan, joined by Justices Clark, Stewart, and Whittaker, concurred on much narrower grounds (that "the unions' activities for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act and that therefore state action is precluded until the National Labor Relations Board has made a contrary determination . . .") *Id.*

310. *Id.* at 239-40 (Labor law preemption doctrine "involve[s] a more complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of Congress'").

311. The author here borrows from his forthcoming article in the Cornell Journal of Law and Public Policy: *Beyond the Employee Free Choice Act Debate: Unleashing the States In Labor Management Relations Policy by Reforming the Labor Law Preemption Doctrines Created by Judges a Half-Century Ago*.

312. *Garmon*, 359 U.S. at 245.

protected,” “arguably prohibited” test rested upon two policy concerns.³¹³ First, as recently explained by the Seventh Circuit, *Garmon* “seeks to prevent conflicts between state and local regulation and . . . [federal] regulation embodied in Sections 7 and 8 of the NLRA.”³¹⁴ Second, “*Garmon* preemption further seeks to protect the NLRB’s primary jurisdiction in cases involving Sections 7 or 8 of the NLRA.”³¹⁵ Generations of labor lawyers, professors, and students have worshipped at this doctrinal shrine.

2. *The Critique of Garmon Offered in This Article*

Whatever its value in 1959, the *Garmon* doctrine today stands as an aging relic. This Article offers several arguments why it should be revised in light of the near death of private sector unions as bargaining agents and the paramount societal interest in fostering structural balance in our economy through a more robust protection for employee free choice and participation.

First, this Section examines the foundational premises of Justice Frankfurter’s doctrinal creation and shows their flaws in today’s conditions. The fear of clashing state and federal law policies no longer, assuming it once did, justifies *Garmon*’s overbroad displacement of state law; this especially holds true in the preemption of state law enhancement of remedies for illegal conduct violating the Section 7 rights of employees. The primary agency expertise jurisdiction rationale, moreover, lies shredded in the light of the now well-known politicization of the Board, the refusal of federal courts (including the Supreme Court) to accept and enforce many important policy judgments by the Board, and the proliferation of situations in which both federal and state courts already apply federal labor law.

Second, a maze of exceptions and limitations announced over the half-century following *Garmon* make it less predictable in its application; many of these exceptions found expression in cases filed against unions. Thus, while Justice Frankfurter’s focus in the 1959 lumber yard picketing dispute may have been on the protection of federal union rights from state encroachment, today the doctrine protects employers far more often than unions and employees.

313. See generally COX ET AL., *supra* note 7, at 1005.

314. 520 S. Mich. Ave. Assocs., Ltd v. Shannon, 549 F.3d 1119, 1125 (7th Cir. 2008).

315. *Id.*

a. Garmon's Premises: The Clash of Substantive Federal and State Rights

Let us start by analyzing *Garmon's* first rationale—preventing a substantive conflict between federal and state law. That remains a valid purpose for any preemption analysis. Suppose the picketing of the lumber yard in *Garmon* was in fact protected picketing under Section 7.³¹⁶ Obviously, under the Supremacy Clause, California state courts cannot award damages for conduct that the Congress protected under federal law. That follows from a straightforward conflicts analysis: the union's picketing at the lumber yard would enjoy no federal protection if the state could award injunctive or damages relief against the unions as a result of that conduct. Why did not the Frankfurter majority simply decide that question? This, after all, provided the basis for Justice Harlan's concurrence for four Justices.³¹⁷ (The answer, of course, is the majority's primary agency jurisdiction rationale. That rationale will be discussed below.)

On the other hand, suppose the union's picketing in *Garmon* was in fact, as found by the California courts, for the purpose of coercing the employees and lumber yard to agree to a union shop absent majority support for the union—a clear violation of Section 8(b), then and now.³¹⁸ How could a state remedy for a *violation* of the NLRA interfere with federal rights any more than state remedies for acts of racial, national origin, and sex discrimination interfere with Title VII rights? And why did not the Court simply decide whether the union's picketing conduct promoted the federally forbidden purpose?

Two rationales explain the “arguably prohibited” prong of the *Garmon* formulation. First, the only substantive difference between state and federal law on the “prohibited” question related not to the *conduct* but to the *remedy* for illegal conduct. The *Garmon* majority was concerned about state court damages awards for union conduct that, even if illegal under the NLRA, could not be the subject of damages awards under the scheme devised by the

316. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

317. *Garmon*, 359 U.S. at 249. Justice Harlan would merely have *deferred* (not preempted) a state court's jurisdiction pending a decision by the NLRB as to whether the conduct enjoyed protection under federal law.

318. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b)(1) (2006). This statute makes it an unfair labor practice for a union or its agents “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [in National Labor Relations Act § 7, 29 U.S.C. § 157 (2006)].” Section 7 gives employees the right to *refrain* from organizing, collective bargaining, and concerted activity for mutual aid and protection.

Congress for the remedy of unfair labor practices under the Act. Thus, to the majority, the California court's award of damages was inconsistent with the weaker NLRA remedy, which would have been merely a cease and desist order and similar equitable relief.³¹⁹ In this view, Congress created a carefully balanced remedial scheme and intended to prevent states from supplementing these federal remedies.

It remains doubtful, to say the least, that the 1947 Congress intended any such displacement of state law. While clearly the Congress must have meant to supplant state law condemnation of federally *protected* conduct, it is not a given that Congress meant to ban state remedies for conduct *prohibited* by federal law. For one thing, in this area of implied conflicts preemption, the presumption against preemption applies; no mention of this presumption appears in Frankfurter's opinion. Second, four Justices of the Supreme Court refused to find preemption of state remedies that differed from federal remedies; though today this notion finds acceptance among labor lawyers with little debate, the Justices in 1959 were almost evenly divided on this proposition.³²⁰ Third, as Justice Harlan explained, for the twelve years between the 1947 Taft-Hartley Act and the *Garmon* decision in 1959, Supreme Court *majorities* followed a more traditional and far narrower preemption analysis. Several cases seemed to uphold state remedies for NLRA-prohibited conduct that were different from federal remedies; there was no intervening action by the Congress.³²¹

The unnecessarily broad doctrine created by Justice Frankfurter, not the Congress, today prevents the states from extending the compensatory (including emotional distress) and punitive damages that now exist for other forms of discrimination other than anti-union activity. Neither may the states apply the new tort of wrongful discharge in violation of public policy.³²² The same holds true for state creation of meaningful remedies for bad faith bargaining. Indeed, the states cannot, under *Garmon*, even

319. National Labor Relations Act § 10, 29 U.S.C. § 160 (2006). The only conduct for which damages can be awarded under the LMRA presently is for a union's violation of the secondary boycott, hot cargo, and recognitional picketing prohibitions of the Act. See National Labor Relations Act § 8(b)(4), (7), 8(e), 29 U.S.C. § 158(b)(4), (7), 158(e) (2006), and Labor-Management Relations Act § 303, 29 U.S.C. § 187 (2006).

320. *Garmon*, 359 U.S. at 249.

321. *Garmon*, 359 U.S. at 250–54 and cases cited therein.

