BEYOND THE EMPLOYEE FREE CHOICE ACT: UNLEASHING THE STATES IN LABOR-MANAGEMENT RELATIONS POLICY

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This Article proposes a major devolution of labor relations policy making authority to the states. Echoing the federalism discussion in other contexts like global warming and prescription drugs, labor relation preemption doctrine should be examined and reformed by Congress. Existing doctrine is entirely judge-made even though only Congress, not the states, carries authority under the constitutional division of powers to displace state law. This judge-created preemption law stifles labor relations measures in the states, and leaves labor law smothered in federal orthodoxy.

Federal labor law reform is necessary for two reasons. First, the private sector unions face near extinction as collective bargaining representatives with fewer than eight percent of private sector employees represented. A rebalancing of labor relations policy is necessary to protect and foster employee free choice on questions of representation and collective voice. The Employee Free Choice Act debate only opened discussion of the many changes possible. Second, new policies more favorable to representation and employee voice can help to rebuild more structural balance in an economy now beset by the swollen powers of the executive suite and financial industry.

The needed changes are more likely to arise in the states than in Washington, D.C. Viewed in the larger context of employment law generally, the current broad federal labor law preemption doctrines are out of step. In wage and hour, occupational safety and health, status discrimination, and leave law, the states and federal government share authority within federal minimum standards and the states have often been innovators of needed reforms. Shared federal-state authority allows experimentation, flexibility, and greater citizen autonomy and involvement.

Furthermore, viewed in their own right, the current doctrines find little support in the rationales offered for them, and are riddled with exceptions and inconsistencies. Thus, the Garmon *doctrine's preemption of conduct "arguably" protected or prohibited by federal law sweeps far*

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broader than necessary to protect federal interests; it was controversial at its inception, and has lost any convincing rationale today. The primary agency jurisdiction rationale reflected a now outmoded faith in federal administrative agencies, was undermined by repeated rejection of the "expertise" based judgments of the National Labor Relations Board by the courts, and currently suffers from the politicization of the Board. Further a mass of exceptions and limitations make this one of the most complex and little understood areas in all of the law of the workplace. The Machinists *doctrine's "free play of economic forces" rationale rested, like* Garmon*, on implied "obstacle" preemption analysis now less favored by the courts, and in any event, is logically inconsistent with established law allowing the states to legislate labor standards directly and to determine whether to grant or withhold unemployment benefits during a strike or lockout. In addition, both* Garmon *and* Machinists *make little sense in light of the "reverse preemption" provisions of Section 14(b) of the National Labor Relations Act that allow the states to set labor relations policy on the fundamental issue of state "right to work" laws. This internal inconsistency is further reflected in federal labor law's use of balancing of state law property rights to determine issues of union access.*

Finally, this Article makes some suggestions about what a congressional reworking of labor law preemption doctrine might look like. The larger point, however, is that the creative ideas and experiments in labor relations are far more likely to originate from ferment in state capitals than from the common denominator policies necessary to overcome gridlock in Washington, D.C.

INTRODUCTION

This Article proposes that Congress enact a major decentralization of labor relations law—the law that governs efforts by employees to collectively deal with their employers through unions and collective bargaining.[1] Two recent events have signaled the reemergence of federal preemption as an issue in labor law. First, in 2007, the U.S. House of Representatives passed the Employee Free Choice Act of 2007 (EFCA),[2] triggering the deepest fundamental debate[3] about labor relations policy

[1] Although this Article uses the conventional reference to "employers," in reality, the relationship governed by labor relations law is most often that between employees and the management of large organizations. That management does not always act to maximize shareholder value found vivid illustration in the spectacle of Wall Street financial firm executives taking huge bonuses, even as their firms faced the threat or reality of bankruptcy or forced sale during the recent financial crisis. *See, e.g.*, Louise Story, *On Wall Street, Bonuses, Not Profits, Were Real*, N.Y. TIMES, Dec. 17, 2008, at A1. While the "stakeholder" theory of corporations languished in recent years, it did find expression in state statutes often enacted to enhance defenses against hostile takeovers. *See, e.g.*, 6A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2841.20 (perm. ed., rev. vol. 2005) (listing state statutes in footnotes). Moreover, while cooperative workplace relationships often prevail in human resources policy today, as Oliver W. Holmes observed more than a century ago, "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return." Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896). What Holmes saw as a clash of labor and capital, in our time, with pension and retirement funds often holding substantial equity positions, might better be seen as a clash between ordinary employees and executive suite managers in corporations and financial firms. Of course, there has been far more sharing of corporate bounty in some industries via stock options and other devices than in others.

[2] Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (1st Sess. 2008).

[3] *Compare* Stewart Acuff & Sheldon Friedman, *Union Choice Would Help A Faltering Economy*, INSTITUTE FOR AMERICA'S FUTURE, Feb. 5 2008, http://institute.ourfuture.org/progressive-opinion/union-choice-would-help-faltering-economy, *with* Nelson Cary & Sater

since the 1947 Republican Congress reined in the power of unions through the Taft-Hartley Act.[4] Unlike the debate sixty years ago, the current debate is not about excessive union power, but about whether labor relations law should become more favorable to employee organization in unions.[5] While many possibilities for change in labor relations policy exist, national consensus often eludes policy makers.

Vorys, *The EFCA's Destruction of Workplace Democracy*, LAW360, Sept. 10, 2008, http://employment.law360.com/print_article/68172. Political considerations permeate the issue in part 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. Peter L. Francia, *Voting on Values or Bread-and-Butter? Effects of Union Membership on the Politics of the White Working Class*, PERSPECTIVES ON WORK, Summer 2008/Winter 2009 at 27, 29.

[4] Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2006)). In reaction to perceived abuses of union power during and after World War II, the 1947 Congress passed the Taft-Hartley Act over President Truman's veto. *See* Archibald Cox, *Some Aspects of the Labor Management Relations Act of 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 12 years after the enactment of the New Deal-era National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2006)), federal policy shifted from 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).

There have been several attempts to amend the National Labor Relations Act. In 1975, the Common Situs Picketing Bill, H.R. 5900, 94th Cong. (1975), passed both houses of Congress, but was vetoed by President Ford. *See* 121 Cong. Rec. 42, 015 (1975). In 1977, the Labor Law Reform Act, S. 2467, 95th Cong., 2d. Sess. (1977), was successfully filibustered by Senate Republicans. *See* 123 Cong. Rec. 18, 393–18, 398. The Reform Act would have, *inter alia*, strengthened remedies for anti-union discrimination, given unions more access to jobsites, and expedited election cases. In 1992, the proposed Workplace Fairness Act, S. 55, 102d Cong. (1992), a bill outlawing permanent striker replacement, commanded majority support in both houses, but again succumbed to a filibuster. *See* 138 Cong. Rec. 14, 865–14, 876. Finally, in 1997, the Teamwork for Employees and Managers (TEAM) Act, S. 295, 105th Cong. (1997), would have loosened restrictions on employer-sponsored employee committees, but was vetoed by President Clinton. *See* Bureau of National Affairs, *Clinton Vetoes TEAM Act Despite Pleas From Business For Passage*, DAILY LAB. REP., July 31, 1996, at AA-1–AA-2. However, none of these proposed enactments raised the across-the-board range of labor relations policy issues that were raised by Taft-Hartley and the proposed EFCA.

[5] *E.g.* Robert Reich, *Does Labor Need More Clout?*, SF CHRON., Mar. 3, 2008, at B5. President Obama recently expressed his view that passing the 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 a Union*, HUFFINGTON POST, Feb. 13, 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 American Economy*, CENTER FOR AMERICAN PROGRESS ACTION FUND, Feb. 18, 2009, http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html.

Second, in 2008, in *Chamber of Commerce v. Brown*,[6] a majority of the U.S. Supreme Court continued the expansion of the judicially-created federal labor law preemption doctrine by striking down a California law limiting employer use of state monies in union organizing campaigns. Such rulings, absent a congressional decision to supplant state authority under the Supremacy Clause, deprive citizens of their right, under the constitutional division of powers, to express their preferences about labor relations policy through their state and local governments. As then-Justice Rehnquist pointed out more than twenty years ago, "From the acorns of [two early] decisions has grown the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress."[7]

Part I of this Article places the issue of labor relations policy in a larger context, and argues that a discussion of labor law preemption is uniquely timely today. Part II surveys ground often covered by labor relations scholars—the decline of private sector unionization, and the debate about whether the National Labor Relations Act, as amended by the Taft-Hartley Act, fails, under today's conditions, to create a viable legal structure for fostering employee representation, voice, and free choice. Part III outlines the debate about the EFCA and shows how the Act addresses fundamental issues in labor law on which no national consensus exists, leaving many questions that could be profitably first addressed at the state level. Part IV compares the broad federal preemption in labor law to other aspects of employment law, and illustrates how labor law preemption is out of step with the role state and local governments play in most other areas of workplace regulation. Part V reviews the federal labor law preemption doctrine and its origins in the different circumstances and highly disputed judicial decision making of another era, and explains how the federal preemption doctrine has prevented state and local governments from adopting innovations in labor relations policy. Part V also examines the federal labor law preemption doctrine on its own premises and shows that the doctrine not only rests upon several major contradictions, but is also riddled with exceptions, making it one of the most studied, but least understood, doctrinal mazes in all of employment law. Finally, Part VI offers a vision of what a more decentralized national labor policy might look like, and suggests several enactments and experiments that could fit within a federally guaranteed right to collective bargaining.

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

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

I. THE TIME IS RIPE FOR A FEDERALISM DISCUSSION IN LABOR LAW

A discussion of federalism issues in labor relations policy finds focus today for several reasons deeper than the EFCA debate and the Supreme Court majority's determination to continue the decades-old judicial expansion of federal labor law's preemptive reach.

First, as Americans at every social level struggle with the Great Recession, there is new thinking, on many fronts, about structural arrangements in both the United States and global economies.[8] While the recent debacle in the financial, equity, and housing markets kindles new calls for regulation to correct the now evident excesses of overly deregulated and unchecked markets,[9] calls for a more hospitable policy toward unions have also arisen.[10] This view posits collective bargaining as a balancing institution that preserves private ordering while creating more structural balance within collective capital arrangements, i.e., the modern corporation, through collective representation of employees. It is argued that a more equitable sharing of the proceeds of production with employees will redound to the benefit not only of employees, but also of busi-

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8 John Schwartz, of the New York Times noted that: "Many liberal thinkers skeptical of states' rights since the days of segregation have begun to see that the states, to use Justice Louis Brandeis' words from the 1930s, can 'serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" John Schwartz, *From New Administration, Signals of Broader Roles for States*, N.Y. TIMES, Jan. 30, 2009 at A16. "'[I]t may be the states that have the best initial take on [problems], and try different regulatory methods until we fasten on a single national solution.'" *Id.* (quoting Professor Samuel Issacharoff of New York University Law School). Of course, not everyone shares this view: "[F]ree-for-all federalism [is] bad for business and would lead to a 'patchwork of laws impacting . . . troubled industry.'" *Id.* (quoting William L. Kovacs, a vice president of the U.S. Chamber of Commerce) (commenting on the auto industry).

9 The problem lies not in markets as an ideal, but with the imperfections of markets caused by human greed, periods of excessive optimism during cycles of asset inflation, information disparities, transaction costs, and the "bounded rationality" ignored by neo-classical scholars but now firmly established in the work of cognitive psychologists and behaviorists. On the latter point, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). *See also* Michel Fouquin, *Globalization and Its Impact on Jobs and Wages*, *in* OFFSHORING AND THE INTERNATIONALIZATION OF EMPLOYMENT: A CHALLENGE FOR A FAIR GLOBALIZATION?, 37, 49–50 (Peter Auer et al. eds., 2006) (showing growing income disparity in the U.S.); Joseph Stiglitz, *The End of Neo-Liberalism*, PROJECT SYNDICATE, July 2008, www.project-syndicate.org/commentary/stiglitz101.

10 *See, e.g.*, Kuttner, *supra* note 5; Reich, *supra* note 5; Steven Greenhouse, *Unions Look For New Life In World of Obama*, N.Y. TIMES, Dec. 29, 2008, at B6. Indeed, as Professor Charles J. Morris recently pointed out, Congress's original purpose in the 1935 National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006), left intact in the statutory language added in the Taft-Hartley Act, 29 U.S.C. §§ 141–97, was to encourage collective bargaining. This was the "core policy" of both Acts from which the NLRB has strayed. Charles J. Morris, *The Congressional Policy of the National Labor Relations Act: Revisionism Exposed*, 60 LAB. L. J. 34, 34–35, 39 (2009). *See also* Acuff & Friedman, *supra* note 3.

ness and society in general, by building both a middle class and domestic demand for goods and services.[11]

From a distributional perspective, corporations are collections of people bringing capital, managerial expertise, and labor to the production of goods and services.[12] They are not the personal fiefdoms of CEOs or the Wall Street creators and sellers of securitized mortgages and other instruments, or the toys of hedge fund managers. Society should encourage both structural balance and checks and balances in the relationships among corporations' major human components.[13]

Second, accompanying this discussion, the division of authority between federal and state lawmaking generates debate on multiple fronts. An ancient,[14] but rekindled, debate rages over the appropriate division of power between the states and the federal government in the twenty-first century,[15] highlighted by current challenges including state-level auto-

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11 *See* Kuttner, *supra* note 5; Joseph Stiglitz, *America's Houses of Cards*, PROJECT SYNDICATE, October 2007, www.project-syndicate.org/commentary/stiglitz92.

12 *See* FLETCHER ET AL., *supra* note 1; R. Edward Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1986).

13 *Cf.* Joe Nocera, *First, Let's Fix the Bonuses*, N.Y. TIMES, Feb. 21, 2009, at A1 (2008 bonuses on Wall Street totaled $18.4 billion, though the 2008 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 three days before the acquisition). The average salary of an American CEO is around 475 times higher than that of the average American worker. *See* NOW on PBS, *Politics and Economy: Executive Pay*, PBS, Jan. 20, 2006, http://www.pbs.org/now/politics/executivepay06.html (In 2004, the average pay for an American worker was $27,000, as compared to $11.8 million average pay for an American CEO). The ratio of the salary of an average American worker to that of an American CEO is staggeringly unbalanced when compared to the ratio for other industrialized countries. *See id.* (noting that the ratio of CEO salary to that of the average worker is 11:1 in Japan, 12:1 in Germany, 15:1 in France, and 22:1 in Great Britain. The next most disparate ratio, compared with the United States, is Venezuela, at 50:1); *see also* Richard B. Freeman, *Solving the New Inequality*, XXI BOSTON REVIEW 6, Dec./Jan. 1996–97, at 3 (identifying five strategies for addressing rising income inequality, one of which is "[e]ncourag[ing] the growth of those citizen organizations with the clearest stake in improving the position of low-wage workers—namely unions"); 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."); Jeffrey Stinson, *Europe's CEO pay lands in spotlight*, U.S.A. TODAY, June 30, 2008, at 3B (comparing German, French, and British CEO pay to the pay of American CEOs); Philippe Waquet, *The Role of Labour Law For Industrial Restructuring*, *in* OFFSHORING AND THE INTERNATIONALIZATION OF EMPLOYMENT, *supra* note 9, at 179 ("Labor law . . . aims to enable workers to participate in the life and future of undertakings which are in operation thanks to their labor; it aims to ensure, without undermining management authority (which is actually more a responsibility), that workers have genuine guarantees . . . .").

14 *See generally* THE FEDERALIST (Alexander Hamilton, John Jay & James Madison), (Jacob E. Cooke ed., Wesleyan University Press, 1961) (1788).

15 *See e.g.*, 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); David A. Dana, *Democratizing the Law of Federal Preemption*, 102 Nw. U. L. REV. 507 (2008); Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117 (2008)

mobile greenhouse emission standards,[16] state tort and civil justice accountability for prescription drug and medical device manufacturers,[17] the application of state law to the manufacture and marketing of cigarettes and other consumer products,[18] predatory lending practices by banks and mortgage firms,[19] and immigration policy,[20] to name but a few. As then-Professor Scalia once observed, federalism is "a stick that can be used to beat either dog."[21] Reversing positions from a generation ago, progressives today often favor preserved state power, while business interests often embrace federal authority as a shield against more stringent state regulations.[22] Moreover, in all of the aforementioned policy areas, traditional objections to an all-knowing federal policy apparatus merge with an appreciation for the role of state experimentation, flexibility, and power sharing in a more nuanced mix of governmental authority and free markets.[23] Whether one focuses on environmental issues like global warming, the preemption of state products liability for prescription drugs and medical devices by the Food and Drug Administration, or immigration policy, federalism issues permeate public policy discourse today.[24]

(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 14th Amendment, but tacked in the opposite direction in federal statutory preemption and Dormant Commerce Clause cases); William H. Pryor, Jr., *Federalism and Freedom: A Critical Review of Enhancing Government*, 83 TULANE L. REV. 585 (2008); Erwin Chemerinsky, *A Troubling Trend in Preemption Rulings*, TRIAL, May 2008, at 62; Adam Cohen, Editorial Observer, *What Ever Happened to (the Good Kind of) States' Rights?*, N.Y. TIMES, May 23, 2008, at A24.

16 *See, e.g.*, John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 25, 2009, at A1; Michael Hilitzik, *Pushing Detroit Onto a Greener Road*, LOS ANGELES TIMES, Jan. 29, 2009, at C1; Stephen Power, *Obama's EPA Move Likely to Spur Fight*, THE WALL ST. J., Jan. 27, 2009, at A3.

17 *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187 (2009); Riegel v. Medtronic, 552 U.S. 312 (2008); *see The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 405 (2008) (discussing *Medtronic*); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008).

18 *See, e.g.*, Altria Group v. Good, 129 S. Ct. 538 (2008) (tort claims for "light" cigarettes not preempted); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (state tort claims concerning delay in standardizing use of auto airbags preempted); Cipollone v. Liggett Group, 505 U.S. 504 (1992) (some state tort cigarette claims preempted, others not preempted).

