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“You’re Not Welcome Here: NLRA Preemption and Removal”
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Restoring the Mighty Oak: A Defense of Labor Preemption

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I. Introduction

While NLRA\(^1\) preemption was once characterized as a “mighty oak … sweep[ing] ever outward ….”\(^2\), states, municipalities, and plaintiffs have increasingly sought to prune its coverage. By passing laws and ordinances designed to regulate labor relations, and in seeking to use state law to resolve labor related disputes, these actors have endeavored to reduce preemption to an acorn. Labor preemption promotes the primary purposes of the Act—increasing industrial peace and encouraging the free flow of commerce—by furthering the development of a consistent, centralized federal labor policy, and preventing localities from creating a patchwork of laws and obligations associated with unionization. The development of disparate local labor policy and the use of state law to resolve labor disputes is contrary to the those purposes, and should be curtailed.

Both management and labor benefit from dependable labor regulations emanating from a singular source, and will suffer without it: (1) if states and counties are permitted to pass legislation regulating labor relations, management and labor will have to expend significant time, effort and resources to track all of the regulations in order to ensure their compliance; (2) because federal preemption has historically been well-supported by the courts, attempts to invade the field of industrial relations will often be met with prolonged litigation for the locality and any affected parties\(^3\); (3) because many of the new local regulations provide remedies but no avenue

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\(^3\) For example, AB 1889, the California statute preventing employers from spending state money to assist, promote, or deter union organizing was passed in September 2000 and ultimately deemed preempted by the Supreme
for investigation, management and labor will spend more money prosecuting offenses that they
could have taken to the NLRB; and (4) because some of the new local regulations allow for
punitive damages, there is an incentive to ignore the federal scheme and resort to civil actions.
Finally, there is no guarantee that the goals of individual states, counties and persons or the
policies they encourage will reflect the nation’s goals, the goals of the Act, or the terms and
conditions that the parties would have agreed to without interference. The confusion and
expense disparate local labor policy would cause demand that if localities and parties wish to
change labor policy, they should be encouraged to do so at the federal level.

II. Union Membership and the Board

The private sector union membership rate has been steadily declining over the past
decade. Whereas 9.0 percent of private sector employees were union members in 2000, 7.2
percent were union members in 2009.4 The overall union membership rate, including the public
sector, has similarly decreased and was down to 12.3 percent in 2009, from 20.1 percent in 1983,
the first year for which comparable data are available.5 This decline in union membership has
led some scholars to argue that state-based labor legislation is necessary to instill a “structural
balance” in the economy—by which they mean, increased union membership.6 This argument
ignores additional credible reasons for declining union membership, including “de-
industrialization and increasingly global and competitive product markets,” and a “mismatch

Court in 2008, after moving through district court, and repeated rehearsings in the Ninth Circuit. See Chamber of
6 See, e.g., Henry H. Drummonds, Beyond the Employee Free Choice Act: Unleashing the States in Labor-
necessary for two reasons. First, the private sector unions face near extinction as collective bargaining
representative 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 … 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 bower of the executive suite and
financial industry. The needed changes are more likely to arise in the states than in Washington, D.C.”).
between employer and employee interests and traditional adversarial unionism,” neither of which would necessarily be served by local labor regulations.7

Despite the decrease in union membership, the National Labor Relations Board has remained robust, with over 50 regional, subregional and resident field offices and over 800 employees, all dedicated to “providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another.”8 The NLRB effectuates this goal by administering secret-ballot elections and preventing and remedying unfair labor practices. To that end, the NLRB processed over 22,000 unfair labor practice charges and conducted nearly 2,700 elections in 2009.9

III. The Three Strains of Labor Preemption: Garmon, Machinists, and Section 301

The Supreme Court’s line of preemption cases have assisted the NLRB in its mission. These cases determined that the NLRB’s exclusive jurisdiction should prevail over state labor law, that conduct left unregulated by the Act should be left unregulated by the states and that a federal common law should govern the interpretation of collective bargaining agreements. Although the NLRA does not contain an express preemption provision, the Supreme Court has long believed that Congress intended to fully occupy the industrial relations field, such that the laws of the states should be superseded under the Supremacy Clause of the Constitution.10