322. E.g., *Luke v. Collotype Labels USA, Inc.*, 72 Cal. Rptr. 3d 440 (Cal. Ct. App. 2008); *Rodriguez v. Yellow Cab Coop., Inc.*, 253 Cal. Rptr. 779 (Cal. Ct. App. 1998); *Lontz v. Joyce Tharp*, 647 S.E.2d 718 (W. Va. 2007).

channel tax monies used in state procurement contracts away from “three time loser” employers found guilty of unfair labor practices by the NLRB!³²³ Thus, NLRA Section 8 now effectively operates more as a shield against state innovation and experimentation, via the “arguably prohibited” prong of *Garmon*, than as a sword against illegal employer conduct. This holds more relevance today given the widespread awareness of the ineffectiveness of NLRB remedies and the proliferation of state remedies under the shared federal and state authority found in the status discrimination, wage and hour, occupational safety and health, family and other leave, and privacy areas.³²⁴

Moreover, as with the “arguably protected” prong of *Garmon*, preemption is triggered even when the conduct only “arguably” stands prohibited by the federal law. The reach of the *Garmon* doctrine to cover conduct only “arguably” protected or prohibited rests, not on a substantive conflict between federal and state law, but rather upon the primary agency jurisdiction rationale to which we now turn.

323. Wis. Dep’t of Indus., Labor, & Human Relations v. Gould, 475 U.S. 282, 287–89 (1986). At the time at least four other states had similar laws: Connecticut, Maryland, Michigan, and Ohio. *Id.* at 288 n.6. Under this case, states were denied the same right that a private sector employer, who favored business partners who were not recidivist unfair labor practice violators, would enjoy. *Id.* at 290.

324. *See supra* Part III.C. The reader may observe that the “arguably prohibited” prong also prevents unions from falling victim to state created remedies for union unfair labor practices under the National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (2006). As developed more fully below, several points apply. First, employers more often than unions are charged with unfair labor practices falling within the prohibitions of Section 8. In Fiscal Year 2008, for example, 22,497 charges were filed, of which 16,169 alleged employer misconduct and 6,210 alleged unfair labor practices by unions. 73 NLRB ANN. REP. 5 (2008). Second, the focus of the reforms in labor law preemption law proposed in this article is to allow states to play a role in creating processes and remedies to implement the protection of Section 7 rights of employees. Only employees, and not unions and employers, enjoy Section 7 rights. Third, while Section 7 rights include the right to *refrain*, no serious argument exists that remedies are insufficient for union interference with that right; indeed unions are already liable for damages in both state and federal courts for mistreatment of employees rising to the level of a breach of the duty to fair representation; further a host of exceptions to *Garmon* carved out over the past fifty years already expose unions to a variety of state tort claims including trespass, assault and battery, intentional infliction of emotional distress, and malicious defamation. *See infra* Part IV.A.2.c. Unions thus have far more to gain from the creation of effective mechanisms in state law for the vindication of Section 7 rights than do employers. Moreover the rebalancing necessary today requires a more favorable system for union organizing, and the preemption reforms urged below (*See infra* Part V) would express that congressional purpose in permitting more leeway for state experimentation and innovation.

b. Garmon's Premises: The Primary Agency Jurisdiction of the NLRB

Though Justice Frankfurter's *Garmon* decision preempted a state court's jurisdiction, the primary agency jurisdiction rationale applied to federal courts as well.³²⁵ A generation before the *Garmon* decision, the Norris-LaGuardia Act of 1932³²⁶ largely banned federal judges from issuing labor injunctions. A primary intellectual foundation for that anti-labor injunction enactment was a book³²⁷ by then Professor Frankfurter that chronicled the use of judicial injunctions in labor disputes, often to the detriment of workers and unions.³²⁸ A few years later, the New Dealers turned to a host of federal administrative agencies to fill the perceived need for regulation of the Depression-era economy. To the New Dealers, agencies, rather than courts, promised an expertise-based and uniform set of federal policies to implement the new thinking of that time. Justice Frankfurter's *Garmon* opinion reflects this background. In his vision, the NLRB would fashion and enforce a uniform national labor policy to which the courts would largely defer.

i. The Primary Agency Jurisdiction Rationale in 1959

Let us first examine Justice Frankfurter's primary agency jurisdiction rationale on its own terms. First, if state law suffers displacement whenever conduct is "arguably" protected or prohibited by the NLRA, then that displacement will obviously occur in some cases where the conduct was *neither* protected nor prohibited. It is extraordinary to attribute such an intent to Congress, particularly in light of the presumption against implied preemption. Second, the doctrine as applied does not merely *defer* to the NLRB in the sense of exhaustion. Rather, the jurisdiction of the NLRB is exclusive under *Garmon*.³²⁹ Yet, exhaustion would suffice to access the presumed expertise of the Board, the justification for this branch of *Garmon*'s foundational premises. Thus, even in its day, *Garmon*'s "arguably" protected or prohibited concern with NLRB expertise did not justify *preemption* of state

325. *Garmon*, 359 U.S. at 245.

326. *See supra* note 314.

327. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1932).

328. COX ET AL., *supra* note 7, at 49–54.

329. William C. Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1039 n.8 (1973); Justice Harlan's concurring opinion in *Garmon* seems to suggest that a deferral, rather than preemption doctrine, might be defensible. *Garmon*, 359 U.S. at 249.

law as opposed to *deferral* of state claims pending resolution of any issues properly before the federal agency.

ii. The Primary Agency Jurisdiction of the NLRB Today

Today, the hopes of the New Dealers seem naïve. A half-century after Justice Frankfurter persuaded a majority of the Supreme Court to join his broad *Garmon* preemption doctrine, the primary agency jurisdiction rationale has suffered fatal erosion from three directions.

First, the NLRB increasingly became politicized. Presidential elections, not the expertise of the Board, determine the labor versus management leanings of a majority of its members. This trend, long underway, accelerated in recent years.³³⁰ NLRB “law” swings to and fro with the political administration.³³¹ Indeed, because of political gridlock concerning appointments, the five-member Board sometimes lacks three members to constitute a majority to hear cases, as in all of 2008, and as of this writing in June 2009.³³²

330. Victoria Bar, *National Labor Relations Board Members Reflect on Their Legacy*, 37 LAB. & EMPLOY. L. (ABA Section of Labor and Employment Law, Chicago, Ill.), Fall 2008, at 4; James Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005); Thomas Kochan, *A Silver Anniversary Not Worth Celebrating: the Impasse Over American Labor and Employment Policies*, 25 COMP. LAB. L. & POL'Y J. 79 (2003); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935–2000*, 61 OHIO ST. L.J. 1361 (2000).

331. E.g., *Bush Labor Board Decisions: Pendulum Shift or Permanent Changes*, 56 LAB. L.J. 212 (2005) (Interview Professors William R. Corbett, Ellen Dannin, & Michael C. Harper); David L. Gregory, *The NLRB and the Politics of Labor Law*, 27 B.C. L. REV. 39 (1985); David P. Twomey, *Policymaking Under the Bush II Labor Relations Board: Where Do We Go From Here?*, 59 LAB. L.J. 141 (2008) (“The Politicization of the NLRB and Current Effects”).