19 *See, e.g.*, Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710 (2009).

20 *See generally* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1559 (2008).

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

22 *See, e.g.*, *Wyeth*, 129 S. Ct. 1187 (2009) (prescription drugs); *Medtronic*, 552 U.S. 312 (2008) (medical devices); *Grier*, 529 U.S. 861 (2000) (automobiles).

23 *See generally* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469 (1993).

24 Then-Professor Scalia stated well the philosophy of shared federal and state power in a federalist system: "[Federalism] is a form of government midway between two extremes. At

Third, this larger federalism debate coincides with now well-known doubts about the efficacy of the New Deal-era administrative agency model of regulation. Agency capture by interest groups and the susceptibility to the cabining of administrative capacity through budget and staff reductions, spring immediately to mind.[25] Nowhere is the federal agency monopoly model of policy making more pronounced than in the lore and reality of federal labor relations law. Significantly, much of the federal labor law preemption doctrine rests substantially on the now outmoded New Deal-era federal agency model.[26]

Finally, a revision of labor law preemption doctrine presses on the congressional agenda for reasons rooted in the constitutional division of power between the states and the federal government. The states regulate the workplace relationship as "sister sovereigns" under the constitutional division of powers.[27] Only Congress, acting under the Commerce Clause, Fourteenth Amendment, or other grant of constitutional authority, can choose to displace the constitutional division of authority between the states and the federal government under the Supremacy Clause.[28] Yet Congress remains largely silent on the issue of federal labor law preemption. "The core reality in [labor law] preemption doctrine is judicial policy making in the face of congressional silence, disguised by the occasional cosmetic judicial divination of congressional purpose and fabrication of intent."[29] Justice Felix Frankfurter, writing for the majority in the seminal labor law preemption case, *San Diego Building Trades Council v. Garmon*,[30] openly acknowledged in his opinion that labor law preemption doctrine involves a "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining

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one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of centralized governments. Federalism is meant to be a compromise between the two." Scalia, *supra* note 21, at 19.

25 *See, e.g.*, Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEXAS L. REV. 1741 (2008).

26 *See infra* Part IV.

27 *See generally* Drummonds, *supra* note 23. *See also* Gregory v. Ashcroft, 501 U.S. 452, 457 (1999) (stating that "our Constitution established a system of dual sovereignty between the States and the Federal Government").

28 *See generally* Wyeth v. Levine, 129 S. Ct. 1187, 1204–17 (2009) (Thomas, J., concurring in judgment), and cases cited therein; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 234, 390-419 (3d ed. 2006) (overview of federal and state powers under the constitution); David Savage, *Thomas breaks with conservative justices to criticize a Bush-era policy*, LOS ANGELES TIMES, Mar. 8, 2009, at A3.

29 David Gregory, *The Labor Law Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 516–17 (1986) (internal quotations omitted). An exception is Section 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b) (2006), giving the states the power to adopt "right to work" laws outlawing the union shop, and overriding the express authorization of such "union security" agreements in Section 8(a)(3) of the NLRA.

30 San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

the intent of the legislature.'"[31] As America again turns to the labor relations question, it is time for Congress to speak on the central question of federalism in labor relations policy.

In summary, though this is not the first call for reform in labor law preemption doctrine,[32] the time is now uniquely ripe for revisiting this issue. On the general issue of labor law reform, Professor Estlund opined, "[I]t is manifestly unrealistic to expect Congress to step in to correct judicial misinterpretation of the NLRA."[33] The Employee Free Choice Act debate of 2007–2009 may prove this too pessimistic a prognosis in changed circumstances. Yet whatever the fate of the EFCA,[34] devolution of some labor relations policy making authority to the states cuts across traditional ideological divisions and would initiate an era of innovation in labor relations policy, help to reverse the trend toward income disparity,[35] and benefit the United States economy.[36]

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31 *Id.* at 239–241; *cf.* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2412 (2008) ("The NLRA itself contains no express pre-emption provision . . . .").

32 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. *See, e.g.*, Drummonds, *supra* note 23; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1599–1600 (2002) [hereinafter Estlund, *Ossification*]; Matthew W. Finkin, *Bridging the Representation Gap*, 3 U. PA. J. LAB. & EMP. L. 391, 407–19 (2001); 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). More recently, Paul Secunda has proposed ways to fit state labor relations initiatives regarding captive audience issues into the existing doctrinal framework. *See* Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. AND POL'Y J. 209 (2008); *see also* 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?*, LAB. AND EMP. REL. ASS'N PROC. OF THE 58TH ANN. MEETING, Jan. 6–8, 2006, at 125, 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.

33 Estlund, *Ossification*, *supra* note 32, at 1598.

34 Passage remains far from certain in light of the sixty votes needed in the U.S. Senate to cut off debate. *See* Taylor E. Dark III, *Prospects for Labor Law Reform*, PERSPECTIVES ON WORK, Summer 2008/Winter 2009, at 23.

35 *E.g.* Elizabeth Gudrais, *Unequal America: Causes and consequences of the wide—and growing—gap between rich and poor,* HARV. MAG., July-Aug. 2008, at 22; *see also* Scott Andron, *Former Labor Secretary Robert Reich Critical of Stagnant Wages*, MIAMI HERALD, Feb. 12, 2009, at C1 (reporting on Reich's speech arguing that stagnant wages are America's biggest trouble spot); Stiglitz, *supra* notes 9 and 11.

36 *See supra* notes 5, 10–11.

II. THE DECLINE OF PRIVATE SECTOR UNIONS AND THE FAILURES OF THE NATIONAL LABOR RELATIONS ACT

Private sector unionization in the United States rests on the tipping point.[37] With only 7.6 percent[38] of the non-agricultural[39] private sector[40] workforce represented by unions,[41] the EFCA may be the last desperate chance for survival of private sector unions as significant institutions of collective bargaining.[42] While the decline is less pronounced in certain

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37 Writing in 1991, Professor James Gray Pope, writing about private sector unions and the NLRA itself, referred to the long "slide toward oblivion." James Pope, *The Past of Labor Law—and Its Future*, 39 UCLA L. REV. 481, 482 (1991) (reviewing WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991)). Professor Estlund, writing about labor law itself, referred to its "ossification" in 2002, Estlund, *Ossification*, *supra* note 32, and to its "death" in 2006. Cynthia L. Estlund, *The Death of Labor Law?*, 2006 ANN. REV. L. & SOC. SCI. 2:105 [hereinafter Estlund, *Death of Labor Law?*]. Professor Gottesman has written of his "despair" for federal labor law. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59 (1993); *see also* James Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985) (analyzing impact of increasing concentration of capital on labor and the role of the law in ignoring or thwarting union efforts to equalize bargaining power).

38 Press Release, Bureau of Labor Statistics, Union Members in 2008 1 (Jan. 28, 2009), http://www.bls.gov/news.release/pdf/union2.pdf [hereinafter NLRB, Union Members in 2008].

39 The National Labor Relations Act excludes agricultural employment. *See* 29 U.S.C. § 152 (2006). Farm workers, however, bargain under state laws. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-1381–23-1395 (1995 & Supp. 2008); CAL. LAB. CODE §§ 1140–66 (West 2003 & Supp. 2009); FLA. STAT. ANN. §§ 450.251–450.38 (West 2002 & Supp. 2009).

40 Public employees are excluded from the NLRA. *See* 29 U.S.C. § 152(2) (2006). State and local governmental employees, however, often bargain under state laws. *See, e. .g.*, Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/1–315/27 (West 2005 & Supp. 2009); Public Employees Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 2006); Public Employee Rights and Benefits, OR. REV. STAT. ANN. §§ 243.650–243.974 (West 2007). Federal employees bargain under a different federal act, the Federal Labor Relations Act, 5 USC §§ 7101–06, 7115–35 (2006).

41 In sharp contrast, 40.7 percent of public sector employees are organized, primarily under state labor relations laws. *See* NLRB, Union Members in 2008, *supra* note 38, at tbl.3. Note that union *membership* in the public sector was 36.8 percent and 7.6 percent in the private sector. *See id.* at 1. Membership numbers are lower than representation numbers because not all the represented are union members.

42 *Cf.* Paul Trapani, *Old Presumptions Never Die: Rethinking the* Steelworkers Trilogy*'s Presumption of Arbitration in Deciding the Arbitrability of Side Letters*, 83 TULANE L. REV. 559, 560–61 (2008) (noting that 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."). Of course, unions provide benefits beyond collective bargaining representation. While private sector unions represent relatively few employees in collective bargaining relationships, they remain a potent lobbying force for worker-oriented legislation, such as the Family Medical Leave Act, 29 U.S.C. §§ 2601–54 (2006), and in appealing to their members for support in political campaigns for candidates friendly to the interests of employees generally. Further, unions reduce the information costs of employees learning about their rights under state and federal employment statutes. *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

industries like transportation and utilities, and telecommunications,[43] for over 90 percent of American private sector workers, unionization is at best an abstraction, irrelevant to their wages, hours, and working conditions. Significantly, those workers often look to statutory, tort, and contract law rights[44] under state law[45] for remedies against unfair treatment. The recent humbling of the United Autoworkers Union in being forced to accept two-tier wage structures, cuts in benefits, and the severance of more than half the workforce over the past ten years,[46] perpetuates the perception of many employees that unions are passé, and can lead to pricing U.S. labor out of global markets. Moreover, the private sector union decline began many years ago and shows few signs of abating.[47]

Multiple factors explain this decline: the globalization of product and labor markets, the change from a manufacturing to a service economy with white and pink collar job holders less receptive to unionization, the "top-down" and bureaucratic organization of entrenched union leadership structures, the persistent problems of corruption in a few unions, and the shift towards less adversarial workplace relationships, resulting from the flattening of managerial hierarchies and work organized by employee teams (especially in the human resources strategies followed by the "information technology" industries).[48]

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43 NLRB, Union Members in 2008, *supra* note 38, at 1 (noting that the industries with the highest rates of unionization are transportation and utilities (22.2%), and telecommunications (19.3%.)).

44 *E.g.,* Drummonds, *supra* note 23, at 479–83 and citations therein.

45 Most of the major federal employment statutes, such as the Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2006), Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2006), Title VII of the 1964 Civil Rights Act (codified as amended in scattered sections of 42 U.S.C.), and the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601–54 (2006), establish a *minimum* federal standard and do not preempt state regulation that is more protective of employee interests.

46 *See* Micheline Maynard, *Chrysler Says It Expects Contract Vote to be Close*, N.Y. TIMES, Oct. 20, 2007, at C2.

47 Union representation and membership has gradually declined from a high of 35.1 percent of private sector employment in the mid-1950s, at times plateauing for a few years, but always resuming the general downward trend. *See* NEIL SHELFIN & LEO TROY, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY 3–20 (1985). The Service Employees International Union (SEIU) is an exception to the trend of declining membership; this union has adopted a strategy of *avoiding* NLRB processes and has encountered success in its "Justice for Janitors" campaign and in the organizing of nursing home and home health care workers. *See* SEIU, Justice for Janitors, http://www.seiu.org/division/property-services/justice-for-janitors/ (last visited Oct. 10, 2009); Steven Greenhouse, A Leader at the Point of Union Growth and Criticism, N.Y. TIMES, Feb. 29, 2008, at A20 (discussing SEIU growth and tactics). For a general discussion and analysis of the "representation gap," see RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (2006).

48 *See* CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 34–55 (1993).

In any discussion of private sector union decline, public sector unionism must be compared.[49] While the private sector unions face near extinction,[50] the flourishing of public sector unions stands in dramatic contrast.[51] Unions represent 40.7 percent of public employees, five times the rate of representation in the private sector.[52] This rise occurred simultaneously with the decline in private sector unions.[53]

With the exception of federal employees, public employees organize under state laws.[54] School teachers, police, nurses, road crews, department of motor vehicles employees, social workers, court clerks, firefighters, corrections officers, and other employees of state and local government join and support unions in the proportion enjoyed at the high water-mark for private sector unionization in 1955.[55] These employees enjoy substantial protection against anti-union discrimination, interference, and coercion through civil service and the vindication of civil rights such as free speech and free association through 42 U.S.C. § 1983 claims, whereby governmental managers who violate associational rights can be sued individually for damages.[56] Further, jobs held by public employees often cannot be easily shifted to other areas of the country or abroad, though their work can sometimes be subcontracted out to the private sector.[57] Many of the public employees who rally to union representation are service workers or hold pink or white collar jobs, sug-

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49 *See* Stephen H. Kropp, Book Review, *Reflections of Law, Economics, and Policy in Public Sector Labor Relations in Canada, the United States, and the United Kingdom*, 27 LAW & POL'Y INT'L BUS. 825, 825–26 (1996) ("There is an ongoing debate in legal and social science scholarship regarding the reason for the precipitous decline in strength of private sector unions over the last twenty-five years, which has coincided with an increased vitality of public sectors unions in the United States.").

50 *See* Barry T. Hirsch & Jeffrey M. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, FLA. ST. U. L. REV. 1133, 1137–39 (2007).

51 *See* Kropp, *supra* note 49, at 827.

52 *See* NLRB, Union Members in 2008, *supra* note 38, at tbl.3; *supra* notes 38 and 41, and accompanying text.

53 *See* Kropp, *supra* note 49, at 827–31.

54 *See* Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees*, 37 N.M. L. REV. 357, 362 (2007).

55 *Compare* Paul Weiler, *Promises to Keep: Securing Worker's Rights to Self-organization Under the NLRA*, 96 HARV. L. REV. 1769, 1772 fig.1 (1983), *with* Union Members 2008, *supra* note 38, tbl.3.

56 *See* Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, UTAH BAR J., May 1999 at 29, 32 ("Since individual-capacity suits do not impose any liability on the state, the Eleventh Amendment is not implicated, though the named defendant holds public office, and though he acted under color of state law. Thus, there is no Eleventh Amendment bar to an individual-capacity suit in federal court under §1983.").

57 *See, e.g.*, Walter v. Scherzinger, 121 P.3d 644 (Or. 2005) (state labor board upheld contracting out of janitorial services under state collective bargaining law, but Oregon Supreme Court held school district lacked authority to contract out janitorial services because of wording of state civil service statute).

gesting that there is nothing about those types of employees that prevent their organization in the private sector as well.[58] Scholars and unionists have asserted that unfavorable provisions in the National Labor Relations Act (as amended by Taft-Hartley and interpreted in various Supreme Court decisions over the past sixty years) have contributed significantly to the decline in private sector unionism by "stacking the deck" against employee choice of representation by unions.[59]

What is the role of federal labor law, if any, in the long decline of the private sector unions? Many argue that legal failings in the National Labor Relations Act cannot fully explain the decline.[60] Management-side lawyers often argue that the law works to allow employees to exercise their free choice rights; since 1947, when the Taft-Hartley Act granted employees an equal right to refrain from organizing their workplaces in unions,[61] unions have often lost elections, or, more often, failed to gain enough support to obtain an election. The argument made in these situations is that there is little demand for unions, and the employees made a rational choice to forgo union representation. The convictions of union lawyers and many scholars stand in sharp contrast; they argue that the Act fails in its basic mission to safeguard employees from anti-union discrimination, to protect and foster a meaningful bargaining process, and to provide effective remedies for unfair labor practices—except those committed by unions.[62] Indeed, leading labor law academ-

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58 *See* 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, 581–82 (1992); *see also* Weiler, *supra* note 55, at 1773 n.6.

59 *See, e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace In Era of Self-Regulation,* 105 COLUM. L. REV. 319, 324 n.15 (2005) ("[T]his pessimism stems from the fact that the right to form a union is perhaps the most trampled upon and under-enforced of employees' legal rights."); Atleson, *supra* note 37; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); Richard Freeman, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUST. & LABOR REL. REV. 351 (1990); Weiler, *supra* note 55 at 1772–74.

60 *See, e.g.*, Michael L. Wachler, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 583 (2007) ("I argue that the cause of this unrelenting decline is a single, fundamental factor—the change in the United States economy from a corporatist-regulated economy to one based on free competition. Most labor commentators have explained the decline by a confluence of unrelated economic and legal forces.").

61 *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2006); NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 279–80 (1960) ("[T]he Taft-Hartley Act added another right of employees . . . namely, the right to refrain from joining a union . . . .").

62 A right of damages for union secondary boycotts, and certain other unfair labor practices by unions, but not employer unfair labor practices, was created in the Taft-Hartley Act. *See* 29 U.S.C. § 187 (2006). Additionally, Section 10(l) of the Taft-Hartley-amended NLRA requires NLRB investigators who have reasonable belief that a union is engaging in unfair labor practices to seek injunctive action against the union in federal district court. *See id.* § 160(l). Other unfair labor practices, including all those involving employer violations, fall under the discretionary powers of the NLRB provided by NLRA Section 10(j), which allows,

ics have openly despaired that the labor law itself is "dead" or "ossified."[63] This Article does not intend to answer the question raised by these two views in the labor union decline debate.

Instead this Article focuses on two more immediately relevant questions in the Employee Free Choice Act (EFCA) debate: (1) Is it desirable from a policy standpoint to rebalance the labor laws to encourage more representation of private sector employees by unions, and (2) will the EFCA have this effect? In this formulation, the question is less "did federal labor law contribute to the decline" and more "can and should federal labor law be utilized to reverse the decline in collective representation, and can state law play an important role as it does in so many other areas of the law of the workplace?"

III. THE EMPLOYEE FREE CHOICE ACT

The Employee Free Choice Act raises three fundamental issues of labor relations policy: (1) what process should exist for unions to legitimately demonstrate their majority support among employees; (2) what process should exist for resolving bargaining disputes other than such devices as strikes, permanent replacement of strikers, lockouts, and unilateral implementation of employer bargaining demands; and (3) should employers face stronger penalties for unfair labor practices, such as anti-union activity discrimination, as they now face for racial, gender, religious, national origin, disabilities, and, often under state law, sexual orientation discrimination?