[In enacting the NLRA] Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final

9 Id.
10 U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.”).
administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies...."\(^\text{11}\)

Given the lack of an explicit statutory provision, labor preemption developed through Supreme Court litigation and decisions.\(^\text{12}\) In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court established that the primary jurisdiction of the NLRB and the integrated scheme of regulations established by the NLRA must be protected: “[W]hen an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with National policy is to be averted.”\(^\text{13}\) The *Garmon* Court emphasized that the mere potential for conflict was sufficient to require preemption: “The governing consideration is that to allow the State to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.”\(^\text{14}\)

In *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Court established that states may not regulate conduct if it is within a zone of activity that Congress intended to leave open to the free play of economic forces: “Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulated by States any more than by the NLRB, for neither the States nor the Board is afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Rather, both are without authority to attempt to introduce some standard of properly


\(^{12}\) Although much is often made of the fact that Congress has never expressly stated their intention to occupy the labor field, it should be noted that, in the fifty years since *Garmon*, neither has Congress ever disclaimed the Court's interpretation of its intention. “Until [*Garmon*] is altered by congressional action or by judicial insights that are borne of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set about again in quest of a system more nearly perfect.” *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 302 (1971).

\(^{13}\) *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959).

\(^{14}\) *Id.* at 246.
balanced bargaining power to define what economic sanctions might be permitted negotiated parties in an ideal or balanced state of collective bargaining.”

Finally, Section 301 of the Labor Management Relations Act gives federal courts jurisdiction over “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations.” Although it appears on its face to be just a jurisdictional provision, Section 301 was essentially intended to create “a comprehensive, unified body of federal law [that would] govern actions concerning the interpretation and enforcement of collective bargaining agreements under the aegis of the Act.” Consequently, although state courts may hear cases involving disputes related to collective bargaining agreements, Section 301 requires that the court apply federal law in its analysis. Section 301 is used by management and labor alike to remove cases from state to federal court, on the grounds that the plaintiff’s claim—although creatively plead only to implicate state law—is actually substantially dependent on an analysis of the parties’ agreement and consequently, should be either treated as a Section 301 claim or preempted altogether. Although courts have rejected defendants’ attempt to call on their collective bargaining agreement in cases that are sufficiently “independent,” Section 301 is nevertheless a strong source of federal preemption.

The Court did establish a few exemptions to the labor preemption doctrine. A state may influence labor relations when it is acting as a market participant, rather than a regulator. And state action will not be preempted when the conduct regulated is only a peripheral concern of the

16 2 DEVELOPING LABOR LAW, Ch. 28.IV.B (5th ed. 2006), at 2381.
Act or touches interests deeply rooted in local feeling and responsibility. But while states may attempt to justify new labor related policies under these exemptions, an analysis of these regulations show that they do not have indirect effect on labor relations, nor do they further the state’s preferences as a market actor.

IV. Legislative Preemption Challenges

A. “Workers Freedom” Statutes

Section 8(c) of the Act specifically protects “the expressing of any views, argument or opinion, or the dissemination thereof … if such expression contains no threat of reprisal or force or promise of benefit.” The Board has determined that an employer may, in exercising these rights permissibly gather its employees on company time and premises in order to express its opinion on unionization, even if it does not grant the union a similar opportunity. However, the Board has regulated employee meetings; an employer may not hold “captive audience” meetings in the twenty-four hours before a union election, or combine these meetings with unlawful barriers to union solicitation.