332. Since the beginning of 2008, the Board has had only two members. The Board was only able to function at all during this period because the Justice Department wrote an opinion saying that the full five-member Board (while it still had five members) could delegate its authority to a three member panel and that these three could in turn delegate their power to two members when one of those three subsequently left the Board. Thus during the past two years the remaining two members decided cases upon which they could agree, but not the many cases on which they did not agree. This double delegation has been challenged in eight courts of appeals; the D.C. Circuit and the Seventh Circuit have issued contradictory decisions on the validity of the two-member decisions. *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009). The cases decided by the two-member panels in any event did not involve substantial legal issues, the two remaining members could not agree on twenty to twenty-five percent of the new cases, and a “significant number of major cases [remain]

Second, the federal courts undercut the claim that the NLRB's expertise would shape the national labor policy by frequently reversing the Board on policy questions. Thus, before and after *Garmon*, the Supreme Court repeatedly rejected the "expertise"-based judgments of the NLRB.

Consider this non-exhaustive list of the broad-ranging questions over which the NLRB suffered reversal by the Supreme Court:

1. the highly factual but important determination of the supervisory exclusion;³³³
2. union access to the employees on employer property;³³⁴
3. the duty to bargain over partial closure of a business;³³⁵
4. the duty to provide information necessary for the union to carry out its responsibilities in a grievance matter;³³⁶
5. the use of economic weapons like the slowdown strike as an economic pressure tactic during the period of good faith bargaining and prior to impasse;³³⁷
6. the denial of equal access and discriminatory application of an employer's rule against union talk at work;³³⁸
7. the reinstatement of sit-down strikers protesting employer unfair labor practices;³³⁹
8. what remedies for bad faith bargaining might "effectuate the policies" of the Act;³⁴⁰

pending [from] when the Board still had 5 members." 37 LAB. & EMPLOY. L. (ABA Section of Labor and Employment Law, Chicago, Ill.), Fall 2008, at 4.

333. *E.g.*, NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001) (reversing NLRB on question of supervisory exclusion).

334. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (NLRB order granting union organizers access to shopping center reversed).

335. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (reversing Board decision that company had duty to bargain before implementing partial closure decision).

336. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (NLRB order that company disclose information relevant to union's grievances under collective bargaining contract partially reversed).

337. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477 (1960) (NLRB ruling that concerted slowdown during bargaining process constituted failure to bargain in good faith unfair labor practice reversed).

338. *NLRB v. United Steelworkers of Am.*, 357 U.S. 357 (1958) (affirming court of appeals' reversal of NLRB finding that employer enforcement of non-solicitation rule was discriminatory).

339. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (Board's order reinstating sit down strikers protesting employer's unfair labor practices reversed).

9. the remedies for anti-union discrimination against undocumented workers;³⁴¹
10. the Board's position that on the question of back pay no mitigation was required;³⁴²
11. the Board's position that a union could validly waive initiation fees to employees who joined the union before the election;³⁴³
12. the Board position that an offensive lockout was unlawful;³⁴⁴
13. the Board position that an employer could not lawfully insist on a "management rights" clause in collective bargaining;³⁴⁵
14. the Board's ruling that an employer's unilateral reduction in union retiree health benefits was unlawful;³⁴⁶ and
15. the Board's position that a successor employer was bound by the seller's labor contract with the union.³⁴⁷

This article does not quarrel with any of these Supreme Court rulings. Rather the point is that the Supreme Court, not the NLRB, made them.

Moreover, perhaps led by the example of the Supreme Court, the courts of appeals refuse to enforce the Board's orders in about fifteen to twenty-five percent of its cases.³⁴⁸ The courts of appeals

340. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (NLRB remedy for bad faith bargaining ordering employer to sign contract with union dues check off provision reversed).

341. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (back pay without reinstatement remedy for undocumented workers fired for union activity reversed by Supreme Court majority).

342. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (rejecting Board position that back pay remedy did not require duty to mitigate).

343. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (reversing Board ruling that Union could waive initiation fees for employees joining union before NLRB election).

344. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (NLRB holding that employer lockout was unfair labor practice reversed).

345. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395 (1952) (reversing Board's holding that employer violated Act by seeking "management rights" clause in collective bargaining agreement).

346. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (reversing Board's holding that unilateral change in retiree medical benefits was unlawful).

347. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972) (reversing Board on successor's obligation to abide by predecessor's employer's labor contract).

348. Venable, *Taking the Board to Court: Winning Appeals Against the NLRB*, (June 2003), <http://venable.com/files/publication/f1d48314-e83a-4f93->

disagree with one another. Absent a Supreme Court decision, the Board refuses to consider itself bound to follow legal interpretations of the courts of appeals beyond the case under review. Thus, at any given point in time prior to resolution by the Supreme Court, the NLRB may apply one “national labor policy,” the Second Circuit another, and the Seventh Circuit still another.

A third development also undercuts the claim of exclusive NLRB competence to fashion federal labor law. *Garmon*'s assumption that judges cannot be entrusted to faithfully follow federal labor law announced by the NLRB (and Supreme Court) finds no support in other aspects of modern labor law. For example, federal and state courts share concurrent jurisdiction over Section 301 suits to enforce collective bargaining agreements;³⁴⁹ state courts are charged in those cases with applying the federal law of collective labor contracts, including the duty to arbitrate and review and to enforce arbitration awards.³⁵⁰ Further, both state and federal courts entertain cases involving union breach of the duty of fair representation under the federal labor law;³⁵¹ unions face liability in these cases for damages in jury trials;³⁵² the NLRB shares this authority over union breach of fair representation.³⁵³ Judges also decide damages actions against unions for illegal secondary boycotts by unions under Section 303 of the LMRA; state and federal judges share concurrent jurisdiction over these damages claims and must interpret and apply the complex federal labor law of secondary boycotts under NLRA Section 8(b)(4) in

ac23-be92ed494968/P; 73 NLRB ANN. REP. 134, tbl. 19A (showing that Board was affirmed in full seventy-seven point four percent of time in courts of appeals, 2003–2007.); ROBERT GORMAN & MATTHEW FINKIN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 12–13 (2004) (In 2000, “the courts of appeals handed down 99 decisions on review of Board unfair labor practice decisions, affirming the Board in whole or in part in about 79% of the cases. In the five-year period 1995–1999, the courts of appeals handed down 572 such decisions, affirming the Board in whole or in part in 73% of these cases”). Of course the courts of appeals exercise only “substantial evidence” review over Board rulings of fact. National Labor Relations Act § 10(e)–(f), 29 U.S.C. § 160(e)–(f) (2006).

349. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506–09 (1962). Further, even where conduct constitutes both an unfair labor practice within the jurisdiction of the NLRB, it can also be a breach of a collective bargaining agreement actionable before federal and state courts under LMRA § 301. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

350. *See Charles Dowd Box Co.*, 368 U.S. at 507–10.

351. *Vaca v. Sipes*, 386 U.S. 171 (1967).