A. *The Process of Demonstrating A Union Majority*

1. The Background of the EFCA

American labor law rests upon the assumption that the majority of employees in an appropriate bargaining unit freely chose to be represented.[64] Once that majority status has been demonstrated, the employer must bargain in good faith regarding compensation issues, hours, and

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but does not require, injunctive relief to be sought upon complaint of unfair labor practices. *See id.* § 160(j). Section 10(j) injunctions were sought by the NLRB against employers in only twenty cases out of 16,291 unfair labor practices complaints filed in 2007. *See* NLRB, SEVENTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2007, at 5, 93 (2007) [hereinafter NLRB ANNUAL REPORT].

63 *See, e.g.*, Estlund, *Ossification*, *supra* note 32; Estlund, *Death of Labor Law?*, *supra* note 37; Gottesman, *supra* note 37.

64 *See* Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 197 (1993) ("Section 7 [of the NLRA] gives employees the right to representatives 'of their own choosing'—not of someone else's choosing, whether that someone else is the employer or a group of co-workers. Such was a tenable reading of Section 7(a) of the NLRA, until the then National Labor Relations Board adopted the requirement of majority rule giving the 'their' of 'their own choosing' a collective rather than individual reference.").

other terms and conditions of employment such as job security and grievance and arbitration procedures.

During the middle third of the twentieth century, labor unions often demonstrated their majority support via "authorization cards" signed by the employees stating their wish for union representation. Absent good faith doubt in the validity of the card majority, an employer was then obligated to bargain with the union.[65] During the late 1960s and early 1970s, the National Labor Relations Board (NLRB) gradually shifted to the view that employers should have the right to insist, instead, on a secret ballot election; this view was enshrined in the national labor policy by a 5–4 majority of the Supreme Court in 1974.[66] In light of this development, contemporary unions have won about half the election campaigns culminating in an NLRB-conducted election.[67]

Yet, as research conducted by Professor Richard Freeman and others has consistently shown, employees have indicated in polls and public opinion surveys that they would prefer union representation at far higher percentages than they are actually represented.[68] What can explain the "representation gap"?[69] Two theories compete for the answer.

a. A Critique of the Present System

Unions claim that several factors make NLRB elections problematic as devices for ascertaining the unfettered choice of employees. First, elections automatically delay the collective bargaining process by months.[70] This delay not only affects the particular election, but also has

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65 *See, e.g.*, 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 had a 'good faith doubt' as to the union's majority status; instead of bargaining he could insist that the union seek an election in order to test out his doubts.") (citing Joy Silk Mills, Inc., 80 N.L.R.B. 1263 (1949)).

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

67 ARCHIBALD COX ET AL., LABOR LAW, CASES AND MATERIALS 108 (14th ed. 2006) [hereinafter COX] (summarizing data from NLRB reports showing that since 1990, union success rates have fluctuated in the range of 47 percent to 52 percent). In addition to recognition based on union authorization card majorities and NLRB-conducted elections, the third way a union can establish bargaining rights under current law is through the so-called "*Gissel*" remedy. A "*Gissel* order" allows the NLRB to award bargaining rights to a union upon a finding of egregiously unfair labor practices that have destroyed the possibility of an untainted election. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *Gissel* remedies are relatively rare; only three such cases came before the NLRB in 2007. *See* NLRB ANNUAL REPORT, *supra* note 62, at 89. Further, the courts of appeal have often been hostile to the enforcement of bargaining orders. *See, e.g.*, NLRB v. Goya Foods, 525 F.3d 1117 (11th Cir. 2008).

68 *See* FREEMAN & ROGERS, *supra* note 47, at 19–20 (analyzing Hart Research Surveys indicating that 53 percent of American workers said they favored union representation); Richard B. Freeman, *Do Workers Want Still Want More Unions?* More Than Ever, Economic Policy Institute (Feb. 22, 2007), http://www.sharedprosperity.org/bp182/bp182.pdf.

69 Estlund, *Ossification*, *supra* note 32, at 1528.

70 *See* Weiler, *supra* note 55, at 1777.

negative ex ante affects on potential organizing, because employees know they are particularly vulnerable during a hotly contested election campaign that can drag on for months. Second, elections allow the employer to wage a "campaign" against unionization with the employees.[71] Under the Taft-Hartley-amended NLRA, infringement of free speech cannot be an unfair labor practice, or even evidence of unfair labor practices absent a threat of reprisal or promise of a benefit.[72]

Third, a union election campaign is far from the equal contest of stylized political elections; the employer—not the union—has the "fist in the velvet glove"[73] of economic power over the employees. Union organizers have no right of access to the workplace absent special circumstances.[74] An employer can restrict employee "union talk" and solicitation to non-work times, while simultaneously requiring "captive audience" meetings with employees and supervisors to campaign against the union during work time, absent special circumstances.[75] In addition,

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71 *See id.* at 1777–78.

72 *See* 29 U.S.C. §158(c) (2006) ("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 or reprisal or force or promise of benefit."). In *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), the Supreme Court noted that the addition of this section "is indicative of how important Congress deemed such 'free debate' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case by case basis," and characterized the policy judgment as "factoring uninhibited, robust, and wide-open debate in labor disputes . . . ." *Id.* at 2413–14 (internal quotations omitted).

73 *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). On the one-sidedness of NLRB election processes generally, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Brudney, *supra* note 59.

74 *See* Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). Justice Thomas, writing for the majority, stated that for a non-employee union organizer to be granted access to the workplace, the union must show "'*that no other reasonable means of communicating its organization message to the employees exist* or that the employer's access rules discriminate against union solicitation,'" and further noted this was a "heavy burden." *Id.* at 535 (quoting Sears, Roebuck & Co. v. S.D. County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978)). In assessing whether the union had reasonable access off the premises to the shopping center's employees, the majority refused to follow the NLRB's finding that reasonable alternative access was not available, alluding to the union's success in learning the names and addresses of about twenty percent of the employees by copying down auto license numbers and obtaining the names and addresses from the DMV; the other employees, opined the majority, could be reached by signs as they drove onto the shopping center property, or through newspaper advertisements. *See id.* at 530, 540. Ironically, the Third Circuit recently held that a union could be liable for compensatory and punitive damages under a federal privacy statute for unauthorized use of DMV information. *See* Pichler v. UNITE, 542 F.3d 380 (3d Cir. 2008).

75 NLRB v. United Steelworkers, 357 U.S. 357 (1958); William B. Gould IV, *Independent Adjudication, Political Process and the State of Labor-Management Relations: the Role of the National Labor Relations Board*, 82 IND. L. J. 461, 484 (2007); Secunda, *supra* note 32, at 214–15. "A recent federal government report studied four hundred union elections and

an employer can deny use of company email for union-related communications, while generally allowing personal use of the email system.[76] In most cases, factual misrepresentations do not invalidate election results,[77] and threats of reprisal are distinguished from mere employer "predictions" about the adverse consequences of unionization using doctrinal tests far removed from the shop or office floor.[78] These rules often make it hard for unions to have direct access to employees to make the case for unionization. The NLRB election process is, thus, far from an "equal opportunity" contest.[79]

Fourth, discrimination against union supporters and leaders among the employee cohort, while illegal in theory,[80] is hard to prove in practice, and occurs far too often, according to empirical studies by Professor Paul Weiler and others.[81] Additionally, the remedy for illegal anti-union firings is weaker than for most other forms of discrimination. Whereas discrimination based on race, national origin, sex, religion, freedom of speech of public employees, and, in many states,[82] sexual orientation, gives rise to compensatory damages (including emotional distress)[83] and even punitive damages,[84] anti-union firings result, after a process that often lasts years, in mere reinstatement with back pay, minus the employee's earnings during the period of legal dispute.[85] For most reinstated employees, life has moved on in the years of litigation, and they decline reinstatement.[86] Furthermore, many who do accept reinstatement continue to suffer discrimination, and most wind up resigning within a year or two.[87] Employees as well as employers must consider these weak remedies. If there is little downside risk of ridding the workplace of agitating union supporters, then a rational calculation of costs and benefits may weigh in favor of illegal action.[88]

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found that 92% of these union campaigns involved employers forcing employees to attend captive audience meetings." Secunda, *supra* note 32 at 215.

76 *See, e.g.*, The Guard Publ'g Co., 351 N.L.R.B. 1110, 1116 (2007).

77 *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 129 (1982).

78 *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

79 *See* Becker, *supra* note 73, at 601; *see also* Brudney, *supra* note 59.

80 *See* 29 U.S.C. §§ 158(a)(1), (3) (2006).

81 *See* Weiler *supra* note 55.

82 *See, e.g.*, OR. REV. STAT. § 659A.030(1) (2007); *see also* Mark A. Rothstein, EMPLOYMENT LAW CASES AND MATERIALS 386 n.5 (6th ed. 2007) ("About half the states . . . have enacted laws prohibiting discrimination on the basis of sexual orientation.").

83 *See* Carey v. Piphus, 435 U.S. 247 (1978) (compensatory damages under 42 U.S.C. § 1983 includes emotional distress damages).

84 *See, e.g.*, OR. REV. STAT. § 659A.885(3)(a), (6)(a).

85 *See* Weiler, *supra* note 55, at 1787.

86 *See* Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 28–29 (1988).

87 *See* COX, *supra* note 67, at 266–267.

88 *Cf.* Weiler, *supra* note 55, at 1769–70.

In summary, the dynamics of NLRB elections and union organizing campaigns are far from the "free and fair" political elections that first come to the mind's eye in our society. The lack of equal access and other rules tilt the process in favor of employers trying to deter and prevent unionization.[89] Thus, top officials of the AFL-CIO have opined that unions would now be better off without federal labor law as it stands now,[90] a far cry from the union optimism that accompanied initial passage of the National Labor Relations Act in 1935.[91] Tellingly, management lawyers and private sector employers now see federal labor law as approaching perfection.[92]

b. The Response to the Critique

The U.S. Chamber of Commerce and many employer associations often ask, "Is the card majority process really superior to secret ballot elections in ascertaining the unfettered choice of employees for or against union representation?"[93] Are the consistent votes against unions in over half of all NLRB elections really the product of an unfair process and employer coercion, or do employees who have heard both sides of the argument simply prefer not to unionize? Perhaps employees sign union cards out of embarrassment or peer pressure. 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

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89 *See* Stanley A. Gacek, *Revisiting the Corporatist and Constructivist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 39 (1994).

90 *See* Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987) ("I say abolish the Act."); Bureau of National Affairs, *Kirkland Says Many Unions Avoiding NLRB*, DAILY LAB. REP., Aug. 1989, at A-11–12 (former AFL-CIO President "would prefer 'no law' to the current labor statutes . . . .").

91 *See* Terry Collingsworth, *Resurrecting the National Relations Act—Plant Closing and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 76–77 (1993).

92 *See, e.g.*, Estlund, *Ossification*, *supra* note 32, at 1543–44. For example, when President Clinton appointed the "Dunlop Commission" in 1993 to study and make recommendations about changes in labor law, the main proposal of management was to make changes in a relatively obscure provision outlawing company unions but having the effect of restricting "employee involvement" committees sponsored by employers. *See* COX, *supra* note 67, at 1100–01. The proposed changes were supported by some scholars but opposed by others. *Compare* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA,* 69 N.Y.U. L. REV. 125 (1994) (supporting changes), *with* Michael Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322 (1998). The point here is not to take sides in this particular dispute, but rather to make two different points: (1) management has grown comfortable with the NLRB system, and (2) here again is an area of law that might profit from state experimentation. For the current state of the law on "company unions," see generally *Electromation, Inc.* 309 N.L.R.B. 990 (1992), *aff'd,* 35 F.3d 1148 (7th Cir. 1994).

93 *See* Brudney, *supra* note 59, at 841–42.

global marketplace. In short, employers involved in the EFCA debate argue there is no problem to fix.

Who is right? This is not an easy question to answer. It is possible that more experimentation at the state level could help answer the question. If fairer union election procedures (such as equal access, no captive audience speeches, and protection against union discrimination on par with that of other forms of discrimination) found support in non-preempted state laws, a fact-based answer would be closer at hand.

2. An Alternative Solution: The Neutrality Agreement

Having lost faith in the fairness of the present election system, some unions have sought alternatives bypassing the NLRB election process altogether. A major initiative of several unions has been the "neutrality agreement," sometimes referred to as a "labor peace agreement."[94] In this scenario, which unions have used successfully in several organizing campaigns including the Justice for Janitors campaigns,[95] the union puts pressure on an employer to agree in advance to remain neutral in a subsequent organizing campaign, and, in some versions, to accept a later card majority process in lieu of the NLRB election process. There are several reasons an employer would agree to such a neutrality agreement: (1) the union might put economic pressure on the employer via publicity campaigns aimed at consumers or other businesses; (2) it might promise cooperation in the gaining of governmental subsidies; (3) it might make concessions in contract negotiations for already represented employees in the belief that the long term interest of all represented employees depends on continued organizing of the unrepresented; (4) it might engage in a "corporate campaign" to convince union pension funds, other shareholders, and directors that neutrality agreements should be encouraged for reasons of ideology or pragmatism; and (5) a union might prevail on local or state governments to require a neutrality agreement as a condition for a state or local contract.[96]

Two developments, however, endanger this new strategy from the unions' point of view. First, in one of the last decisions made while President George W. Bush's appointees constituted a majority on the National Labor Relations Board, a 3–2 majority held, in *Dana Corporation*, that an election can be forced if a decertification petition is supported by a minimum of 30 percent of the employees within forty-five days from a voluntary recognition of a union card majority.[97] This threatens to delay the fragile bargaining process at a critical time. As explained by the two

94 *See* Brudney, supra note 59, at 825–26.
95 *See* Justice for Janitors, *supra* note 47.
96 *See infra* Part V.
97 *See* Dana Corporation, 351 N.L.R.B. 434, 443 (2007).

dissenters, the ruling reversed prior Board precedent barring a challenge to a union's majority status for a "reasonable period" following an employer's voluntary recognition of a union as representative based on a union card majority.[98]

The second development arises from the Supreme Court's June 2008 decision in *Chamber of Commerce v. Brown*, which struck down California's law restricting the use of profits from state contracts by employers during union organizing campaigns.[99] The Court's majority opinion used language that suggests employees have an affirmative right to hear an employer's arguments against unionization.[100] The decision goes beyond the literal language of Section 8(c) of the NLRA and arguably makes otherwise lawful neutrality agreements illegal and unenforceable, since such agreements essentially waive this asserted employee statutory right.[101] Enter the Employee Free Choice Act.

3. The Solution Proposed in the Employee Free Choice Act

The Employee Free Choice Act (EFCA) would allow a union to demonstrate its majority status via union authorization cards, and would give employers no option to insist on an NLRB election campaign.[102] Instead, the NLRB would be required to certify the union as representative of the employees upon a showing that a majority had signed cards authorizing that representation.[103] It should be noted that several state laws for public and private employees already allow the "card majority" process, a further indicator of the value of experimentation and flexibility of labor relations policy in the states.[104]

4. Beyond the Employee Free Choice Act

But what if employer contentions that card majorities unreliably gauge employee support, and that employees often simply change their minds when they learn more about the pros and cons of union representation, prove correct? Will the card majority process central to the Employee Free Choice Act trap employees who change their minds as they

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98 *Id.* at 445–47.

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

100 *See id.* at 2413–14.

101 The argument is sketched in more detail by a lawyer in a prominent management-side firm. *See* Douglas A. Darch & Shaw Seyforth, *The End of Neutrality Agreements?*, LAW360, Aug. 4 2008, http://www.law360.com/articles/64797.

102 *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2 (1st Sess. 2009).

103 *Id.*

104 *See, e.g.*, CAL. GOV'T CODE 71636.3 (West 2009) (public); MASS. ANN. LAWS ch. 150A §§ 2(12), 5 (LexisNexis 2008) (private); MINN. STAT. ANN. § 179.16 (West 2006) (private); N.H. REV. STAT. ANN. § 273-A:1 (XII) (LexisNexis Supp. 2008); OR. REV. STAT. § 243.682(2)(a) (2007) (public); County of Du Page v. Ill. Lab. Bd., 900 N.E.2d 1095, 1103 (D. Ill. 2008)) (public);

learn more about the collective bargaining process? This is a fair question.

One solution springs from the public sector laws that already have card majority processes. That is, to allow a "window period" for employees, not the employer, to request an election.[105] This might still present opportunities for delay and employer encouragement of election petitions by employees, but such actions could be handled by unfair labor practice proceedings and other safeguards. Where at least 50 percent[106] of the employees wish to determine the representation question via a secret ballot, the union's card majority is called into doubt. Further, as a practical matter, if 50 percent or more of the employees want to vote, the union will not be in a strong enough bargaining position with the employer until it convinces a strong majority to support the union. While employee election petitions might invite employer mischief, such as threatening or encouraging employees to seek an election, such behavior could be overcome if employers were held accountable for bribing or threatening employees. Furthermore, the union, presumptively enjoying majority support via its card majority, should have equal access to the employees during the window for an employee election request. Rather than the forty-five days provided in *Dana Corporation*,[107] a shorter period of, say, fourteen days, should suffice to allow represented employees to decide if they want an election.

Another, more fundamental, approach would be to take a step back and consider the majority status question in far broader sweep. One of the oddities of labor law is that inordinate attention is placed on the union's majority status at one moment of time (e.g., the day of an election, the day a card majority arises, or the day an employer withdraws union recognition), and then the majority status question is ignored altogether for long periods. A union's ascendency as lawful majority representative triggers an irrebuttable presumption of continued majority status for a period of time, and then a rebuttable presumption of majority

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105 *See, e.g.*, OR. REV. STAT. ANN. § 243.682 (2)(3) (2007) (mandating that 30 percent of employees may force an election). In 2007, a similar procedure was required by the NLRB in a hotly debated 3-2 split decision involving voluntary recognition of the union's majority after the employer signed a "neutrality" agreement with the union agreeing not to oppose unionization. *See* Dana Corporation, 351 N.L.R.B. 434, 443 (2007). Under *Dana Corporation*, 30 percent of the employees may force an election during the forty-five days after an employer's voluntary recognition, notwithstanding the union's card majority. *See* Henry Drummonds, *The Union Authorization Card Majority Debate*, 58 LAB. L. J. 217, 221–22 (2007).