352. *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983); *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

353. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962).

such cases.³⁵⁴ And, paradoxically, federal labor law preemption doctrine, “one of the more intricate structures in legal theory,”³⁵⁵ must be applied by state courts faced with claims of federal labor law preemption.³⁵⁶

Even if the hopes of the New Dealers were justified in their own time, events since *Garmon* carry lessons that can no longer be ignored. Just as we do not rely exclusively on federal agencies to protect the environment or reasonably safe access to prescription drugs with proper research and disclosure of risks, so too must labor relations discard the myth of the exclusive federal agency regulatory model.³⁵⁷

c. *Garmon’s Many Exceptions and Doctrinal Caveats*

In the fifty years since *Garmon*, numerous “exceptions, limitations, refinements, and qualifications”³⁵⁸ have developed. Two vague exceptions were introduced in *Garmon* itself. One arises from matters “deeply rooted in local feeling and responsibility,” under which state tort and criminal law remedies for violence, mass picketing, or property destruction withstand

354. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 187 (2006); GORMAN & FINKIN, *supra* note 350, at 388–93.

355. Gregory, *supra* note 31, at 514.

356. *E.g.*, Willard v. Khotol Servs. Corp., 171 P.3d 108 (Alaska, 2007); Barbieri v. United Techs. Corp., 771 A.2d 915 (Conn. 2001); Foreman v. AS Mid-America, Inc., 586 N.W.2d 290 (Neb. 1998); Ohio State Bldg. & Constr. Trades Council v. Cuyahoga County Bd. of Comm’rs, 781 N.E.2d 951 (Ohio 2002); J.A. Croson Co. v. J.A. Guy, Inc., 691 N.E.2d 655 (Ohio 1998); Lontz v. Tharp, 647 S.E.2d 718 (W. Va. 2007).

357. Of course federal agencies in and outside the field of employment and labor law play an important role. The Equal Employment Opportunity Commission (EEOC) provides regulations and guidelines under Title VII, the Americans with Disabilities Act, and the Family Medical Leave Act; it also brings important “impact” litigation and attempts to conciliate some of the thousands of cases filed each year for administrative exhaustion purposes. It does not, however, displace resort to judicial litigation after receipt of a “right to sue” notice, nor does it, as shown earlier in Part III.C, displace state remedies or foreclose states from the broader application of their own discrimination statutes to additional categories of discrimination such as sexual orientation, transgender, and marital status. The Department of Labor investigates wage and hour violations, brings “impact” cases, and issues administrative regulations under the FLSA, but does not displace state law. The Food and Drug Administration approves prescription drugs and their labeling, but does not after *Levine v. Wyeth*, 129 S. Ct. 1187 (2009), displace state common law claims—so also with the Environmental Protection Act. Thus, the argument here is not that the NLRB should be abolished but that exclusive reliance should not be placed on it to vindicate society’s interest in a rebalanced labor relations system to meet the needs of today.

358. Drummonds, *Sister Sovereigns*, *supra* note 1, at 565.

Garmon preemption.³⁵⁹ Another concerns matters of “merely peripheral concern” to the federal labor law.³⁶⁰ Other exceptions soon appeared: some state laws of “general applicability” escaped preemption as did others where “properly understood, federal regulatory policy can be narrowly construed and the state policy readily accommodated.”³⁶¹ Thus, in the Supreme Court cases alone, state tort claims for malicious defamation in labor disputes, fraud and misrepresentation, trespass, and intentional infliction of emotional distress³⁶² escape the embrace of *Garmon* preemption. As Professor Gregory noted more than twenty years ago: “The litany of exceptions to *Garmon*, in areas wholly removed from the well-established violence and local concerns exceptions, threatens to swallow the doctrine, and has compromised the practicality of its application.”³⁶³ Many of the cases announcing exceptions to *Garmon*, moreover, involve state tort claims *against* unions or state laws regulating unions, an ironic twist to Justice Frankfurter’s concerns in 1959 about state court actions hostile to unions.³⁶⁴

Not only exceptions but doctrinal inconsistencies infected the *Garmon* doctrine as well. In the *Sears* trespass case against a picketing union, the Court suggested that the “arguably prohibited” prong of *Garmon* might be limited to cases in which the state and NLRB proceedings address the identical controversy; the NLRB case involved the purpose and nature of the picketing while the state trespass action focused on its location.³⁶⁵ Other cases

359. COX ET AL., *supra* note 7, at 1005; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

360. See *Garmon*, 359 U.S. at 243.

361. COX ET AL., *supra* note 7, at 1005.

362. Drummonds, *Sister Sovereigns*, *supra* note 1, at 565–66 and cases cited therein.

363. Gregory, *supra* note 31, at 527.

364. Compare Linn v. United Plant Guard Workers of Am., 383 U.S. 53 (1966) (knowing or reckless defamation claims against union and officers not preempted), with Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) (non-malicious libel claim against union preempted), and Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290 (1977) (intentional infliction of emotional distress claim against union and union officials not preempted), and *Sears*, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (state trespass action against union not preempted), and Brown v. Hotel & Rest. Employees & Bartenders Int’l Union Local 54, 468 U.S. 491 (1984) (state regulation of eligibility for union office in casino bargaining unit not preempted).

365. *Sears*, 436 U.S. at 198 n.28, 200. Thus even though the union picketing at issue in *Sears* was arguably prohibited recognitional picketing under the National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (2006), since the state trespass action focused on the location rather than the purpose of the

suggested that a “balancing test” is superimposed on the *Garmon* analysis.³⁶⁶ A recent case involving a union’s drumming (“a banging racket”) and hand billing outside the Empire State Building shows how fluid the revised and evolved *Garmon* doctrine can be.³⁶⁷ The NLRB decided the union “was engaged in protected hand billing or leafleting” and that “the use of the drum . . . was [not] sufficient to transform the leafleting activity into unlawful conduct.”³⁶⁸ But the New York Court of Appeals nonetheless allowed a state law nuisance action, reversing the Appellate Division that had dismissed the action under *Garmon*,³⁶⁹ applying a balancing test.³⁷⁰

In summary, neither *Garmon*’s “clash of federal/state substantive rights,” nor its “primary agency jurisdiction” rationales, supports its broad labor law preemption today. Doctrinal inconsistency and many exceptions further undermine its utility. Certainly the continued broad displacement of state law in labor law, in contrast to the shared federal and state regime in most areas of employment law, grows more and more anomalous.

B. The Machinists Doctrine Implies Preemption from Rights Themselves Implied by the Supreme Court, Further Unnecessarily Displacing State Law in a Broad Variety of Settings Involving State Efforts to Aid Unions

1. The Machinists Case and Its Analytical Content

A different strand of labor law preemption doctrine grew from a labor dispute almost forty years ago in Wisconsin. The employer proposed an extension of work hours in contract negotiations for a successor contract. When the union declined to agree, the employer announced it would unilaterally implement the changes. The union members voted to decline work longer than their traditional hours during continuing negotiations; this constituted a partial strike. The NLRB Regional Director declined to prosecute

picketing, it was not preempted. Under the original *Garmon* formulation, of course, it is the arguably protected or prohibited status of the conduct, not the legal issue, that controls analysis.

366. See *Farmer*, 430 U.S. at 300; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 n.9 (1985).

367. *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470 (N.Y. 2008), *rev’g*, 39 A.D.3d 361 (N.Y. App. Div. 2007).

368. *Id.* at 473.

369. *Id.* at 476–77.

370. *Id.* at 477–83 (Read, J., dissenting) (distinguishing the *Sears* case as one in which the NLRB had not ruled on the conduct).

the employer's unfair labor practice charge on the ground that concerted economic pressure during bargaining is neither unlawful nor protected under the NLRA.³⁷¹ The employer then challenged the overtime refusal under Wisconsin law. The Wisconsin Employment Relations Commission found that the overtime refusal was neither arguably protected nor arguably prohibited under the NLRA (and hence was not preempted under *Garmon*) and that the refusal violated state law, ordering the union and employees to cease and desist.³⁷²

The Supreme Court reversed in a six–three decision.³⁷³ Justice Brennan's majority opinion agreed that the union members' conduct was not arguably protected or prohibited by federal law under *Garmon* but nonetheless held that the state law fell to the preemption axe. Congress, said Justice Brennan, intended such disputes to be resolved by “the free play of economic forces.”³⁷⁴ “[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining.”³⁷⁵ The presumption against implied preemption of the sister sovereigns was ignored.

Justice Stevens, joined by Justice Stewart and then-Justice Rehnquist, dissented on the grounds that the union's “partial strike activity” was neither arguably protected nor arguably prohibited under the NLRA, that a 1949 case³⁷⁶ upholding state regulation of partial strike activity was never overturned by the Congress, and that the dissenting Justices were unpersuaded “that partial strike activity is so essential to the bargaining process that the States should not be free to make it illegal.”³⁷⁷

Significantly, the conclusion that the Wisconsin statute conflicted with the NLRA required three analytical steps not made explicit in the majority's opinion. First, unconventional strike activity—such as a slowdown, sit down, and the partial strike activity (concerted refusal of overtime) involved in *Machinists*—

371. NLRB v. *Ins. Agents' Int'l Union*, 361 U.S. 477, 481 (1960).

372. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 134–37 (1976).

373. *Id.*

374. *Id.* at 140; *see also Ins. Agents'*, 361 U.S. at 489.

375. *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents'*, 361 U.S. at 495); Justice Powell and Chief Justice Burger concurred, emphasizing that the states could apply “state laws that are not directed toward altering the bargaining positions of employers or unions” such as “their law of torts or of contracts . . .” *Id.* at 155–56.

376. *See Int'l Union v. Wis. Employment Relations Bd. (Briggs-Stratton)*, 336 U.S. 245 (1949), *overruled by Machinists*, 427 U.S. 132.

377. *Machinists*, 427 U.S. at 158–59.

falls outside Section 7's general protection for "concerted activity . . . for mutual aid and protection."³⁷⁸ Though inconsistent with a literal reading of Section 7, a series of cases starting soon after the NLRA's enactment in 1935 held these concerted activities fell outside the protections of Section 7.³⁷⁹ Second, the *Machinists* majority assumed that Congress intended such strike-related activity, though unprotected by Section 7, nevertheless to be among a range of self-help activities that the NLRA implicitly allowed.³⁸⁰ Third, having taken those two analytical steps, the *Machinists* majority then took an analytical leap to find that Congress further implicitly intended, contrary to the Court's own earlier decision in the 1949 *Briggs-Stratton* case,³⁸¹ to displace state regulation of these same activities.

Whether one considers such preemption of state authority to be wise or unwise, the *Machinists* decision rested not on any intent of Congress but on a federal labor law policy fashioned by the Court majority in 1976.³⁸² And, as with *Garmon*, again the *Machinists* decision seemed at the time to offer protection from state restriction of union activity.³⁸³

378. 29 U.S.C. § 157 (2006).

379. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (sit down); *NLRB v. Local Union No. 1229 Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953) (hand billing during labor dispute not protected where handbills attacked quality of employer's conduct and did not relate to labor dispute); *Briggs-Stratton*, 336 U.S. at 265 (1949) (intermittent strike activity not protected under NLRA); *Ins. Agents'*, 361 U.S. at 490 (concerted slowdown not protected by NLRA Section 7). As unprotected activity the employer can lawfully fire employees who engage in such activity.

380. This assumption derived in turn from the 1960 case, *Insurance Agents'*, 361 U.S. 477.

381. *Briggs-Stratton*, 336 U.S. 245.

382. Justice Stevens made just this point in his dissent for three Justices: "Despite the numerous statements in the Court's opinion about Congress' intent to leave partial strike activity wholly unregulated, I have found no legislative expression of any such intent . . ." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n.*, 427 U.S. 132, 157 (1976).

383. Represented employees, however, seldom draw solace from the *Machinists* holding that states cannot regulate slowdowns. That is because the self-help rationale also means that employers facing concerted slowdowns can fire employees participating in the slowdown. Under the self-help right created by the Supreme Court, slowdowns are unprotected under the federal labor law, and the two-way street of self-help applies to the employer as well.

2. *How Machinists' Preemption Hinders State Law Efforts to Protect or Foster Unions*

Cases striking down state law favorable to union interests followed *Machinists*. In 1986, the Court majority extended *Machinists* to an action by the Los Angeles City Council to deny renewal of a taxicab franchise unless the cab company settled a labor dispute with its drivers.³⁸⁴ It seems hard to imagine that either the 1935 or 1947 Congress meant to limit the powers of municipal governments in this way or to impinge upon the right of union members to seek and gain the support of their local governments in labor disputes; again there is displacement of the constitutional division of powers by the Court, not the Congress. Similarly, state efforts to limit or ban striker replacement fell under the federal shield of *Machinists* preemption.³⁸⁵

Recently, despite the Supreme Court's rulings in the 1980s holding that the states retained authority under the NLRA to adopt labor standards legislation,³⁸⁶ the Seventh Circuit applied the *Machinists* doctrine to preempt an Illinois statute governing rest breaks and meal periods for hotel attendants in Cook County (enacted during a strike by hotel attendants against a hotel

384. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608 (1986). (Justice Rehnquist dissented). In 1989, moreover, the Court held that local governments that violate the *Machinists* doctrine by interfering with the free play of economic forces in a labor dispute governed by the NLRA faced liability under 42 U.S.C. § 1983 (2006). *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103 (1989) (three Justices dissented).

385. *E.g.*, *Employers' Ass'n, Inc. v. United Steelworkers of Am.*, 32 F.3d 1297 (8th Cir. 1994) (Minnesota Striker Replacement Law preempted under *Garmon* and *Machinists* doctrine); *Kapiolani Med. Ctr. for Women & Children v. Hawaii*, 82 F. Supp. 2d 1151 (D. Haw. 2000) (statute imposing liability on employment agencies aiding employers seeking striker replacements preempted); *People v. Fed. Tool & Plastic*, 344 N.E.2d 1 (Ill. 1975) (Illinois law requiring disclosure of labor dispute in advertisements seeking striker replacements preempted); *Mich. State Chamber of Commerce v. State*, No. 83-256399, 1984 WL 61212 (Mich. Cir. Ct. Jan. 25, 1984) (Michigan Strikebreakers Act preempted under *Machinists*); *Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters*, 512 N.W.2d 881 (Minn. 1994) (Minnesota Striker Replacement Act preempted under *Machinists* doctrine). For a recent argument for changing the permanent replacement doctrine at the national level, see Norelli, *supra* note 222. As Lance Compas has pointed out, the U.S. position on permanent replacement violates obligations under international law as interpreted by the International Labor Organization. LANCE COMPAS, UNFAIR ADVANTAGE xvii–xviii (2004).

386. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987).

owner);³⁸⁷ the court interpreted *Machinists* to apply where labor standards legislation was not “a law of general application;” since the Illinois Hotel Attendant Amendment applied only “to one occupation, in one industry, in one county,” it fell to *Machinists* preemption.³⁸⁸ The Seventh Circuit purportedly relied on rulings in the Ninth and Eleventh Circuits making the same distinction.³⁸⁹ Many occupation and industry-specific state hours of work statutes are vulnerable under this reasoning.

To take another example, in the Empire State Building drumming case,³⁹⁰ the New York Court of Appeals refused to apply *Machinists* preemption doctrine to bar a state nuisance action (even though the NLRB dismissed unfair labor practice charges against the union) because “[l]oud drumming is not an ‘integral part of the legislative scheme’ of the NLRA.”³⁹¹

Project labor agreements between unions and local governmental bodies also generate debate under the *Machinists*’ “free play of economic forces” doctrine. The Supreme Court upheld such an agreement in a case involving the federally required clean-up of Boston Harbor.³⁹² Distinguishing between “government as regulator and government as proprietor,”³⁹³ the Court cautioned that the agreement “was specifically tailored to one particular job, the Boston Harbor cleanup project.”³⁹⁴ Thus state and local

387. 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119 (7th Cir. 2008).

388. *Id.* at 1139. The Illinois statute applied to counties with populations exceeding 3,000,000; Cook was the only such county in the state. *Id.* at 1130 n.7.

389. *Id.* at 1130 (citing *Barnes v. Stone Container Corp.*, 942 F.2d 689, 692 (9th Cir. 1991); *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 503 (9th Cir. 1995); *Hull v. Dutton*, 935 F.2d 1194, 1198 (11th Cir. 1991)). *See also Cannon v. Edgar*, 33 F.3d 880 (7th Cir. 1994) (striking down under both *Garmon* and *Machinists* a provision of Illinois law requiring cemeteries and gravediggers to negotiate for pool of workers to perform religiously required internments during labor disputes); *Levy v. Verizon Info. Servs., Inc.*, 498 F. Supp. 2d 586, 600 (E.D.N.Y. 2007) (wage deduction law claims preempted); *New Eng. Health Care v. Rowland*, 221 F. Supp. 2d 297 (D. Conn. 2002) (payment of Medicaid subsidies and transportation of replacement and non-striking workers preempted); *United Steelworkers v. St. Gabriel’s Hosp.*, 871 F. Supp. 335 (D. Minn. 1994) (Minnesota successor statute preempted).

390. *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470 (N.Y. 2008).

391. *Id.* at 477.

392. *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218 (1993).

393. *Id.* at 227.

394. *Id.* at 232; *compare Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005) (labor peace agreement required for contract transporting and providing other services to elderly and disabled citizens preempted), *and Ohio State Bldg. & Constr. Trades Council v. Cuyahoga County Board of Comm’rs*, 781 N.E.2d 951 (Ohio 2002) (holding

governments can prefer union labor agreements for projects ad hoc, but not as a general policy. Again, such intent cannot, with credibility, be attributed to the Congress in 1935 or 1947.

Additionally, “Worker Freedom Act” legislation proposed in several states, which would restrict captive audience meetings and give employees other rights, remains vulnerable to challenges under *Machinists*,³⁹⁵ especially after the *Chamber of Commerce* case. For example, in Oregon, the 2009 Legislature adopted Senate Bill 519 which employer attorneys call a “gag rule” law; it prohibits employers from holding mandatory meetings for the purpose of communicating the employer’s views on religious or political matters.³⁹⁶

3. Chamber of Commerce v. Brown³⁹⁷

California legislators adopted, after lobbying by unions, a statute prohibiting “employers that receive state funds from using those funds to ‘assist, promote, or deter union organizing.’”³⁹⁸ As expressed in the Preamble to the statute, its purpose was to “prohibit an employer from using state funds . . . for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract.”³⁹⁹ However, the California statute expressly exempted employer expenditures, allowing union representatives access to and expenses for the negotiation of a “voluntary recognition agreement” with a union.⁴⁰⁰

An en banc majority of the Ninth Circuit upheld the California statute because “Congress did not intend to preclude the States

that state statute could not under NLRA prohibit “project labor agreements” in public works contracts), *with* *Associated Builders & Contractors, Inc. v. S.F. Airports Comm’n*, 981 P.2d 499 (Cal. 1999) (upholding a “project stabilization agreement” that specified procedures for resolving labor disputes), *and* *George Harms Constr. Co. v. N.J. Tpk. Auth.*, 633 A.3d 76 (N.J. 1994) (upholding agreement).

395. See generally *Secunda*, *supra* note 1, at 211 nn.13–17, 212–13 & 226–27.

396. Naomi Levelle-Haslitt, *It’s a Wrap! 2009 Oregon Legislature Adjourns After Creating New Employment and Labor Concerns and Considerations For Employers*, Aug. 6, 2009, http://www.martindale.com/labor-employment-law/article_Miller-NashLLP_767158.htm.

397. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008).

398. *Id.* at 2410.

399. *Id.* at 2411. The California statute tracked the language of several federal statutes that similarly restricted the use of federal funds. *Id.* at 2417–419.

400. *Id.* at 2411.

from imposing such restrictions on the use of its own funds.”⁴⁰¹ The majority drew a distinction between a condition on *receiving* state funds (condemned by the Supreme Court in the *Gould* case)⁴⁰² and a condition on *use* of such funds.

The Supreme Court in a seven–two decision ruled that the contested provisions of the statute are preempted under *Machinists* because they touch a protected area; “[Congress meant] to shield a zone of activity from regulation.”⁴⁰³ Justice Stevens, who dissented in the seminal *Machinists* case,⁴⁰⁴ wrote the majority decision thirty years later in *Chamber of Commerce v. Brown*. The opinion reasoned that NLRA Section 8(c)⁴⁰⁵—which provides that non-coercive free speech “shall not constitute or be evidence of an unfair labor practice”—constituted an “explicit direction from Congress to leave non-coercive speech unregulated.” In effect, the *Chamber of Commerce* majority elevated an employer’s desire to speak against unionization, neither protected nor prohibited in the statute, to an affirmative NLRA right; this was so even though Section 8(c) (on which the Court relied) is explicitly phrased merely as a restriction on the use of speech in unfair labor practice proceedings.⁴⁰⁶ The “mighty oak” of judicially-created preemption doctrine continues to grow without Congressional guidance. Justice Breyer, joined by Justice Ginsburg, dissented on this further extension of the *Machinists* doctrine. Pointing out that the Wisconsin statute struck down in *Wisconsin, Department of Industry, Labor, and Human Relations v. Gould*⁴⁰⁷ was assumed by the Court in that case to be for the purpose of deterring unfair labor practices, a violation of the *Garmon* doctrine’s “arguably prohibited” prong, Justice Breyer declared that “California’s statute . . . does not seek to compel labor related activity . . . [or] to forbid labor related activity.”⁴⁰⁸ It would only violate the *Machinists* doctrine, according to Justice Breyer, if it unreasonably restricted or discouraged the use of the employer’s *own* funds.⁴⁰⁹

401. *Id.* at 2412.