106 In *Dana Corporation,* the NLRB's General Counsel, as an amicus curiae, advocated for the window period adopted by the Board majority, but would have required the employee election petition be supported by 50 percent of the employees on the theory that only that would seriously call into question the union's earlier card majority. *See* 351 N.L.R.B. at 436. The NLRB majority, however, rejected this suggestion and allowed an election upon a petition supported by only 30 percent of the employees.

107 *See id.* at 441.

status that does not expire.[108] This indifference to a union's actual continued majority support finds its most extreme expression in cases that hold a union contract blocks a majority status challenge even where the employees overwhelmingly express opposition to union representation the day after the union has telegraphed its acceptance of an employer offer after an unsuccessful strike,[109] or where the Board refuses to assume that replacement workers for striking unionized employees oppose the striking union in higher proportion than the strikers.[110]

Of course, important policy considerations underlie the presumption of continued majority status, such as the need to not undercut the representative work of the union by allowing continual challenges to its majority status, and the need for stability in collective bargaining relationships even from an employer perspective. The point is that the focus, in the EFCA debate, on whether the union actually represents a majority on the date it asserts a card majority, or on whether majority status can better be ascertained on the date of an NLRB election, is not the only question about majority status that must be addressed.

Consider two examples of how a less-cabined discussion might unfold. One could imagine, for example, a system in which employees were periodically asked, as in political elections, to renew or withdraw their support for union representation. Of course, a more equal and balanced election process would be required. Although this suggestion might well be labeled naïve and unrealistic by many of this writer's union friends, it would hold labor law true to its pretensions that majority support of employees provides the foundational legitimacy to the union's representative claims. Further, it might help unions achieve more bargaining power by having a periodically renewed and affirmative mandate for representation. Or, even more fundamentally, labor law could allow non-exclusive or "minority" representation of employees who choose to join a union while allowing the non-union majority of that same employer to go unrepresented; that is, accept the suggestions of several

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108 When a union wins an election, a "certification bar" prevents any challenge to a union's majority status, even by the represented employees, for a period of one year; where an employer recognizes a union voluntarily based on a card majority, an irrebuttable presumption of continued majority status continues for a "reasonable time." *See* Brooks v. NLRB, 348 U.S. 96, 98–99 (1954). Moreover, the "contract bar" prevents challenges to a union's majority status, absent unusual circumstances, at any time during a collective bargaining agreement for up to 3 years, except during a thirty-day "window" period. *See* Gen. Extrusion Co., 121 N.L.R.B. 1165, 1167 (1958) (enumerating certain exceptions to doctrine); Deluxe Metal Furniture, 121 NLRB 995, 999–1006 (1958); *see also* COX, *supra* note 67, at 219–21.

109 *See, e.g.*, Auciello Iron Works Inc. v. NLRB, 517 U.S. 781, 783–86 (1996).

110 *See, e.g.*, NLRB v. Curtin Matheson Sci. Inc., 494 U.S. 775, 788–94 (1990) (holding that NLRB's refusal to adopt presumption that strike replacements oppose union was rational and consistent with the NLRA); Station KKHI, 284 N.L.R.B. 1339, 1344 (1987) (refusing to adopt a presumption that strike replacement oppose a striking union).

scholars that unions might reestablish credibility with a broader cross-section of workers by first representing their members, and only their members, in non-exclusive bargaining arrangements.[111]

As with the question of card-check or election majorities that frame much of the EFCA debate, proposals for members-only representation, or periodic union representation elections, generate no easy answer. Yet the possibilities for experimentation and innovation beckon in a field that, in the words of Professor Cynthia Estlund, suffers from extreme "ossification."[112] In short, if the goal is to revitalize the union representation movement in the private sector, there are many ideas that are not part of the current EFCA debate that could be explored, but the chances of a national consensus seem remote.

B. *The Process for Resolving Bargaining Disputes*

1. The Change Proposed in the Employee Free Choice Act

The Employee Free Choice Act proposes interest arbitration[113] as a mechanism for resolving bargaining disputes over the terms of first contracts.[114] This would constitute a major change in the philosophy of collective bargaining enshrined in federal labor law.

As the Supreme Court has 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 for their differences."[115]

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111 *See* 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, 180 (2006) (book review); Christine Neylon 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, 600 (2008); Clyde Summers, *Unions Without a Majority-A Black Hole?*, 66 CHI-KENT L. REV. 531, 541–45 (1990). Several unions also have also supported the idea of non-majority representation. *See* Steven Greenhouse, *Seven Unions Ask Labor Board To Order Employers to Bargain,* N.Y. TIMES, Aug. 15 2007, at A14.

112 Estlund, *Ossification*, *supra* note 32, at 1530.

113 Interest arbitration differs from grievance arbitration. *See* DONALD H. WOLLET ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 321–22 (4th ed. 1993) (referring to grievance arbitration as "conventional arbitration" and to interest arbitration as "final-offer" arbitration). In grievance arbitration, which is common under collective bargaining contracts, an arbitrator chosen jointly by the union and employer resolves disputes over the meaning or application of an existing collective bargaining contract. *Id.* By 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. *Id.*

114 *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (1st Sess. 2009).

115 NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488 (1960) (citing Local 24 Int'l Bhd. of Teamsters Union v. Oliver, 358 U.S. 283, 295 (1959)).

The EFCA's interest arbitration provision would both change this private ordering premise and leave it intact. It would change private ordering by requiring a neutral third party resolve bargaining disputes in "first contract" situations—the resulting contract would be the product of the third party's choice instead of that 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.

2. The Current Balance of Power in Bargaining Disputes

To evaluate the debate about first contract interest arbitration, one must again consider the current law. Once a union has established majority status, the employer and union must bargain in good faith. Failure to do so constitutes an unfair labor practice.[116] The obligation to bargain in good faith, however, does not carry an obligation to agree or make concessions.[117] The remedy for "bad faith" bargaining is generally a cease and desist order from the NLRB, enforceable by further petition to a federal court of appeals.[118] Since this process often takes years to play out, the remedy for bad faith, or "surface" bargaining, entails the proverbial "slap on the wrist."[119] While collective bargaining in established relationships often results in agreements in which the parties have fashioned their own terms regarding compensation, hours, and working conditions, the success rate for bargaining in first contract negotiations involving newly established union representation is lower.[120] In either established or first contract situations, however, the parties can reach an "impasse," a breakdown in negotiations, removing any realistic chance that further discussion will close the gap between the parties' positions.

At impasse, both the union and employer may, under current law, resort to certain self-help remedies in the nature of economic warfare.[121] For employees represented by unions, the primary options at a bargaining impasse are: (1) working without a contract, (2) striking for a better

116 *See* 29 U.S.C. §§ 158(a)(5), (b)(3) (2006).

117 *See id.* § 158(d).

118 *See id.* § 160(a), (f).

119 *See* H.K. Porter v. NLRB, 397 U.S. 99, 102–06 (1970); *see also* NLRB v. General Electric, 418 F.2d 736, 738–49 (2d Cir. 1969) (noting that the decision came "[a]lmost ten years after the events that gave rise to [the] controversy").

120 *See* Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354 (1984) ("Only slightly more than 60% of newly certified units achieve a collective agreement . . . .").

121 Indeed, though relatively rare, the parties may resort to economic pressure during bargaining. *See, e.g.*, Am. Shipbldg. Co. v. NLRB, 380 U.S. 300, 301–02 (1965); NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 479 (1960).

contract offer, but risking replacement, or (3) engaging in unconventional tactics such as a slowdown, sit-down, or intermittent strike, but risking being firing, as unconventional strikes stand unprotected under federal labor law.[122] For employers, the primary options at impasse are: (1) locking out the employees to pressure them and the union to come to terms,[123] (2) temporarily or permanently replacing striking employees and continuing operations,[124] or (3) unilaterally implementing its final contract offer if the employees remain at work.[125]

The balance of economic power generally favors employers. Most students of labor law can readily understand the temptation for employers to purposefully pursue an impasse strategy in negotiations, especially in the fragile situation of a new bargaining relationship, since the remedies for bad faith bargaining are minimal. Further, even without abuse of the process, the parties may simply fail to reach agreement. In general, employers fare better in economic warfare than employees represented by unions. Large corporations can consider redirecting capital investment to other domestic and international locales where collective bargaining is not established, or spend more on robotics, information systems, and other technologies that decrease their need for labor. With the economic power of private sector unions declining, federal labor law fails to provide either a significant legal or practical self-help remedy when employers abuse the bargaining process, or a balanced set of self-help remedies for resolving bargaining disputes when they do not.

3. Beyond the Employee Free Choice Act

Many have suggested that the permanent replacement of strikers, which has been lawful since the 1938 *Mackay* case,[126] tips the balance

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122 *See, e.g.*, Int'l Union v. Wis. Employment Relations Bd., 336 U.S. 245, 252–60 (1949); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253–57 (1939). Another unconventional tactic is for the employees to continue to work and perform their duties, but no more than that; this is sometimes called "work to the rule." *See, e.g.*, Local 702 IBEW v. NLRB, 215 F.3d 11, 16–18 (D.C. Cir. 2000) (holding that an employer's lockout was not illegal, and that the union's "inside game" strategy did not involve protected activity).

123 *See, e.g.*, Local 15 IBEW v. NLRB, 429 F.3d 651, 659–61 (7th Cir. 2005) (reversing NLRB ruling holding employer's use of partial lockout did not violate NLRA); Bunting Bearings Co., 343 N.L.R.B. 479 (2004) (holding post-impasse lockout not unlawful).

124 *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938); *see also* COX, *supra* note 67, at 585–88.

125 *See, e.g.*, Duffy Tool & Stamping L.L.C. v. NLRB, 233 F.3d 995, 999 (7th Cir. 2000); Visiting Nurse Servs. of W. Mass., Inc., v. NLRB, 177 F.3d 52, 57–58 (1st Cir. 1999).

126 *See Mackay Radio*, 304 U.S. at 345–46. 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," 29 U.S.C. § 157 (2006), this seminal case, decided just three years after the original enactment of the NLRA, rather casually assumed a right of permanent replacement in dictum, holding that an employer could not pick and choose who to bring back to work on the basis of their support for a strike. *See* James Pope, *How American Workers Lost the Right to Strike, and Other Tales,* 103 MICH. L. REV. 518, 527–34 (2004).

too far in favor of employers.[127] Strikes pressure both employers and employees to find a path to settlement.[128] An employer can try to continue operating with replacement workers, but to do so may involve training and productivity costs. The striking employees must do without a paycheck, and, in most states, are not eligible for unemployment insurance benefits.[129] Thus, both sides suffer during a strike, and both sides can win or lose the strike. An employer may be forced to agree to terms it wanted to avoid, after calculating that continued strike losses outweigh the benefits of continued resistance to the employees' and union's proposal. Similarly, the employees and the union may, and often do, lose a strike. It is entirely consistent with NLRA policy for the employees and union to throw in the towel and abandon the strike if the costs, particularly loss of income, outweigh the perceived benefits of continued striking.

Permanent strike replacement changes this calculus of costs and benefits. 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.[130] While Section 7 of the NLRA protects strikes over collective bargaining disputes, making it illegal for employers to retaliate or discriminate against employees for striking, employers may permanently replace striking employees. Even if employees are willing to end the strike, the employer is not obligated to allow them return to work if permanent replacements have been hired, or if strikers who crossed the picket line before cessation of the strike have taken the place of the strik-

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127 The literature on this point is vast. *See, e.g.*, J. GETMAN, THE BETRAYAL OF LOCAL 14 224–28 (1998); WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 198–205 (1993); Charles Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 406–07 (1992); William B. Gould, *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, 297 (2008); Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L J. 103 (2001); Joseph P. Norelli, *Permanent Replacement: Time for a New Look,* 24 LABOR LAWYER 97, 99–106 (2008); Weiler, *Striking a New Balance*, *supra* note 120*,* at 387–94.

128 Strikes have ex ante effects as well. 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, *supra* note 67, at 506.

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

130 *See* Stephen F. Bedfort*, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 440–41 (2002); Joseph A. Martin, *The Anniversary Everybody Forgets*, HIST. NEWS SERV., August 11, 2001, at 2.

ers who honored the strike picket line to the bitter end.[131] Many a union lawyer, explaining these distinctions to employees contemplating whether to strike, have faced the incredulous responses of employees who quite naturally ask, "You mean the labor law protects me in striking, but I can still lose my job?"[132]

One possibility for restoring a balance of power to the bargaining impasse situation would be to eliminate permanent replacement. In 1991, the Democrat-controlled House of Representatives passed the Workplace Fairness Act,[133] which would have banned the permanent replacement of strikers in most situations, but the bill died in the Senate under threat of a filibuster.[134] President Clinton then, by Executive Order, provided that employers that were parties to governmental procurement contracts could lose their government contracts if they utilized permanent replacements in their labor relations, but this Order was struck down by the Court of Appeals.[135]

Whether providing for first contract interest arbitration or eliminating permanent replacement of strikers constitutes the best way to try to rebalance the remedies for resolving bargaining disputes is fairly debatable. Again, allowing some variance and experimentation at the state level appears essential.

Further, assuming that interest arbitration for first contracts is the method chosen, what particular interest arbitration procedure would work best? One option would be for the parties to present all their positions to the arbitrator, and allow the arbitrator discretion to write the contract. A second option 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, or "final offer by item arbitration." Still a third option 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, also known as "final offer package arbitration." Obviously, the pressures and bargaining strategies of the parties will vary depending on the type of interest arbitration chosen.

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131 *See* Trans World Airlines v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 433–37 (1989).

132 The answer to that question is technically "no." Permanently replaced employees are entitled to go onto a preferential rehiring list for vacancies which occur within one year of their unconditional offer to return to work. *See* Laidlaw Corp., 171 N.L.R.B. 1366, 1369–70 (1968). They also remain eligible to vote as employees in the event of an election to end union representation. *See* Bio-Science Lab. v. NLRB, 542 F.2d 505, 508 (9th Cir. 1976). This is little solace to the employees contemplating risking their jobs by striking.

133 H.R. 5, 102d Cong., 1st Sess. (1991).

134 *See* Cox, *supra* note 67, at 587–88.

135 *See* Chamber of Commerce v. Reich, 74 F.3d 1322, 1337–39 (D.C. Cir. 1996) (holding that the Executive Order was contrary to the NLRA as interpreted in *Mackay*); *see also supra* note 67 and accompanying text.

The EFCA is silent on these questions. Again, the EFCA is not the end, but the beginning of the discussion.

C. *Remedies for Unfair Labor Practices*

1. The Employee Free Choice Act

The Employee Free Choice Act would modify the remedies for unfair labor practices in three respects. First, the EFCA strengthens provisions for expedited injunctive relief for illegal employer discrimination or restraint, interference, or coercion during union organizing campaigns or during first contract negotiations by expanding Section 10(l) of the NLRA to include those unfair labor practices.[136] Section 10(l) requires priority investigation of certain unfair labor practice charges and 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 . . . ."[137] Without the EFCA amendments, Section 10(l) only covers unfair labor practices committed by unions, such as unlawful secondary boycotts and recognitional picketing.[138] Thus, the EFCA merely opens to employees an avenue of temporary relief that has been available to employers since the passage of the Taft-Hartley Act in 1947. 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.[139] One problem that could arise is scarce financial resources for a greatly increased number of cases in which the Regional Director would seek injunctive relief in federal court. Here, again, increased authority for state officers to seek these injunctions would be entirely consistent with the policies of the Act.

A second remedy change in the EFCA provides for triple back pay awards for willful illegal anti-union discrimination, interference, or coercion during an organizing campaign or first contract negotiations.[140] While this provision strengthens remedies for some unfair labor practices by employers, it does not cover anti-union actions in other situations, and falls far short of the compensatory and punitive damages available for almost all other forms of discrimination. NLRB case law requires that back pay be reduced by interim earnings and that a discharged employee

136 *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § (4)(a) (1st Sess. 2009).

137 29 U.S.C. § 160(l) (2006).

138 *See id*. §§ 158(b)(4), (7).

139 29 U.S.C. § 160(j) has long authorized requests for injunctive relief for unfair labor practices not covered by Section 10(l) of the NLRA. 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. *See id.* § 160(j).

140 *See* Employee Free Choice Act of 2009, § 4(b)(1).

make reasonable efforts to mitigate back pay losses by seeking other work.[141] Thus, 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, the Employee Free Choice Act only begins a discussion.

Finally, the 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.[142] Such a penalty, even if levied to the maximum, is unlikely to provide significant deterrence, and would not compensate for emotional distress or include the punitive damages available in other types of discrimination cases. Indeed, in many cases, a $20,000 fine, assuming the maximum fine was levied, would be less than an employer's attorney's fees for defending the unfair labor practice charge. As will be seen below, state tort and other state remedies could easily be allowed to supplement EFCA remedies, just as these state remedies may supplement Title VII remedies for other forms of discrimination.[143]

IV. THE STATES HAVE ALWAYS BEEN BASTIONS OF INNOVATION UNDER THE BASELINE RULE IN THE AMERICAN LAW OF THE WORKPLACE

Like a little country cottage gradually overtaken by a sprawling metropolis, federal labor law, first enacted in 1935, now exists in the larger world of employment law regulation. This includes, for example, state wage and hour laws, laws prohibiting various forms of discrimination, workplace leave laws, occupational health and safety laws, and state torts such as wrongful discharge in violation of public policy. Indeed, as many writers have pointed out, the "individual rights revolution" has replaced the older, New Deal-era, collective bargaining system for most

141 *See, e.g.*, NLRB v. Midw. Personnel Servs., 508 F.3d 418 (7th Cir. 2007); *see also* COX, *supra* note 67, at 264–66.

142 *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 4(b)(2) (1st Sess. 2009).

143 *See* 42 U.S.C. § 2000e-7 (2006); Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1300 (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, 551–53 (N.H. 1974) (allowing for recovery for breach of contract where plaintiff was discharged for resisting sexual harassment).

American employees.[144] Shared federal, state, and local governmental responsibility constitutes the pattern in many other contexts as well.[145]

The broad federal labor law preemption doctrines originating in an earlier time no longer fit into this larger context. This raises an important question: Why is a uniform and exclusively federal labor management relations law necessary for private sector employers and employees when most other areas of workplace regulation incorporate state and local regulation within federal minimum standards?

Further, as history teaches, the states have time and again utilized their shared authority under the federalism model of employment regulation to pioneer new and needed protections, and this history is instructive in considering the EFCA debate.[146]

A. *Minimum Wage, Overtime Pay, and Child Labor Regulation*

State minimum wage laws preceded federal legislation by a quarter century.[147] Since the adoption of the Federal Fair Labor Standards Act (FLSA) in 1938,[148] state minimum wage laws, laws regulating maximum hours of work and overtime pay, and child labor regulation have coexisted with their federal counterparts. Indeed, in the FLSA, Congress provided expressly, as this Article argues should be the case with federal labor law, for non-preemption of more protective state enactments.[149]

While minimum wage laws continue to generate debate,[150] the point here is not that the states always make the "correct" policy decision, but rather that they make the policy decisions.

While the federal minimum wage rests at $7.25,[151] the state minimum wage is $8.00 in California,[152] $7.75 in Illinois,[153] $8.55 in Wash-

144 *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE 7–15 (1990); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10–12 (1988) (describing the move from collective bargaining toward prescribing minimum rights and terms of employment by public laws).

145 *See* Drummonds, *supra* note 23, at 479–88.

146 For a more exhausting coverage of this history, see *id.* at 489–509.

147 *See* David Neumark & William Waschler, *Minimum Wage Wages and Low-Wage Workers: How Well Does Reality Match the Rhetoric?*, 92 MINN. L. REV. 1296, 1298 (2008) (noting that fifteen states plus the District of Columbia and Puerto Rico had adopted minimum wage legislation by 1923—fifteen years before the Federal Fair Labor Standards Act was enacted).

148 Federal Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

149 *See* 29 U.S.C. § 218.

150 *See, e.g.*, Neumark & Waschler, *supra* note 147.

151 *See* 29 U.S.C. § 206 (a)(1)(C).

152 *See* CAL. LAB. CODE, § 1182.12 (West Supp. 2009).

153 *See* 820 ILL. COMP. STAT. ANN. 105/4 (West 2008).

ington,[154] and $8.40 in Oregon.[155] Millions of workers benefit directly from this shared federal and state authority, and several million more benefit indirectly because of the "spillover" effect minimum wage laws exert on "near minimum" compensation.[156] This illustrates an important point about federalism in workplace law: some states can adopt standards that fit local conditions long before a federal consensus evolves, while others accept the federal minimum standard. Further advantages to this federalism model include experimentation at the state level and more direct involvement of citizens in crafting the state laws governing their workplace relationships.[157] This same pattern holds with hours of work regulation. While, with many exceptions, the FLSA requires premium overtime pay for work over forty hours per week,[158] state laws can provide for overtime pay after an eight-hour work day,[159] or cap work hours altogether in certain occupations.[160]

It is important to take these differences into account because compliance with varying state and local minimum wage and maximum hour laws and child labor regulations, and the "push" effects this has on other employees, involve major costs for employers. Human resources personnel and the lawyers responsible for legal compliance in these areas deal daily with differential standards in the states, whether the affected business entity is local, national, or global in scope.

B. *Occupational Health and Safety—Preventing and Compensating Workplace Injury and Workplace-Related Disease*

The Federal Occupational Safety and Health Act (OSHA)[161] provides another model for shared federal and state authority over the workplace. "Workplace injuries and occupational disease involve tremendous costs for employees and employers alike. For that reason, the equitable

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154 *See* WASH. REV. CODE ANN. § 49.46.020(4)(b) (West 2008) (authorizing annual upward adjustment for inflation); *see also* Department of Labor, *Minimum Wage Laws in the States*, Oct. 1, 2009, http://www.dol.gov/whd/minwage/america.htm.

155 *See* OR. REV. STAT. ANN. § 653.025(2)(a), (b) (2007) (authorizing annual upward adjustment for inflation); Department of Labor, *supra* note 154.

156 *See Fact Sheet For 2009 Minimum Wage Increase in* MINIMUM WAGE ISSUE GUIDE, July 20, 2009, www.epi.org/publications/entry/mwig_fact_sheet.

157 *See* Drummonds, *supra* note 23, at 513–25. Of course, minimum wages carry redistribution effects and may decrease the number of jobs available to low-end workers. *See* Neumark & Waschler, *supra* note 147 at 1304.

158 *See* 29 U.S.C. § 207(a)(1) (2006).

159 *See, e.g.*, CAL. LAB. CODE. § 511 (West 2008); United States Department of Labor, *supra* note 154.

160 *See, e.g.*, OR. REV. STAT. ANN. § 652.010 (2007) (maximum 10 hour day in certain occupations).

161 29 U.S.C. § 651–78.

allocation of these costs, and their reduction by preventive . . . measures " continue to be major issues in the law of the workplace.[162]

1. Compensation for Injury

Compensation for workplace injury remains a state law issue under the "workers' compensation" statutes for most employers and employees. These "no fault" statutes were pioneered in the states during the Progressive Era,[163] and continue to be the primary remedy for workplace injury today. In fact, these state statutes provided the model for the subsequent enactment of federal no-fault compensation statutes in areas of unique federal concern, such as federal employees,[164] and longshore and harbor workers.[165] Under exceptions to the "exclusive remedy" provisions of these statutes, state tort law also sometimes provides compensatory remedies against employers and third parties.[166] State tort law remedies also provided the model for other categories of unique federal concern, such as the federal remedies for railroad workers[167] and sailors.[168] Some states innovated with these workers' compensation systems, expanding them to include occupational diseases, most famously asbestos-related diseases.[169] Congress expressly preserved these state compensation claims in OSHA.[170]

2. Workplace Injury and Disease Prevention

Beyond these obvious examples, the prevention of (as distinct from compensation for) workplace injury and disease provides a different model of shared state and federal authority. The federal Occupational Safety and Health Act (OSHA) regulates workplace safety primarily through thousands of detailed federal "standards."[171] The Occupational

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162 Drummonds, *supra* note 23, at 493.

163 *See generally* Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L. Q. 206 (1952).

164 *See* 5 U.S.C. § 8116(c) (2006).

165 *See* Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–50 (2006).

166 *See, e.g.*, Teal v. E.I. DuPont De Nemours & Co., 728 F.2d 799 (6th Cir. 1984) (contractor's employee's personal injury suit for manufacturers' negligence and OSHA violations allowed); Borel v. Fibreboard, 493 F.2d 1076 (5th Cir. 1973) (worker allowed to bring third party claim against manufacturer of asbestos used at worksites).

167 *See* Federal Employers Liability Act (FELA), 29 U.S.C. §§ 51–60 (2006) (railroad workers may sue their employers for negligence).

168 *See* Jones Act, 46 U.S.C. § 688 (2006) (extending rights to sue employer for personal injury to seamen).

169 *See, e.g.*, Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation and Information*, 72 GEO. L.J. 1231, 1246 (1984) ("Asbestos insulation workers [in one study] filed workers' compensation claims for only thirty-three percent of their asbestos-related disabilities . . . .").

170 *See* Occupational Safety and Health Act § 4(b)(4), 29 U.S.C. § 653(b)(4) (2006).

171 *See* 29 U.S.C. § 655.

Safety and Health Administration and the Department of Labor enforce these standards through a system of citations, abatement orders, and fines and penalties.[172]

Yet Congress created a unique and innovative system of shared federal and state authority in the prevention area. Under OSHA, federal law preempts more stringent state law only to the extent the practice or condition in question is covered by a specific standard; there is no concept of "field" preemption under OSHA.[173] Even this decree of preemption was controversial, with the Supreme Court splitting 5–4 on this interpretation of the law.[174]

The most unique part of the congressional preemption scheme under OSHA, however, lies in Section 18(b).[175] These provisions provide for a kind of "reverse preemption" of federal standards and enforcement schemes by more protective state occupational health and safety plans approved by the U.S. Secretary of Labor. About one-half of the states operate under Section 18(b) workplace plans.[176]

C. *Status Discrimination*

Banning status discrimination immediately comes to mind in any discussion of the need for uniform federal standards. Yet here again, state law plays a unique role in crucial respects. Again, Congress has spoken on the issues of federalism and preemption.

First, despite persistent perceptions to the contrary, state law led federal governmental action in the employment discrimination area, and continues to do so. Long before the passage of Title VII of the Civil Rights Act in 1964,[177] many states had banned racial discrimination in employment.[178] In fact, Congress carefully preserved these state systems by requiring that Title VII plaintiffs exhaust state administrative remedies as a condition of bringing a case in the federal district courts, and allowing more time for filing a charge in states with such agencies.[179] Similarly, "[a]bout half the states and the District of Columbia, and numerous cities have enacted laws prohibiting discrimination in private em-

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172 *See id.*. §§ 657–659.

173 *See id.*. § 667(a); Gade v. Nat'l Solid Wastes Mgmt Ass'n, 505 U.S. 88, 96 (1992).

174 *See Gade*, 505 U.S. at 95 (Souter, Blackmun, Stevens, & Thomas, JJ., dissenting).

175 *See* Occupational Safety and Health Act § 18(b); 29 U.S.C. § 667(b) (2006).

176 *See* OSHA, *Factsheet: State Job Safety and Health Programs,* DEPARTMENT OF LABOR, Apr. 2004, http://www.osha.gov/OshDoc/data_General_Facts/factsheet-statejob.pdf.

177 *See* 42 U.S.C. § 2000e-2 (2006).

178 *See generally* Michael A. Bamberger & Nathan Lewin, Note, *The Right To Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961) (describing state enforcement of antidiscrimination statutes by the establishment of commissions authorized to combat discrimination by various measures).

179 *See* Title VII, §§ 706 (c)–(e), 42 U.S.C. §§ 2000e-5(c)–(e) (2006).

ployment on the basis of sexual orientation."[180] A bill pending in Congress may extend Title VII to sexual orientation,[181] but its passage would follow many state and local enactments. Additionally, while the Supreme Court did not interpret Title VII to reach sexual harassment until 1986,[182] many forms of sexual harassment were already actionable under state tort theories such as assault, battery, intentional infliction of emotional distress, and wrongful discharge.[183] As these examples demonstrate, a national consensus on any new employment or labor law policy is far more likely after it has first been accepted in a critical number of states.

Second, state remedies supplement and often exceed federal remedies in the discrimination area. Before the 1991 Civil Rights Act created compensatory and punitive damages remedies for intentional Title VII violations,[184] state anti-discrimination statutes and tort remedies provided such remedies for discrimination.[185] Even after the 1991 Act, state discrimination law remedies, unlike Title VII, often allow uncapped or higher caps for damages,[186] as do state tort theories.[187] Labor law stands in sharp contrast, as the preemption doctrine prevents the states from supplementing federal remedies for anti-union discrimination.

D. *Family and Other Leave Issues*

The same pattern is observed in other areas of workplace regulation, such as family, parental, and medical leave laws. Today, state statutes often cover a broader range of employers and provide for leave in cir-

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180 Rothstein, *supra* note 82, at 386 n.5.

181 *See* Employment Non-Discrimination Act of 2009 (ENDA), H.R. 2981, 111th Cong. (1st Sess. 2009).

182 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

183 Drummonds, *supra* note 27, at 496–97.

184 *See* 42 U.S.C. § 1981(a).

185 *See, e.g.*, Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1299 (Or. 1984) (wrongful discharge); Phillips v. Smalley Maint. Servs. Inc., 435 So.2d 705 (Ala. 1983) (right to privacy); Monge v. Beebe Rubber Co., 316 A.2d 549, 552 (N.H. 1974) (breach of implied covenant of good faith and fair dealing).

186 *Compare* 775 ILL. COMP. STAT. ANN. § 5/8B-104(B) (West 2009), N.Y. EXEC. LAW § 297(4)(c)(iii) (McKinney 2006), *and* OR. REV. STAT. § 659A.885 (2007), *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). *But see* CAL. GOV'T CODE §12970(a)(3) (West 2005) (damages capped at $150,000); TEX. LAB. CODE ANN. § 21.2585(d) (Vernon 2007) (capping damages at $50,000 to $300,000 depending on size of employer as measured by the number of employees).

187 *See, e.g.*, Stockett v. Tolin, 791 F. Supp. 1536, 1556 (S.D. Fla. 1992); Tate v. Browning Ferris Inc., 833 P.2d 1218, 1230 (Okla. 1992).

cumstances not permitted under federal law.[188] Further, paid leave laws are now being pioneered in the states.[189]

E. *Summary of Shared Federal and State Law in the Law of the Workplace*

The point is not that every initiative at the state or local level is wise or needed, but that state level initiatives and experimentation have been the norm in the American law of the workplace. This allows federal action to be informed both by what works and what does not. It allows citizens in the states to seek to fulfill their aspirations without being bound by a national common denominator. It allows experimentation, flexibility, and a greater voice in the formulation of such policies.

V. THE MAZE OF JUDICIALLY CREATED LABOR LAW PREEMPTION DOCTRINE[190]

As set forth in the Introduction to this Article, in theory, preemption rests upon congressional intent. Often, however, as with the federal labor law preemption doctrine, judges, not senators and congressmen, create the doctrines that displace state authority.[191]

As Supreme Court cases often explain, three general types of federal preemption exist: (1) express preemption by Congress, (2) pervasive federal governmental regulation, which occupies an entire "field," and (3) implied "conflict" preemption.[192] There are two types of conflict

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188 For example, the Family Medical Leave Act covers only employers with at least fifty employees, while in Oregon, the state statute covers employers with as few as twenty-five employees. *See* Family Medical Leave Act, 29 U.S.C. §§ 2601–54 (2006); OR. REV. STAT. §§ 659A.150–186 (2007); *see also* California Family Rights Act, CAL. GOV'T CODE § 12945.2 (West 2005) (providing paid leave in some situations).

189 *See, e.g.*, CAL. UN. INS. CODE § 3301 (West Supp. 2009); NJ STAT. ANN. § 43:21-27 (West Supp. 2009); WASH. REV. CODE. ANN. § 49.78.220 (West 2008).

190 Three distinct preemption doctrines created by the Supreme Court rest upon the Labor Management Relations Act, which subsumed the National Labor Relations Act. These are the "*Garmon*" doctrine, the "*Machinists*" doctrine, and the "Section 301" preemption doctrine. *See* Drummonds, *supra* note 23, at 564 (citing statutes and cases). This Article addresses only the first two of these presumptions. The author has elsewhere made suggestions for changes in Section 301's unnecessarily broad displacement of state law, because the displacement has had the ironic effect of placing limits on the individual state law rights of union members in situations where non-union members would enjoy those same individual rights. *See id.* at 574–82.

191 *See supra* notes 27–31 and accompanying text.

192 *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 79–80 (1990). This framework, however, sheds little light on the cases. *See* Drummonds, *supra* note 23, at 529 & nn.343–44 (noting that "field" preemption can be either express or implied (citing *English*, 496 U.S. at 79–80 ("[F]ield preemption may be understood as a species of conflict pre-emption."))); *see also e.g.*, Gade v. Nat'l Solid Waste Mgmt Ass'n, 505 U.S. 88, 98, 109, 114 (1992) (four justice plurality applied implied conflict preemption analysis, with Justice Kennedy treating the case as involving express preemption, and the four dissenters characterizing the plurality

preemption: (1) conflicts arising from the impossibility of complying with state and federal law simultaneously (which is generally not controversial), and (2) conflicts from state law that "stands as an obstacle" to the full attainment of congressional objectives, as divined by the courts.[193] Labor law preemption doctrine fits into this latter category.[194]

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.[195] As will be seen, much federal labor law preemption doctrine ignores this general principle of the broader law of preemption.

Instead, this labor law preemption doctrine sprang from the New Dealers' faith in a federal administrative agency's ability to enunciate and promulgate a uniform and consistent national labor relations policy.[196] Originating a half-century ago, the federal labor law preemption doctrine preceded the larger framework of shared federal and state responsibility in employment law that has grown up around it (as shown in Part IV above). Then-Justice Rehnquist's reminder, noted at the outset of this Article, colorfully emphasized that this mighty doctrinal oak grew from the acorns of a few early decisions, without congressional guidance.[197] As the authors of a leading casebook point out, "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

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approach as involving both "purpose-conflict" doctrine and "federal occupation of a field . . . .").

193 *See Gade*, 505 U.S. at 983 (1992); Fla. Lime and Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963). The second type of conflicts preemption, "obstacle preemption," gives the courts almost unbridled discretion. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1211–18 (2009) (Thomas, J., concurring); Livadas v. Bradshaw, 512 U.S. 107, 120 (1994).

194 "The national Labor Management Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner v. Teamsters Local, 776, 346 U.S. 485, 488 (1953); *see also* 520 S. Mich. Ave. Assoc. Ltd. v. Shannon, 549 F.3d 1119, 1125 (7th Cir. 2008) ("[T]he issue facing us is one of implied preemption."). The NLRA, however, contains two provisions that explicitly preserve state authority. National Labor Relations Act § 14(c), 29 U.S.C. § 164(c) (2006), allows the states to assert jurisdiction when it is declined by the NLRA. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b), allows the states to "reverse preempt" the NLRA's express authorization for the union shop. Twenty-one states, mostly in the South and Midwest, presently carry "right to work" laws on their books and these states have relatively low rates of unionization. *See generally* Cox, *supra* note 67, at 1193–97. The latter provision in particularly concedes a foundational issue of labor policy to the states.