402. *Wis. Dep’t of Indus., Labor, & Human Relations v. Gould*, 475 U.S. 282 (1986).

403. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2414 (2008).

404. *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976).

405. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2006) provides: “The expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”

406. *Chamber of Commerce*, 128 S. Ct. at 2414.

407. 475 U.S. 282 (1986).

408. *Chamber of Commerce*, 128 S. Ct. at 2419–420.

409. *Id.* at 2421–422. Justice Breyer would have remanded on this issue.

4. *The Machinists Doctrine Loses Coherence When Considered in the Light of Other Rulings*

Like the *Garmon* doctrine, *Machinists* makes even less sense when considered in its context. Though the doctrine protects “the free play of economic forces” as an NLRA-implied right, other Supreme Court rulings allow a state to directly affect those economic forces. First, states, while not permitted in cases like *Golden State, Chamber of Commerce*, and *Boston Harbor* to award governmental franchises,⁴¹⁰ restrict the use of state tax monies,⁴¹¹ or generally require union contractors on state projects⁴¹² (in the name of an implied right to the “free play of economic forces”), may nonetheless adopt labor standards legislation directly establishing the terms of employment.⁴¹³ Thus, the Supreme Court rejected *Machinists* challenges to the state of Massachusetts’ statute mandating that medical plans contain mental health benefits even if covered employers negotiated union contracts covering those medical plans.⁴¹⁴ Similarly, Maine could adopt a severance pay law for plant closures that applied to unionized workers.⁴¹⁵ Second, states may directly affect a strike situation, the classic scenario for the “free play of economic forces,” by granting or withholding unemployment benefits to strikers.⁴¹⁶ Third, states may award breach of contract and tort damages for workers affected by a dispute over permanent replacement in strikes.⁴¹⁷ These cases fly in the face of the assertion that Congress impliedly meant to preempt

410. *See supra* note 389.

411. *Chamber of Commerce*, 128 S. Ct. at 2410.

412. *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./R.I.*, 507 U.S. 218 (1993).

413. *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996) (California statute permitting only unionized miners to work over eight hours per day not preempted). *See also* *NBC v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995) (state overtime pay statute not preempted in context of impasse in dispute between employer and union); *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993) (Oregon statute requiring overtime over eight hours on public works projects, absent collective bargaining agreement, not preempted); *Wash. Serv. Contractors Coal. v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995) (district enactment requiring contractors taking over service contract from predecessor contractors to retain employees not preempted); *Metro. Life Ins. Co. v. Commonwealth of Mass.*, 471 U.S. 724 (1985) (Massachusetts mandated health plan benefits statute not preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (Maine severance pay law for plant closure not preempted).

414. *Metro. Life Ins.*, 471 U.S. 724.

415. *Fort Halifax Packing Co.*, 482 U.S. 1.

416. *N.Y. Tel. Co. v. N.Y. Dep’t of Labor*, 440 U.S. 519, 526 (1979) (3 Justices dissented).

417. *Belknap v. Hale*, 463 U.S. 491 (1983).

state actions that interfere with an implied right to “the free play of economic forces.”

C. “Section 301” Preemption: The Federal Policy Basis for This Labor Law Preemption Doctrine Could Be Completely Vindicated by Deferring to Rather Than Preempting the Claims of Union Members Asserting Individual Rights Claims Under State Law

Employees do not forfeit their individual rights under state and local employment statutes and common law when they unionize.⁴¹⁸ Thus, unionized employees maintain their protections under status discrimination law, wage and hour laws, family leave laws and other developments that make up the individual rights revolution in the American law of the workplace. Indeed, the Supreme Court recently held in the *14 Penn Plaza* case⁴¹⁹ that “clear and unmistakable” clauses in collective bargaining agreements may bind unionized employees to arbitrate such disputes regarding their individual employment rights through contractual grievance-arbitration provisions.⁴²⁰ But still another labor law preemption doctrine announced by the Supreme Court in the 1980s sometimes unnecessarily preempts the individual rights claims of unionized employees (but not their non-union cousins). This doctrine is known as “Section 301” preemption. Again the rationale offered fails to support it.⁴²¹

Section 301 preemption started with the sensible requirement that state law could not control the interpretation of a collective bargaining agreement.⁴²² But, in 1985, in *Allis-Chalmers Corp. v. Lueck*,⁴²³ the Supreme Court preempted a unionized employee’s tort claim against an insurance company for breach of the state law covenant of good faith and fair dealing implied in insurance contracts; the insurance coverage involved was incorporated in the union contract.⁴²⁴ The Court held that the employee’s state claim was preempted because it was “inextricably intertwined” with the collective bargaining contract.⁴²⁵ Anomalously, a non-union employee could sue for bad faith processing of insurance claims,

418. *E.g.*, *Wright v. Universal Mar. Serv., Inc.*, 525 U.S. 70 (1998); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

419. *14 Penn. Plaza v. Pyett*, 129 S. Ct. 1456, 1462 (2009).

420. *Id.*

421. *See generally* Drummonds, *Sister Sovereigns*, *supra* note 1, at 574–82.

422. *Id.* at 575 and cases cited therein.

423. 471 U.S. 202 (1985).

424. *Id.* at 204.

425. *Id.* at 213.

but a unionized employee could not sue if her contract mentioned the insurance plan involved. This preemption of the employee's individual rights claim under state law occurred even if the union labor agreement provided no similar protection.⁴²⁶

Three years later the Court clarified this holding in *Lingle v. Norge Div. of Magic Chef, Inc.*⁴²⁷ Section 301 preemption occurred, according to the Court in *Lingle*, only when resolution of the state law individual rights claim required interpretation of a union labor contract. “[A]s long as the state law claim can be resolved without interpreting the [collective bargaining] agreement itself, the claim is ‘independent’ of the agreement for § 301 preemption purposes.”⁴²⁸ As explained by the Court: Section “301 pre-emption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.”⁴²⁹

But individual rights claims under state law arguably *do* involve interpretation of a union contract in a variety of situations. For example, a right to privacy claim may depend on the reasonable expectation of privacy, and that in turn may involve expectations under the labor contract. An intentional infliction of emotional distress claim may require analysis of the conditions of work specified in the union contract to help the court's consideration of the “outrageousness” element. Even a state law discrimination claim, moreover, may require examination of the labor contract on the issue of treatment for “similarly situated” employees.

The courts struggle to apply the *Lueck-Lingle* doctrine consistently. Both the American Bar Association and the federal circuit courts of appeals have expressed frustration with the workability of the doctrine.⁴³⁰

Other, more fundamental, problems arise. As noted above, the policy concern with Section 301 preemption is that federal law must be applied in the interpretation of collective bargaining agreements. Yet the state courts enjoy concurrent jurisdiction over

426. The doctrine does not affect non-union employees because they are not subject to collective bargaining agreements; Section 301 preemption requires the presence of an applicable collective labor contract in order for the federal policy favoring arbitral interpretation of such contracts to trigger.

427. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

428. *Id.* at 409–10.

429. *Id.* at 409.