195 Drummonds, *supra* note 23, at 530–31 (quoting Cippllone v. Leggett Group Inc., 505 U.S. 504, 516 (1992)); *see also Fla. Lime*, 373 U.S. at 146–52; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236–37 (1947); Estlund, *Ossification*, *supra* note 32, at 1599–1600.

196 *See infra* notes 212, 229–232 and accompanying text.

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

perhaps no other issue has been left in quite as much confusion."[198] Thus, attention must be paid to the major cases that have developed the federal labor law preemption doctrine.

A. *"Garmon" Preemption of State Law Concerning Conduct That Is Either "Arguably Protected" or "Arguably Prohibited" by the NLRA.*

1. The *Garmon* Decision and Its Underlying Rationales

The beginning of the federal labor law preemption doctrine involved a modest dispute in California in 1953. Two California unions demanded a union shop agreement from a lumberyard.[199] The employer responded that its employees did not desire unionization and that neither union was the lawfully designated representative of the employees, and the unions commenced picketing.[200] A California trial court enjoined the picketing and awarded the lumberyard $1,000 in damages after concluding that the union's purpose was to force a union shop agreement despite the lack of representation rights in either of the unions; the injunction was to last until one of the unions became the majority representative of the employees.[201] The California Supreme Court sustained the judgment on the ground that the NLRB had declined jurisdiction over the dispute.[202] In "*Garmon I*,"[203] the United States Supreme Court reversed and remanded, holding that "the refusal of the National Labor Relations Board to assert jurisdiction did not leave the states power over activities they would otherwise be preempted from regulating."[204] On remand, the California Supreme Court sustained a $1,000 damages award against the unions, and again the U.S. Supreme Court reversed.[205] While the result was unanimous, four Justices, led by Justice Harlan, concurred on markedly different grounds than those articulated by Justice Frankfurter for

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198 COX, *supra* note 67, at 1004. This is the view of many scholars. Justice Brennan, a champion of broad preemption, once forthrightly acknowledged, "Pre-emption cases in the labor law area are 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, 436 U.S. 491, 523 (1983) (Brennan, J. dissenting); *see also* Gregory, *supra* note 29, at 508 (Labor law preemption doctrine is "one of the most intricate structures in legal theory."); Drummonds, *supra* note 23, at 560–61, and sources cited therein.

199 *See* San Diego Bldg. Trades v. Garmon, 359 U.S. 236, 237 (1959) [hereinafter *Garmon II*].

200 *See id.* The unions claimed the picketing was solely to educate the employees and persuade them to become members of the union. *Id.* at 237.

201 *See id.* at 237–38.

202 *Id.* at 238.

203 *See* San Diego Bldg Trades Council v. Garmon, 353 U.S. 26 (1957) [hereinafter *Garmon I*].

204 *Garmon II*, 359 U.S. at 237 (explaining holding in *Garmon I*).

205 *See Garmon II*, 359 U.S. 236, 239–49 (1959).

the majority.[206] It is not the result of Justice Frankfurter's decision but its reasoning, that affects federal labor law preemption a half-century later.

Justice Frankfurter's 1959 opinion for the majority in "*Garmon II*" became the seminal case for the broad labor law preemption doctrine that shackles the states in the labor relation policy arena today—the *Garmon* doctrine. After pointing out that the "Court was called upon to apply a new and complicated legislative scheme [the amended NLRA], the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process,"[207] Justice Frankfurter stated that "'the 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 the process of litigating elucidation.'"[208] Thus, right from the start, the *Garmon* doctrine resulted not from any policy decision by Congress, but from a split 5–4 decision of the Supreme Court.[209] On this shaky foundation rests the federal preemption doctrine referred to in 1982 by then-Justice Rehnquist as an inappropriately judicially created "mighty oak" of a doctrine,[210] grown even larger by another quarter century of cases, and still growing, as illustrated by the 2008 *Chamber of Commerce*[211] decision.

When Justice Frankfurter wrote the *Garmon* majority's decision in 1959, his focus was on state interference with NLRA rights, then only a quarter-century old, and his long-seated distrust of judicial labor relations policy making.[212] The unions' picketing of the lumberyard, depending on its purposes, may have been protected by Section 7 of the NLRA, which guaranteed the right to engage in "concerted activity . . . for mutual aid or protection."[213] Section 7 protects picketing for the purpose of peacefully persuading employees that they should join the union.[214] On

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206 *See id.* at 249–54 (Harlan, J., concurring).

207 *Id.* at 240.

208 *Id.* at 241 (quoting International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958)).

209 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.* at 249 (Harlan, J., concurring).

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

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

212 *See Garmon II*, 359 U.S. 236, 239–49 (1959); FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 200–03, 206 (1930).

213 National Labor Relations Act § 7, 29 U.S.C. § 157 (2006). Since the adoption of the NLRA in 1935, Section 7 has provided employees a federally guaranteed right to organize, bargain collectively, and to engage in concerted activity for mutual aid and protection. *See id.*

214 *See id.*

the other hand, the unions' picketing might have been, as the state court found, a violation of the NLRA if the purpose was to coerce the employees or put economic pressure on the lumberyard to sign a union shop contract when a majority of the employees did not want union representation.[215] Yet Justice Frankfurter and other New Dealers distrusted the state courts, and placed great faith in the NLRB, the federal agency entrusted by Congress with the general administration of the Act.[216] This was true even where the federal agency had declined to hear the dispute, and where the state court had already made findings of fact and determined that the unions' picketing had the proscribed purpose, and thereby violated the employees' Section 7 rights to refrain from union representation, and hence, violated Section 8 of the Act.

Holding that Congress impliedly preempted the California courts, the *Garmon* majority announced the test that remains the law 50 years later: "When an activity is arguably subject to [Section] 7 or [Section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[217] The *Garmon* "arguably protected, arguably prohibited" test rests upon two policy concerns.[218] 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."[219] Second, "*Garmon* preemption further seeks to protect the NLRB's primary jurisdiction in cases involving Sections 7 or 8 of the NLRA."[220] Generations of labor lawyers, professors, and students have worshipped at this doctrinal shrine.[221]

As shown below, a maze of exceptions and alternative analytical constructs have sprung up in the many Supreme Court cases since *Gar-*

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215 *See* Garmon v. San Diego Bldg. Trades Council, 320 P.2d 473 (Cal. 1958). Since the 1947 Taft-Hartley Act, Section 7 has also provided employees with federally guaranteed right to refrain from organizing, collective bargaining, and engaging in concerted activities. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2006). Moreover, Taft-Hartley also makes illegal any attempt to interfere with or coerce employees in the exercise of their Section 7 right to refrain an unfair labor practice under National Labor Relations Act § 8(b), 29 U.S.C. § 159(b).

216 *See* Drummonds, *supra* note 23, at 562 nn.517–19 and sources cited therein.

217 *Garmon II*, 359 U.S. 236, 245 (1959).

218 *See* COX, *supra* note 67, at 1004–05.

219 520 S. Mich. Ave. Assoc., Ltd. v. Shannon, 549 F.3d 1119, 1125 (7th Cir. 2008) (citation omitted).

220 *Id.* (citations omitted).

221 The leading labor law casebook, Archibald Cox's *Labor Law Cases and Materials*, *supra* note 69 at 1001–86, devotes an entire chapter of 85 pages to these doctrines. A second leading casebook expends 32 pages discussing labor law preemption. *See* THEODORE ST. ANTOINE ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS § 8 (11th ed. 2005).

mon. But before turning to the intervening case law complexity, we shall more closely examine the underpinnings of *Garmon* itself.

a. The "Conflict in Substantive Rights" Rationale of *Garmon*

Garmon's first rationale, to prevent a substantive conflict between federal and state law, remains a valid purpose for any preemption analysis. Suppose the picketing of the lumberyard in *Garmon* was in fact protected picketing under Section 7. Obviously, under the Supremacy Clause, California state courts cannot award damages for conduct that Congress protects. This premise follows from a straightforward conflicts analysis. Why didn't the Frankfurter majority simply decide that question? Indeed, this provided the basis for Justice Harlan's concurring opinion, joined by three other Justices.[222] The answer, of course, is the majority's second rationale—the primary agency jurisdiction rationale—which will be returned to in the following part.

Suppose, on the other hand, 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. How could a state remedy for violation of the NLRA interfere with federal rights? Here again, why didn't the Court simply decide whether the unions' picketing conduct promoted the forbidden purpose?

Two rationales explain *Garmon*'s formulation of the "arguably prohibited" prong. First, the only substantive difference between state and federal law in the "prohibited" situation would relate not to the conduct, but to the remedy for illegal conduct. The *Garmon* majority was concerned about state court damages awards for union conduct which, even if illegal under the NLRA, could not be the subject of damages awards under the scheme devised by Congress for the remedy of unfair labor practices under the Act.[223] Thus, to the majority, the California court's award of damages was inconsistent with the NLRA remedy, which would have been merely a cease and desist order and similar equitable relief.[224] In this view, Congress created a carefully balanced remedial scheme and intended to prevent states from supplementing these federal remedies for NLRA prohibited conduct.

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222 *Garmon II*, 359 U.S. at 249 (Harlan, J., concurring).

223 *See Garmon II*, 359 U.S. 236, 238, 244 (1959).

224 *Cf.* National Labor Relations Act § 10, 29 U.S.C. § 160 (2006). Presently, the only conduct for which damages can be awarded under the NLRA 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; Labor Management Relations Act § 303, 29 U.S.C. § 187.

It remains doubtful, to say the least, that the 1935 or 1947 Congress intended any such displacement of state law. While clearly 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 several reasons. First, in this area of implied conflicts preemption, a presumption against preemption applies, and the *Garmon* majority says nothing about this presumption. Second, the four concurring Justices in *Garmon* refused to find that state remedies were preempted by the existence of a federal remedy for federally prohibited conduct; the judges of that time were almost evenly divided on this proposition, though it is now commonly accepted with little discussion.[225] Third, as Justice Harlan explained, for the twelve years between the 1947 Taft-Hartley Act and *Garmon II*, the Court followed a more traditional and far narrower preemption analysis; several cases seemed to uphold state remedies for NLRA-prohibited conduct that differed from the federal remedies and there was no intervening congressional action.[226]

As will be seen below, the unnecessarily broad doctrine created by Justice Frankfurter, not Congress, today prevents the states from extending the compensatory—including emotional distress—and punitive damages remedies that now exist for other forms of discrimination to anti-union, discriminatory activity. Moreover, federal preemption is triggered even when the conduct only "arguably" stands prohibited by the federal law. That reach of the doctrine, however, rests not on the substantive conflict, but rather upon the primary agency jurisdiction rationale.

b. The Primary Agency Jurisdiction Rationale of the *Garmon* Majority

Though Justice Frankfurter's *Garmon* decision preempted a state court's jurisdiction, primary agency jurisdiction applies to federal courts as well.[227] A generation before the *Garmon* decision, the Norris-LaGuardia Act of 1932 largely banned federal judges from issuing labor injunctions.[228] The primary intellectual foundation for this anti-labor injunction enactment was a book[229] by then-Professor Frankfurter that chronicled the use of judicial injunctions in labor disputes, often to the detriment of workers and unions.[230] A few years later, the New Dealers

225 *Garmon II*, 359 U.S. at 249 (Harlan, J., concurring).

226 *See id.* at 250–54, and cases cited therein.

227 *See id.* at 245.

228 *See* Norris LaGuardia Anti-Injunction Act, Ch. 90, 47 Stat. 70 (1932), codified as amended at 29 U.S.C. §§ 101–15 (2006).

229 FRANKFURTER & GREENE, *supra* note 212.

230 *See* COX, *supra* note 67, at 49–54.

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.[231] 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.[232]

Fifty years later, the hopes of the New Dealers lie in ruins. The courts, including the Supreme Court, often ignore the "expertise" based judgments of the NLRB.[233] The NLRB has become politicized and its decisions swing to and fro with the changing political administrations.[234] Indeed, because of political gridlock concerning appointments, the five member Board sometimes lacks three members to constitute a majority to hear cases, as occurred for the entirety of 2008 and, as of this writing, most of 2009.[235] The substantive law fashioned by the Board so disfa-

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231 *See* THE READER'S COMPANION TO AMERICAN HISTORY 784 (Eric Foner & John A. Garraty, eds., 1991) (listing administrative agencies created by New Deal legislation 1933–1936, and discussing the National Labor Relations Act).

232 *Cf. Garmon II*, 359 U.S. 236, 242 (1959) ("Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . .").

233 *See, e.g.*, NLRB v. Ky. River Cmty. Care Inc., 532 U.S. 706 (2001) (reversing NLRB on question of supervisory exclusion); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (NLRB order granting union organizers access to shopping center reversed); First Nat'l. Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (reversing NLRB decision that company had duty to bargain before implementing partial closure decision); 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); HK 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); Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (NLRB holding that employer lockout was unfair labor practice reversed); 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 reversed); 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); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (NLRB's order re-instating sit-down strikers protesting employer's unfair labor practices reversed).

234 *See Bush Labor Board Decisions: Pendulum Shift or Permanent Changes?*, 56 LAB. L. J. 212 (2005) (Interview with 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, 40 (1985); David P. Twomey, *Policymaking Under the Bush II National Labor Relations Board: Where Do We Go From Here?*, 59 LAB. L. J 141 (2008).

235 Throughout 2008 and at least most of 2009, the Board had only two members. The Board was only able to function at all 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 the remaining two members decided only the cases upon which they could agree. This double delegation has been challenged in eight courts of appeal. The cases decided did not involve substantial legal issues, and the two remaining members could not "agree on 20 to 25 percent of the new cases, and on a 'significant number' of major cases pending [from] when the Board still had five members."

vors union representation that major unions openly pursue a policy of avoiding Board processes altogether.[236] Only a small percentage of the unfair labor practice charges filed with the Board result in hearings in which the interested parties have resort to the subpoena power and cross-examination of witnesses under oath.[237] Many academics have concluded that Board processes and remedies fail to protect employees in the right to organize and engage in activities supportive of unions.[238] Board processes, when charges do lead to hearings, take years to conclude and result in remedies that do little to vindicate those whose rights have been violated. Absent a Supreme Court decision, the Board itself refuses to consider itself bound to follow legal interpretations of the courts of appeal in any case other than the case under review. The circuits have split in their interpretations of federal labor law. In short, the "uniform labor law" is often a chimera of changing Board decisions, conflicting courts of appeal decisions, and inconsistent Supreme Court willingness to defer to Board expertise under administrative review doctrines.

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 federal agencies are not relied upon exclusively to protect the environment or ensure reasonably safe access to prescription drugs with proper research and disclosure of risks,[239] so too must labor relations break out of the exclusive federal agency regulation model.

Nonetheless, Justice Frankfurter's primary agency jurisdiction rationale should be examined 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 to Congress an intent to displace state law in these situations. Second, the doctrine, as applied, does not merely defer to the NLRB in the sense of exhaustion of remedies. Rather, under *Garmon*, the NLRB has exclusive jurisdiction.[240] Yet, literal exhaustion would

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Victoria L. Bor, *National Labor Relations Board Members Reflect on Their Legacy*, 37 LAB. & EMPLOY. L. 4 (2008). On November 2, 2009, the Supreme Court granted certiorari to review the legality of these two-member rulings in unfair labor practice and representation cases. *See* New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009) *cert. granted* 130 S. Ct. 488 (2009).

236 *See* Estlund, *Ossification*, *supra* note 32.

237 *See generally* COX, supra note 67, at 98–101. "In the 2004 fiscal year . . . of the 29,954 unfair labor practice charges that were 'closed,' 29% were withdrawn before the complaint issued, 30.8% were dismissed before a complaint, and 35.8% were settled or adjusted—only 2.3% proceeded contested cases to be closed by a final Board order." *Id.* at 99.

238 *See supra* notes 37 and 59 and sources cited therein.

239 *See* Wyeth v. Levine, 129 S. Ct. 1187 (2009).

240 *See* William C. Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1039 n.8 (1973).

suffice to access the presumed expertise of the Board, which is the justification for this branch of *Garmon*'s underpinnings.

Finally, *Garmon*'s assumption that judges cannot be entrusted to faithfully follow federal labor law as announced by the NLRB and the Supreme Court finds no support in other aspects of modern labor law. For example, state and federal courts share concurrent jurisdiction over Section 301 suits to enforce collective bargaining agreements;[241] in those cases, state courts are charged with applying the federal law of collective labor contracts.[242] Furthermore, state courts entertain cases involving unions' breaches of the federal labor law duty of fair representation.[243] Paradoxically, considering *Garmon*'s distrust of courts as exemplified in the primary agency jurisdiction rationale, state courts faced with preemption claims must also apply federal labor law preemption doctrine,[244] "one of the most intricate structures in legal theory."[245]

2. *Garmon*'s Tangled Web of Exceptions and Departures

In the fifty years since *Garmon*, numerous "exceptions, limitations, refinements, and qualifications"[246] have appeared. Two vague exceptions appeared in *Garmon* itself. First, state tort and criminal law remedies for violence, mass picketing, or property destruction withstand *Garmon* preemption for matters "deeply rooted in local feeling and responsibility."[247] The second is for matters of "merely peripheral concern" to the federal labor law.[248] 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."[249] Thus, in Supreme Court *Garmon* jurisprudence alone, state tort claims for malicious defamation in labor disputes, fraud and misrepresentation, trespass, and

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241 *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506–09 (1962). Further, even where conduct constitutes 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 Section 301. *See* Smith v. Evening News Ass'n, 371 U.S. 195, 197–98 (1962).

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

243 *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 173, 188 (1967).

244 *See, e.g.*, Willard v. Khotol Services Corp., 171 P.3d 108, 120 (Alaska 2007); Barbieri v. United Tech. Corp., 771 A.2d 915, 923 (Conn. 2001); Foreman v. As Mid-Am. Inc., 586 N.W. 2d 290, 297–98 (Neb. 1998); Ohio State Bldg & Constr. Trades Council v. Cuyahoga County Bd. of Comm'rs, 781 N.E.2d 951, 954–55 (Ohio 2002); J.A. Croson Co. v. JA Guy, Inc., 691 NE.2d 655, 660 (Ohio 1998); Lontz v. Tharp, 647 S.E.2d 718, 721–22 (W.Va. 2007).

245 Gregory, *supra* note 29, at 514 (citation omitted).

246 Drummonds, *supra* note 23, at 565.

247 Cox, *supra* note 67, at 1005; *see Garmon II*, 359 U.S. 236, 244 (1959); *see also* Auto. Workers v. Russell, 356 U.S. 634 (1958); United Constr. v. Laburnum Constr., 347 U.S. 656 (1954).

248 *Garmon II*, 359 U.S. at 243.

249 Cox, *supra* note 67, at 1005.

the intentional infliction of emotional distress all escape the embrace of *Garmon* preemption.[250] For example, in a 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."[251] Other cases suggested that a "balancing test" superseded the *Garmon* analysis.[252] 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 concern exceptions, threatens to swallow the doctrine, and has compromised the practicality of its application."[253] 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 earlier concerns about state court actions hostile to unions.[254] Again, state courts wrestling with preemption questions must apply this complex body of federal law.

3. *Garmon*'s Effects on State Attempts to Update the Moribund Law of Labor Relations[255]

Today, *Garmon*'s legacy stifles state-level labor relations initiatives, in sharp contrast to the pattern of shared federal and state policy making in most other areas of employment law. A look at a few selected cases makes this clear.[256]

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250 *See* Drummonds, *supra* note 23, at 565–66 and cases cited therein.

251 *See* Sears, Roebuck & Co. v. S.D. County Dist. Council of Carpenters, 436 U.S. 180, 198 n.28, 200 (1978). Thus, even though the union picketing at issue in *Sears* was recognitional picketing and arguably prohibited under NLRA Section 8(b)(7), since the state trespass action focused on the location rather than the purpose of the picketing, it was not preempted. Under the original *Garmon* formulation, of course, it is the "arguably protected" or "prohibited" status of the conduct that controls analysis.

252 *See, e.g.*, Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 213 n.9 (1985) ("So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests."); Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 295 (1977) ("The doctrine of pre-emption in labor law has been shaped primarily by two competing interests.").

253 Gregory, *supra* note 29, at 527.

254 *See, e.g.*, Linn v. Plant Guard Workers of Am., 383 U.S. 53 (1966) (knowing or reckless defamation claims against union and officers not preempted). *Compare* Old Dominion Branch No. 496 Nat'l Ass'n. of Letter Carriers v. Austin, 418 U.S. 264 (1974) (non-malicious libel claim against union preempted), *with* Brown v. Hotel and Rest. and Bartenders Int'l Union, 468 U.S. 491 (1984) (state regulation of eligibility for union office in casino bargaining unit not preempted), *Sears*, 436 U.S. 180 (state trespass action against union not preempted), *and Farmer*, 430 U.S. 290 (intentional infliction of emotional distress claim against union and union officials not preempted).

255 *Cf.* Estlund, *The Death of Labor Law?*, *supra* note 37.

256 *See generally id.*

a. *Gould*

In the 1986 *Gould* case, a Wisconsin law debarring three-time unfair labor practice losers under the NLRA from state contracts suffered federal preemption because the Supreme Court held that *Garmon* "prevents States . . . from providing their own regulatory or judicial remedies" for conduct arguably protected or prohibited by the NLRA.[257] Wisconsin could not forbid private parties from doing business with repeat labor law violators, and, according to the Supreme Court, could not even impose such a rule on itself under its spending power.[258] While recognizing that "private purchasers" could lawfully boycott "labor law violators,"[259] the Court withheld that same control over contractual arrangements from state government. Wisconsin, the Court held, did not enjoy that privilege under *Garmon* because Wisconsin's goal was "to deter labor law violations and to reward fidelity to the law."[260]

This reasoning seems entirely inadequate. It would not cover, for example, a state that debarred employers committing multiple unfair labor practices for reasons not of deterrence, but as an expression of the moral indignation of its citizenry or as a sign of solidarity with the victims of illegal employer action, or even as a sign of solidarity with law-abiding employers seeking a level playing field for competition. In any event, it seems doubtful that the Congresses that enacted the NLRA in 1935 and the Taft-Hartley Act in 1947 even remotely understood these enactments to prevent states from deterring labor law violations by the use of their own powers to control the terms of state contracts. Certainly, there was no "clear and manifest" expression of such a congressional will.

As noted above, most forms of discrimination now trigger compensatory and punitive damages, as well as damages for emotional distress under various federal and state statutes or common law theories. But state statutes or common law theories, such as wrongful discharge in violation of public policy, continue to fall under the strangling embrace of *Garmon* when they are applied to restraint, coercion, or anti-union activity discrimination.[261] Yet states remain free to effectively alter NLRA remedies for these same federal violations, to the detriment of

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257 *See* Wis. Dep't of Indus., Lab., & Human Relations v. Gould, 475 U.S. 282, 286 (1986).

258 *See id.* at 287–89. At the time, at least four other states had similar laws: Connecticut, Maryland, Michigan, and Ohio. *See id*. at 288 n.6.

259 *Id.* at 290.

260 *Id*. at 287 (internal quotation omitted).

261 *See, e.g.*, Luke v. Collotype Labels USA, Inc., 72 Cal. Rptr.3d 440 (Cal. Ct. App. 2008); Rodriquez v. Yellow Cab Coop., Inc., 253 Cal. Rptr. 779 (Cal. Ct. App. 1998); Lontz v. Tharp, 647 SE.2d 718 (W.Va. 2007).

employees, by providing for the recoupment of unemployment benefits from back pay awards.[262]

b. *Helmsley-Spear v. Fishman*

Helmsley-Spear v. Fishman, a recent case involving a union's drumming—"a banging racket"—and handbilling outside the Empire State Building shows how fluid the revised and evolved *Garmon* doctrine can be.[263] The NLRB held that the union "was engaged in protected handbilling or leafleting" and that "the use of the drum . . . was not sufficient to transform the leafleting activity into unlawful conduct."[264] But the New York Court of Appeals, applying a balancing test,[265] nonetheless allowed a state law nuisance action, reversing the Appellate Division, which had dismissed the action under *Garmon*.[266]

B. *The* Machinists *Doctrine and Its Extension in the 2008* Chamber of Commerce *Case*

1. The *Machinists* Case

A different strand of federal labor law preemption doctrine grew from a 1971–72 dispute in Wisconsin over an employer's attempt to extend the hours of work.[267] For seventeen years before the dispute erupted, the employees worked a seven and a half-hour day and a thirty seven and a half-hour workweek under the parties' collective labor contract.[268] In contract negotiations for a successor contract, the employer proposed work hours be extended to an eight-hour day and a forty-hour week, and announced it would unilaterally implement the changes.[269] Union members voted to decline to work longer than their traditional hours during continuing negotiations.[270] The employer charged the union with unfair labor practices, but the NLRB Regional Director declined to issue a formal complaint on the ground that concerted economic pressure during bargaining is neither unlawful nor protected under the

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262 *See, e.g.*, Moreno Roofing Co. v. Nagle, 99 F.3d 340 (9th Cir. 1996) (California law requiring plaintiff employer to repay state unemployment benefits when worker receives back pay not preempted by the NLRA). While under the NLRA, mitigation requires back pay awards be reduced by the worker's interim earnings, unemployment benefits are not deducted.

263 *See* Helmsley-Spear v. Fishman, 900 N.E.2d 934 (N.Y. 2008).

264 *Id.* at 935 (internal quotation omitted).

265 *See id*. at 938. Judge Read dissented, distinguishing *Sears, Roebuck & Co. v. S. D. County Dist. Council of Carpenters*, 436 U.S. 180, as a case in which the NLRB had not ruled on the conduct. *See id.* at 939–43 (Read, J., dissenting).

266 *See* 833 N.Y.S.2d 491 (N.Y. App. Div. 2007).

267 *See* Lodge 76, Int'l Ass'n of Machinists v. WERC, 427 U.S. 132, 134 (1976) [hereinafter *Machinists*].

268 *See id.*

269 *See id*.

270 *See id.*

NLRA.[271] The employer filed a charge with the Wisconsin Employment Relations Commission, challenging the overtime refusal under Wisconsin law.[272] The Commission found that the overtime refusal was neither arguably protected nor arguably prohibited under the NLRA, and hence was not preempted under *Garmon*, thus violating state law. The Commission ultimately ordered the union and the employees to cease and desist from the concerted overtime refusal.[273]

The U.S. Supreme Court reversed in a 6–3 decision.[274] Justice Brennan's opinion for the majority, while acknowledging earlier cases eschewing preemption in similar cases, and agreeing that the union members' conduct was neither arguably protected nor arguably prohibited by federal law, nonetheless held that the state law fell to the preemption axe because Congress intended such disputes to be resolved by "the free play of economic forces."[275] Justice Brennan held that "the 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."[276]

Justice Stevens, joined by Justice Stewart and then-Justice Rehnquist, dissented on the ground that the union's "partial strike activity" was neither arguably protected nor arguably prohibited under the NLRA;[277] that a 1949 Supreme Court case[278] upholding state regulation of partial strike activity was never overturned by Congress;[279] and that they were not persuaded "that partial strike activity is so essential to the bargaining process that the States should not be free to regulate it."[280]

What lessons for today can be gleaned from the 1976 *Machinists* case? Once again, this was an implied conflict preemption case that ignored the presumption against preemption. Any conflict between the Wisconsin statute and the NLRA could be found only by departing from the text of the NLRA to find federal "rights" embedded *sub silentio* beyond the activities expressly protected by Section 7. This ventures far from a clear and manifest congressional intent to displace the constitu-

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271 *See id.* at 135.

272 *See id*.

273 *See Machinists*, 427 U.S. 132, 135–36 (1976).

274 *See id*.

275 *Id*. at 147; *see also* NLRB v. Ins. Agents Int'l Union, 361 U.S. 477 (1960) (holding that the economic pressure in question was not a violation of the duty to bargain in good faith).

276 *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents Int'l Union*, 361 U.S. at 495). Justice Powell and Chief Justice Burger concurred, emphasizing that the states could, "in the context of a labor dispute" still 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 (Powell, J., concurring).

277 *See Machinists*, 427 U.S. at 156 (Stevens, J., dissenting).

278 Int'l. Union v. Wisc. Emp. Rel. Bd., 336 U.S. 245 (1949).

279 *See Machinists*, 427 U.S. 132, 156 (1976) (Stevens, J., dissenting).

280 *Id.* at 159.

tional division of power to the states, as three members of the Court found.[281] As shown below, the idea of NLRA self-help "rights," apart from those explicitly set forth in Section 7, later provided the foundation for the Supreme Court majority's extension of labor law preemption doctrine in the 2008 *Chamber of Commerce* case holding that California could not condition the use of monies from state contracts upon non-use in union organizing campaigns.

Significantly, the conclusion that the Wisconsin statute conflicted with the NLRA required three analytical steps that were not made explicit in the majority's opinion. First, unconventional strike activity—such as a slowdown, sit down, or the partial strike activity like the concerted refusal of overtime involved in *Machinists*—fall outside Section 7's general protection for "concerted activity . . . for mutual aid and protection." Though inconsistent with a literal reading of Section 7, a series of cases starting soon after the NLRA's enactment in 1935 held that these concerted activities fell outside the protections of Section 7.[282] Second, the *Machinists* majority assumed that Congress intended such strike related activity, though unprotected by Section 7, to be among a range of self-help activities that the NLRA implicitly guaranteed.[283] 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,[284] to displace state regulation of these same activities.[285] Whether one considers such preemption of state authority to be wise or unwise, the *Machinists* decision rested not on any congressional intent, but on a federal labor law policy fashioned by a Supreme Court majority in 1976.[286] As with *Garmon*, the *Machinists* decision again seemed at the time to offer protection from state restriction of union activity.[287]

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281 *See id*. at 156–59.

282 *See* NLRB v. Ins. Agents Int'l Union, 361 U.S. 477 (1960) (concerted slowdown not protected); NLRB v. Local 1229 Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953) (handbilling during labor dispute not protected where handbills attacked quality of employer's conduct and did not relate to labor dispute); Int'l Union v. Wis. Employment Relations Bd., 336 U.S. 245 (1949) [hereinafter *Briggs-Stratton*] (intermittent strike activity not protected); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (sit-down strike not protected). Because such activities are unprotected, an employer can lawfully fire employees who engage in these activities.

283 This assumption was derived from *Ins. Agents' Int'l Union*, 361 U.S. 477.

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

285 The Court in *Briggs-Stratton* found preemption was implied by the implied right to engage in unprotected, and hence, subject to employer discipline, "slowdown" activity. *See id.*

286 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 . . . ." *Machinists*, 427 U.S. 132, 157 (1976) (Stevens, J., dissenting).

287 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

2. The Post-*Machinists* Cases

Soon enough, as with *Garmon*, the *Machinists* doctrine began to be used to challenge state laws favorable to union activity and employee rights.

The first flurry of cases rejected arguments to extend *Machinists*. In 1978, an employer challenged the Minnesota Private Pension Benefit Protection Act, which imposed a pension funding charge against employers who ceased to operate a place of employment or pension plan; the Supreme Court rejected a *Machinists* challenge to the Minnesota law, but it proved a harbinger of many challenges to come.[288] The next year, New York's law allowing unemployment benefits for strikers reached the Supreme Court. The employer argued that the law disturbed the balance of self-help remedies in labor disputes and the *Machinists* case's "free play of economic forces," but the Supreme Court rejected the argument.[289] In two cases decided a few years later, the Court upheld state labor standards legislation against arguments that *Machinists*' "free play of economic forces" policy required that such decisions be made by the parties to the collective bargaining relationship rather than the state.[290]

Cases striking down state law favorable to union interests also followed *Machinists*. In 1986, the Court majority extended *Machinists* to overturn an action by the Los Angeles City Council conditioning renewal of a taxicab franchise on the cab company's settling a labor dispute with its drivers.[291] 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

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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.

288 *See* Malone v. White Motor Corp., 435 U.S. 497 (1978).

289 *See* N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519 (1979).

290 *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (Maine severance pay law for plant closure not preempted); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (Massachusetts-mandated health plan benefits statute not preempted); *see also* Viceroy Gold Corporation v. Aubry, 75 F.3d 482 (9th Cir. 1996) (California statute permitting only unionized miners to work over eight hours per day not preempted); Wash. Serv. Contractors Co. v. D.C., 54 F.3d 811 (D.C. Cir. 1995) (District enactment requiring contractors taking over service contract from predecessor contractors to retain employees not preempted); Nat'l Broad. Co. 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).

291 *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). Moreover, in 1989, 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 face liability under 42 U.S.C. § 1983. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989).

of their local governments in labor disputes. Yet, again, the Court, and not Congress, displaced of the constitutional division of powers.

Similarly, state efforts to limit or ban striker replacement fell under the federal shield of *Machinists* preemption.[292] Despite Supreme Court rulings in the 1980s holding that the states retained authority under the NLRA to adopt labor standards legislation,[293] the Seventh Circuit recently applied the *Machinists* doctrine to preempt an Illinois statute governing rest breaks and meal periods for hotel attendants in Cook County that had been enacted during a strike by hotel attendants against a hotel owner.[294] The Court of Appeals interpreted *Machinists* to apply where labor standards legislation was not "a law of general application."[295] Since the Illinois Hotel Attendant Amendment applied only "to one occupation, in one industry, in one county," it fell to *Machinists* preemption.[296] The Court of Appeals purportedly relied on rulings in the Ninth and Eleventh Circuits making the same distinction.[297] Under this reasoning, many occupation and industry-specific state hours-of-work statutes are vulnerable.

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292 *See, e.g.*, Employers Assn. v. United Steelworkers, 32 F.3d 1297 (8th Cir. 1994) (Minnesota Striker Replacement Law preempted); Kapiolani Med. Ctr. for Women and Children v. Hawaii, 82 F. Supp.2d 1151 (D. Haw. 2000) (statute imposing liability on employment agencies aiding employers seeking striker replacements preempted); Illinois v. Fed. Tool and 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. Michigan., No. 83-256399-CZ, 1984 WL 61212 (Mich. Cir. Ct. Jan. 25, 1984) (Michigan Strikebreaker Law preempted under *Machinists*); Mid-West Motor Express v. Int'l Bhd. of Teamsters, 512 NW.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 Joseph P. Norelli, *Permanent Replacements: Time for a New Look?*, 24 LAB. LAW. 97 (2008). As Lance Compa has pointed out, the position of the United States on permanent replacement violates obligations under international law as interpreted by the International Labor Organization. *See* LANCE COMPA, UNFAIR ADVANTAGE: WORKER'S FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS xvii–xviii (2004).

293 *See Fort Halifax Packing Co.*, 482 U.S. 1; *Metro. Life Ins. Co.,,* 471 U.S. 724.

294 *See* 520 S. Mich. Ave. Assoc. Ltd. v. Shannon, 549 F.3d 1119 (7th Cir. 2008).

295 *Id.* at 1139.

296 *Id.* The Illinois statute applied only to counties with populations exceeding 3,000,000 and Cook County was the only one covered. *See id.* at 1130 n.7.

297 *See id.* at 1130 (citing Chamber of Commerce v. Bragdon, 64 F.3d 497 (9th Cir. 1995); Barnes v. Stone Container Corp., 942 F.2d 689 (9th Cir. 1991); Hull v. Dutton, 935 F.2d 1194 (11th Cir. 1991)); *see also* Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994) (striking down under both *Garmon* and *Machinists* an Illinois law requiring cemeteries and gravediggers to negotiate for a pool of workers to perform religiously required interments during labor disputes); New England 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 Hosp., 871 F. Supp. 335 (D. Minn. 1994) (Minnesota successor statute preempted); Levy v. Verizon Info. Servs. Inc., 498 F. Supp. 2d 586 (E.D.N.Y. 2007) (wage deduction law claims preempted).