430. Drummonds, *Sister Sovereigns*, *supra* note 1, at 578 and notes cited therein.

Section 301 claims and apply federal law when they exercise that jurisdiction.⁴³¹ No reason exists, therefore, to preempt state court judges from deciding a unionized employee's individual rights claim merely because a collective bargaining agreement must be interpreted to decide the state claim; state court judges decide union contract issues routinely in the exercise of their Section 301 jurisdiction.

But what if the labor contract provides for interpretation by an arbitrator? Federal law favors arbitration of disputes under collective bargaining contracts. The answer seems obvious: an individual rights claim requiring some interpretation of the labor contract could simply be deferred pending resolution of the contract interpretation issue by an arbitrator. In short, the disease (or federal policy concern) does not require the strong medicine of Section 301 preemption—which leaves union employees with fewer remedies than non-unionized employees.⁴³² Mere deferral suffices to serve the federal policy interest even in the situation in which the union and employer agreed to an arbitrator's interpretation of the labor agreement. Once again we see an unnecessarily broad federal labor law preemption doctrine needlessly created by the Supreme Court. And again the practical effect disfavors unionized employees.

V. ONE VISION FOR A LABOR LAW PREEMPTION CLARIFICATION ACT

The reform of labor law preemption doctrine must come from Congress. Even Justices generally opposed to broad judicially-created preemption doctrines sometimes feel bound, by *stare decisis* or other policy considerations, to acquiesce to labor law preemption precedents now decades old.⁴³³ Most disturbingly, the United States Supreme Court's 2008 decision in *Chamber of*

431. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

432. Drummonds, *Sister Sovereigns*, *supra* note 1, at 581–82.

433. For example, Justice Stevens (joined by then-Justice Rehnquist and Justice Stewart) dissented in *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), but joined the majority extending that doctrine thirty-two years later in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). Justice Thomas, whose eloquent concurrence in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), decried broad federal preemption implied by the courts in the context of state tort suits involving failure to warn claims for prescription drugs, nonetheless joined the majority in *Chamber of Commerce*, extending the implied preemption theory in labor law.

*Commerce*⁴³⁴ makes clear that a majority of the current courts continue to *expand* the labor law preemption doctrine even to the point of striking down California's law seeking to prevent the use of taxpayer monies for anti-union campaigns.⁴³⁵

Further, as shown below, all three strands of labor relations law sprang not from Congress, but entirely from the Supreme Court's own policy making. Yet, as a matter of constitutional principle, Congress, not the courts, holds the power to make decisions that displace state law-making.⁴³⁶ Thus, the legitimacy of federal labor law preemption rests upon congressional intent in the labor relations area. Once again, Chief Justice Rehnquist aptly described the reality: labor preemption doctrine started from "acorns" of sensible decisions but has now grown into a "mighty oak" without any guidance by Congress.⁴³⁷ Judges on opposite ends of the jurisprudential spectrum at various times voiced similar complaints.⁴³⁸ Indeed, Justice Felix Frankfurter, who wrote the seminal labor law preemption opinion a half-century ago, forthrightly acknowledged the silence of Congress in that decision.⁴³⁹ It is time for the Congress to speak.

What might a 2009 Labor Law Preemption Clarification Act look like? Three principles should guide the analysis. First, the changes must allow the states to play a role in creating innovations that rebalance our labor relations law system in the direction of

434. *Chamber of Commerce*, 128 S. Ct. 2408 (Justices Breyer and Ginsburg dissented).

435. *See supra* Part IV.

436. *See generally* Drummonds, *Sister Sovereigns*, *supra* note 1, at 513–14, 525–28 (citing cases).

437. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting).

438. Justice Brennan, for example, voiced a similar point: "Preemption cases in the labor law area are often difficult because we must decide the questions presented without any clear guidance from Congress . . . [Our] standards are by necessity general ones which may not provide as much assistance as we would like in particular cases." *Belknap v. Hale*, 463 U.S. 491, 523 (1983) (Brennan, J., dissenting).

439. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239–41 (1959) (labor law preemption doctrine involves a more "complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature' . . . '[T]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by of the process of litigating elucidation.'"). As Professor Gregory summarized: "The core reality in [labor law] preemption doctrine is judicial policymaking in the face of congressional silence, disguised by the occasional cosmetic judicial 'divination of congressional purpose' and 'fabrication of' intent," Gregory, *supra* note 31, at 516–17.

offering more protection for employee free choice. Just as the 1947 Taft–Hartley Congress rebalanced labor relations policy to correct abuses by unions in that day, reform today must rebalance to correct abuses by employers.⁴⁴⁰ Second, NLRA Section 7 rights belong to employees, not labor unions or employers. States should be allowed to play a larger role in the protection and fostering of the exercise of those rights. Third, the broader field of employment law teaches us that shared federal and state authority most often creates the conditions for innovation and change in the law. As in the law of the workplace generally, federal labor law should set minimum standards but not displace state law-making consistent with those minimums.

Consider ten areas of potential state law-making that fit within these principles:

1. authorization for state level damages for discrimination based on union activity or pro-union speech similar to that provided in many states for race, national origin, religious, sex, disabilities, sexual orientation, marital status, age, and other forms of discrimination, and which the federal civil rights law already extends to public employees;
2. allowing states to experiment with restrictions on permanent replacement of striking workers and the use of offensive lockouts during labor disputes similar to their already existing power to grant or withhold unemployment benefits to strikers and to directly establish conditions of employment through labor standards legislation;
3. allowing states to experiment with “card check” recognition with adequate protection for employees (not employers or unions) to seek an NLRB election to determine representational issues;
4. state level experimentation with “equal access” rules to make the election process fairer to those supporting unions;
5. state regulation of “captive audience” employer meetings with employees to discourage unionization (with adequate protection as well for employer free speech);
6. state level flexibility to require that exclusive representatives periodically demonstrate their continuing majority status via “equal access” elections or “card checks,” or to periodically require, in non-union

440. As noted above, the federal labor law already imposes considerable accountability on unions. Unions are already liable for damages for breach of the duty of fair representation, secondary boycotts, and for torts committed under the many exceptions to *Garmon*. What is missing is any similar accountability for employers.

workplaces, an employee election on the question of union representation;

7. “reverse” preemption provisions, similar to those in OHSA and in NLRA Section 14-B (“Right to Work” laws), allowing the states to establish alternative procedures for the vindication of NLRA rights subject to the approval of the Secretary of Labor or other federal officials;
8. authorization for states to allow non-exclusive representation by minority unions for those employees who want it;
9. provisions for flexibility for states to require “work councils” in non-union workplaces to provide a mechanism for employee voice in corporate governance; and
10. authorization for states to experiment with different forms of interest arbitration in first contract bargaining disputes or as a remedy for bad faith bargaining.

To be sure, most of the revitalized state authority in labor relations embodied in these ten suggestions would favor employees wishing for more collective voice in the workplace. That, indeed, is the point. Just as the changes sixty-two years ago in Taft–Hartley sought to rein in rogue union behavior, today labor law must be reformed to rein in the many weapons employers can now quite legally employ to dampen, and too often suppress, the exercise of unfettered employee free choice rights.

At the same time, the Section 7 right of employees to *refrain* from collective action must also be respected. Rebalancing labor law to respond to new conditions is entirely appropriate. But the scope of needed change and experimentation demands that states, not the federal government, show the way.