Furthermore, the courts sometimes find non-preemption when unions invoke "the free play of economic forces" theory; that is, rulings against *Machinists* preemption do not always favor unions. In 1983, for example, the Supreme Court considered a case involving striker replacements who sued their employer for fraud and breach of contract after they were laid off when a strike settled. The Court, with three Justices dissenting, held that the replacement workers' state law misrepresentation and breach of contract claims survived arguments that the NLRA left such matters to the parties' self-help remedies under *Machinists*.[298] Or, to take another example, in the Empire State Building drumming case, 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."[299]

Project labor agreements between unions and local government 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.[300] In distinguishing between "government as regulator and government as proprietor,"[301] the Court cautioned that the agreement "was specifically tailored to one particular job, the Boston Harbor cleanup project."[302] Thus, state and local governments can prefer union labor agreements for projects *ad hoc* but not as a general policy.[303] Again, such intent cannot credibly be attributed to the 1935 or 1947 Congress.

Finally, several states have proposed "Worker Freedom Act" legislation, which would restrict captive audience meetings and grant other employee rights.[304] This proposed legislation remains vulnerable to

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298 Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

299 *See* Helmsley-Spear v. Fishman, 900 N.E.2d 934, 939 (N.Y. 2008) (quoting Bldg. Trades Employers' Educ. Ass'n v. McGowan, 311 F.3d 501, 509 (2d Cir. 2002)).

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

301 *Id.* at 227.

302 *Id.* at 232.

303 *Compare* Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005) (holding that the NLRA preempts a county ordinance requiring labor peace agreements for county contracts), *and* Ohio State Bldg. & Constr. Trades Council v. Cuyahoga County Bd. of Comm'rs, 781 N.E.2d 951 (Ohio 2002) (holding that the NLRA preempts a state statute prohibiting creation or enforcement of project labor agreements in public works contracts), *with* George Harms Constr. Co. v. N.J. Turnpike Auth., 644 A.2d 76 (N.J. 1994) (holding that the NLRA does not preempt a resolution particular to the construction industry requiring prospective contractors to enter into project labor agreements).

304 *See, e.g.*, Senate Bill 519 (Or. 2009); *see also* Naomi Lavelle-Haslitt, *It's a Wrap! 2009 Oregon Legislature Adjourns After Creating New Employment and Labor Concerns and Considerations for Employers*, http://www.martindale.com/labor-employment-law/article_Miller-Nash-LLP_767158.htm (Aug. 6, 2009).

challenges under *Machinists*,[305] especially after the *Chamber of Commerce* decision.

3. The Culmination of *Machinists*—A State Cannot Control the Use of Taxpayer Monies in State Contracts—the 2008 *Chamber of Commerce* Decision

In response to union lobbying, in 2000, California legislators adopted a statute prohibiting "employers that receive state funds . . . from using those funds to 'assist, promote, or deter union organizing.'"[306] As expressed in the preamble, the purpose of the statute 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."[307] The California statute, however, expressly exempted employer expenditures allowing union representatives access and expenses for the negotiation of a "voluntary recognition agreement" with a union.[308] An *en banc* majority of the Ninth Circuit upheld the California statute because "Congress did not intend to preclude the States from imposing such restrictions on the use of its own funds,"[309] drawing a distinction between a condition on receiving state funds, which was condemned by the Supreme Court in *Gould*,[310] and a condition on the use of such funds.

In a 7–2 decision, the Supreme Court ruled the contested provisions of the statute were preempted under *Machinists* because they reach an area protected by "congressional intent to shield a zone of activity from regulation . . . ."[311] Justice Stevens, who dissented in *Machinists*,[312] wrote the majority decision thirty years later in *Chamber of Commerce*.[313] His opinion reasoned that NLRA Section 8(c), which provides that non-coercive free speech "shall not be an unfair labor practice or evidence of an unfair labor practice,"[314] constitutes an "explicit direction from Congress to leave non-coercive speech unregulated," in effect, elevating an employer's desire to speak against unionization to an affirma-

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305 *See* Secunda, *supra* note 32, at 212–13, 226–27.

306 Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2410 (2008) (quoting CAL. GOV'T CODE §§ 16645–49 (West Supp. 2008)).

307 *Id.* at 2411 (quoting 2000 Cal. Stats. ch. 872, §1). The California statute tracked the language of several federal statutes that similarly restricted the use of federal funds. *See id.* at 2417–19.

308 *Id.* at 2411 (quoting CAL. GOV'T CODE. § 16647(d)).

309 *Id.* at 2412 (citing Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1085–96 (9th Cir. 2006)).

310 *See* Wis. Dep't of Indus., Lab. & Human Relations v. Gould, 475 U.S. 282 (1986).

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

312 *Machinists*, 427 U.S. 132, 157 (1976) (Stevens, J., dissenting).

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

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

tive right under NLRA, though Section 7(c) is explicitly phrased merely as a restriction on the use of speech in unfair labor practice proceedings.[315]

Justice Breyer, joined by Justice Ginsburg, dissented on this further extension of the *Machinists* doctrine.[316] Pointing out that the Court assumed the Wisconsin statute struck down in *Gould* was 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."[317] And, according to Justice Breyer, a statute would violate the *Machinists* doctrine only if it unreasonably restricts or discourages the use of employers' *own* funds.[318] The "mighty oak" of judicially created preemption doctrine continues to grow without congressional guidance.

C. *The Premises of the Broad Preemption Doctrines Announced in* Garmon *and* Machinists *and Extended in Later Cases are No Longer Supportable*

The idea of a "uniform national labor policy" lies in shambles for six reasons. First, it no longer fits within the broader landscape of American workplace law as it has evolved over the past several decades. Shared federal and state responsibility within federal minimum standards has become the baseline rule in employment law, and as with employment law in general, labor relations law badly needs the experimentation, flexibility, and greater citizen empowerment inherent in a less centralized and constricting federal regime.

Second, state courts already swim in oceans of federal labor law. Ironically, state courts must interpret and apply federal labor law in all its complexity; interpret and apply the federal "common law" of collective labor contract under Section 301 of the Taft-Hartley Act; and entertain suits against unions under the duty of fair representation, an essential ingredient of federal labor law. Furthermore, state courts entertain a variety of tort claims against unions under the many exceptions to preemption.[319]

Third, within the NLRA itself, federal law already gives states authority over two key labor relations issues. The first is the most basic of all labor law issues—the "right to work" or "union shop" issue—which has, since the introduction of the Taft-Harley Act, been subject to control

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315 *Chamber of Commerce*, 128 S. Ct. at 2414.
316 *See id*. at 2419 (Breyer, J., dissenting).
317 *Id.* at 2420.
318 *See id.* at 2421–22. Justice Breyer would have remanded on this issue.
319 *See supra* Part V.A.2 and accompanying footnotes.

by the states under Section 14(b) of the NLRA.[320] More than twenty states have such "right to work" laws, and union membership is at its lowest in many of those states.[321] The second is that, within the statutory scheme of the NLRA itself, the issue of union access is already theoretically tied to state laws regarding property rights. Thus, a union's interest in access to the disputed property must be balanced against an employer's state law property rights:[322]

> Under [federal NLRA cases] the rights of non-employee union representatives to access to an employer's private property are based in state law. Where state common law grants an employer the right to exclude nonemployee union organizers from its property, the NLRA guarantees access only if the union can show that employees are otherwise inaccessible . . . . Where state law grants nonemployee union organizers the right to access the employer's property, a violation of these state rights will also be a violation of the NLRA.[323]

Therefore, under this federal labor law analysis, union organizers have more access to shopping centers in California than in many other states.

Fourth, states have a major effect on labor disputes through their authority to provide unemployment benefits to strikers, notwithstanding the obvious effect this has on the "free play of economic forces" during a bargaining impasse.[324]

Fifth, the NLRB itself suffers from politicization, gridlock, and the inability to decide cases raising important issues. In 2008, approximately 20–25% of its caseload was not decided for more than a year.[325] The New Deal-era and Frankfurtian ideal of exclusive and expert administrative agency regulation has failed, undermined by the Supreme Court's many decisions overturning the Board on crucial policy issues.

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320 *See* National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (2006).

321 *See* COX, *supra* note 67, at 1193 (the states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming); NLRB, Union Members in 2008, *supra* note 38 at tbl.5 (comparing rates of union representation in the aforementioned states).

322 *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992); United Bhd. of Carpenters v. NLRB, 540 F.3d 957 (9th Cir. 2008).

323 *United Bhd. of Carpenters*, 540 F.3d at 962.

324 *See, e.g.*, N.Y. Tel. v. N.Y. Dep't. of Lab., 440 U.S. 519 (1979).

325 *See* Bor, *supra* note 235; *see also* James Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935–2000*, 61 OHIO ST. L. REV. 1363 (2000); 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).

Finally, greater decentralization of labor management relations policy follows significant examples both within and outside the United States. The states have long played a major role in the collective bargaining laws for many American workers, including public employees, agricultural employees in states like California and Florida, and employees of small businesses that do not meet the NLRB's jurisdictional guidelines.[326] Moreover, in the past decade, hundreds of thousands of home health and childcare workers have been organized through state level initiatives.[327] Looking beyond the borders of the United States, the Canadian labor relations system allows many major policy decisions to be made at the provincial level.[328] In the European Union, the laws of member states continue to control labor relations, even though significant initiatives are also made at the EU level, such as the Works Council Directive.[329]

VI. A VISION OF A NEW FEDERALISM REGIME FOR LABOR RELATIONS

A. *Some Proposals*

The following are a few modest suggestions for how loosened federal control might work hand-in-hand with policy judgments to adjust the law more favorably to provide union representation to employees who want it. First, Congress should declare that states may provide the same remedies for anti-union discrimination as they provide for other forms of discrimination and wrongful discharge under state law.

Second, Congress should allow state and local governments to control the expenditure of tax monies without the stifling restrictions of cases like *Chamber of Commerce v. Brown* and *Gould v. Wisconsin La-*

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326 *Cf.* National Labor Relations Act §§ 14(c)(1)–(2), 29 U.S.C. §§ 164(c)(1)–(2) (2006). *See generally* ROBERT GORMAN & MATTHEW FINKIN, LABOR LAW, UNION ORGANIZING, AND COLLECTIVE BARGAINING (2d ed. 2004).

327 *See* Peggie R. Smith, *The Publicization of Home Health Care Workers in State Labor Law*, 92 MINN. L. REV. 1390, 1404 (2008) (citing organizing campaign and state laws in California, Illinois, Oregon, Washington, Michigan, Wisconsin, Iowa, Massachusetts, Kansas, and New Jersey).

328 *See* Health Servs. and Support-Facilities Subsector Bargaining Ass'n v. B.C., [2007] S.C.R. 391; JAMES ATLESON ET AL., INTERNATIONAL LABOR LAW 131–57 (2008) (describing Canadian Supreme Court decisions establishing certain "fundamental rights" in labor relations binding on the provinces under the Canadian Charter of Rights and Freedoms); ROGER BLANPAIN ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW 158–59 (2007); David J. Doorey, *The Medium and the "Anti-Union Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. LAW & POL'Y J. 79, 81 (2008) ("Since 1925, principle [sic] jurisdiction over labor relations has resided with the provinces.").

329 *E.g.*, 1994 O.J. (L 254) 64 (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 ATLESON ET AL, *supra* note 328, at 347–55.

bor Relations Board.[330] This freedom should extend to the efforts of state and local governments to exercise governmental prerogatives in response to the wishes of their citizens, as in the Los Angeles taxicab franchise case.[331]

Third, states should be allowed to experiment with various means of ensuring that employee preferences control the question of exclusive union representation, including mechanisms such as card checks, periodic union elections, equal access rights, abolition of captive audience meetings, and non-majority representation of members only by unions in non-exclusive bargaining arrangements. These experiments could be subject to Department of Labor approval and modeled after the reverse preemption provisions of OSHA.

Fourth, states should be allowed to experiment with impasse procedures and other matters affecting parties enmeshed in labor disputes, including laws involving the permanent replacement of strikers, lockouts, and the use of various forms of interest arbitration to resolve bargaining disputes, such as use of arbitration as a remedy for failure to bargain in good faith.

Finally, the decentralization of labor relations policy may take many forms not discussed here. This Article offers some specific ideas to demonstrate that decentralization is possible within a properly conceived balance of shared federal and state policy authority. It is not the specifics, but rather the broader idea of more labor policy decentralization that is the focus this Article.

B. *Objections*

The discussion above addresses the mantra-like arguments traditionally advanced for the *Garmon* and *Machinists* preemption doctrines: the need for the expertise of a New Deal-era administrative agency, the need for a uniform national labor policy, and the near-perfection of that policy from the point of view of managers and businesses. This part addresses the more practical problems with decentralization.

1. Laws Unfavorable to Unions

Might states pass laws unfavorable to unions, frustrating the proposed federal policy to rebalance labor laws to favor renewed fostering of the right to representation? This would indeed be a risk, especially in "right to work" states. But, there are two responses. First, the citizens in New York, New Jersey, Connecticut, Rhode Island, Pennsylvania, Illinois, Michigan, Minnesota, Wisconsin, Massachusetts, California, Ore-

330 Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008); Wis. Dep't of Indus., Lab., & Human Relations v. Gould, 475 U.S. 282 (1986).

331 *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

gon, Washington, Nevada,[332] and other states with significant levels of support for unions, should no longer be imprisoned by a stifling federal orthodoxy. As in other areas of employment law, such as discrimination or wage and hour law, there is no need to require all areas of the country to adhere to the lowest common denominator of federal labor law.

Second, and more importantly, this Article calls for shared federal and state authority within minimum federal labor relations standards. Significantly, under Section 7 of the NLRA, only employees find protection. Thus, a state could not make conduct protected by Section 7 unlawful. Additionally, under the aforementioned proposals, a state could not legalize conduct that Section 8 forbids for example, union secondary boycotts,[333] or Section 8(a) prohibited employer actions.[334] Moreover, statutory reform could make it clear that a state may supplement NLRA remedies only to an extent consistent with the proposed congressional policy to allow states to develop laws more protective of unions or other forms of collective representation.

At first blush, this might seem one-sided. But, notwithstanding the assertions of neoclassical thinkers,[335] federal labor law in 1935 reflected, as it still reflects today, an explicit judgment that employees are generally the weaker party in their relationships with employers.[336] Working conditions, however, are different today, and labor relations policy must be reformed to allow for state policies that protect the right to organize and that foster worker participation in the policies and sharing of corporations. More unionization in the private sector and possibly other forms of employee participation in corporate governance will help to restore more structural balance against the swollen powers of the executive suite and financial centers in our economy. A prospering middle class is a prerequisite to national economic health, and the decentralization of labor relations policy provides a way to promote these policies in a spirit of experimentation, flexibility, and power sharing.

2. Big Labor and Big Business in Washington, D.C.

Big Business and Big Labor may quite naturally be reluctant to cede more authority to state level lawmaking, lobbying, and political action; to

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332 According to the NLRB, each of the named states has union membership rates at or above 15 percent, more than twice the national average. New York ranks first at 24.9 percent. *See* NLRB, Union Members in 2008, supra note 38,

333 *See* National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006). Whether the secondary boycott provision of the NLRA should be revisited is outside the scope of this article.

334 *See* National Labor Relations Act § 8(a), 29 U.S.C. § 158(a).

335 *See, e.g.*, Nathan Gardels, *Stiglitz: The Fall of Wall Street Is To Market Fundamentalism What the Fall of the Berlin Wall Was to Communism*, HUFFINGTON POST, Sept. 16, 2008, http://www.huffingtonpost.com/nathan-gardels/stiglitz-the-fall-of-wall_b_126911.html.

336 *See* National Labor Relations Act §1, 29 U.S.C. § 151.

state business and labor groups; and to the representatives and citizens of state and local governments. Ironically, both labor and business organizations, headquartered in Washington D.C., may fear the results of a more decentralized system that compromises each of their perceived, though contradictory, interests.

In any event, decentralization in labor relations policy implicates more than the narrow interests of national labor federations like the AFL-CIO and business groups like the U.S. Chamber of Commerce. Under the proposals advanced here, more labor relations decision making would devolve to state and local governments, unions, and business groups. But the sky will not fall, and national labor and business groups would still be able to continue in their present important role of working for the interests of employees and business in Congress and elsewhere, just as they do now for occupational health regulations, discrimination law, family leave, and wage and hour policy. Even if national labor federations and business groups choose not to lead a decentralizing reform, labor activists, lawyers, and managers working in Washington, D.C., will simply adapt to the change in a rebalanced federalism structure for labor relations. It is yesterday's idea that citizens in the states cannot play a vital and necessary role in this rebalancing.

CONCLUSION

The Employee Free Choice Act has sparked an important discussion about union representation and the role of unions in our overall economy. The decentralization urged in this Article seeks to continue that discussion. Labor relations policy is about balancing the structures in our economic system to encourage markets for goods and services, to discourage excess, and to bring about a broader market-based sharing of the proceeds and bounty of the economy. It will perhaps come as no surprise that the author supports passage of the Employee Free Choice Act. But the Act raises many fundamental questions of labor relations policy on which no national consensus exists. The virtual death throes of most private sector unions as collective bargaining representatives of all but a small percentage of employees cries out for experimentation, flexibility, and the involvement of citizens and union members at the local and state level. Just as the Taft-Hartley Congress in 1947 met the perceived abuses of that time by readjusting the national labor policy, so today we face different circumstances requiring a policy adjustment that is more favorable to employee choice of union representation. Instead of a stifling federal orthodoxy, the situation today calls for shifting more responsibility to citizens in the states.