Several states have enacted, or sought to enact, legislation that directly addresses this subject. These statutes, often called “workers freedom” statutes, make it illegal for an employer to fire or otherwise penalize workers for refusing to take part in “captive audience” meetings. The statutes provide broad remedies for violations, including reinstatement, triple damages and attorney’s fees. Oregon became the first state to pass a “workers freedom” statute that directly implicates labor relations in June 2009. While New Jersey passed a similar statute

21 Garmon, 359 U.S. at 243-44.
22 In re Livingston Shirt Corp., 107 NLRB 400, 409 (1953).
24 Oregon Senate Bill 519, the “Worker Freedom Bill,” passed in June 2009. New Jersey passed N.J.S.A. §§ 34:19-9-34:19-14, the “Freedom from Employer Intimidation Act” in 2006, however, this law does not concern meetings about the decision to join a labor organization. Legislation has also been considered in Connecticut (Connecticut Substitute House Bill No. 7326).
in 2006, that statute did not address “captive audience” meetings. The Washington State Senate passed a similar bill to Oregon’s, but its bill has not passed the House.\textsuperscript{25}

Proponents of these statutes argue that they only promote the freedom of the individual employee and do not inhibit an employer’s ability to exercise its Section 8(c) rights, only the employer’s right to force the worker to listen.\textsuperscript{26} This view ignores that these laws provide employees with a private right of action against their employer and the ability make demands for damages that far exceed those that could be obtained after successfully pursing an unfair labor practice charge. The possibility of unpredictable litigation alone—given the newness of these laws and lack of precedent in the state arena—could influence an employer not to hold meetings at all, lest an unrelated termination after the fact be connected to an employee’s refusal to attend a meeting. These laws also suggest that employers keep more detailed records about attendance at these meetings, or have employers sign statements that their attendance was voluntary—however, whether those actions would be somehow seen as coercive under the Act, or like a method of “polling” employees, is unclear.

Furthermore, both \textit{Garmon} and \textit{Machinists} preemption are arguably implicated by these statutes. Timely “captive audience” meetings, absent coercion or other unfair labor practices, are unquestionably permitted under Section 8 of the Act, as the Board has repeatedly held. And “captive audience” meetings can be seen as a form of economic weapon, the use of which was not meant to be regulated by the states or the Board. One could also argue that the Board has intended its regulation of these meetings to go as far as the above-mentioned limitations, and no

\footnote{\textsuperscript{25} Substitute Senate Bill 5446. \textit{See also AGO 2009 No. 3}, available at http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=23460, arguing that the bill would be preempted if passed.  
\textsuperscript{26} \textit{Oregon House sides with labor on workplace communications}, THE OREGONIAN, June 19, 2009, available at http://www.oregonlive.com/politics/index.ssf/2009/06/oregon_house_sides_with_labor.html (“All [the law] does is protect the natural rights of employees; it doesn’t hinder employers in any way.”).}
In *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), see infra Section IV.B, the Supreme Court expressed its view that an employer’s non-coercive speech is both explicitly and implicitly protected by the Act and the Congress intended to leave noncoercive speech unregulated:

Section 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to §7 [in the Labor Management Relations Act] calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of §8(c) expressly precludes regulation of speech about unionization so long as the communications do not contain a threat of reprisal or force or promise of benefit.

*Brown*, 554 U.S., at 7-8 (internal citations omitted). While proponents of these statutes might argue that Congress sanctioned employer speech, rather than forced employee participation, the Court’s view (1) that noncoercive speech should be left unregulated and (2) that employees have a right to receive information opposing unionization calls these statutes into question, since they do impact and regulate noncoercive employer speech and could encourage employers not to share opposing views with employees because of the threat of litigation.

Proponents of “workers freedom” statutes argue that they fall under the preemption exemption allowing states to establish minimum employment standards that are consistent with the general legislative goals of the Act. Although proponents argue that establishing sanctions for employers who terminate employees for refusing to attend “captive audience” meetings will not disturb the Act’s interest in “uninhibited, robust, and wide-open debate in labor disputes,” as was discussed above, it is likely that such statutes will impede the free flow of relevant information to employees, or at least create increased burdens on employer speech. Given those


28 Secunda, at 237.

consequences, these statutes are not consistent with the purposes of the Act and should be preempted.

B. Neutrality Statutes and Ordinances

Another avenue states and counties have taken to influence industrial relations has been to require employers who take their money to commit to not using those funds to support or oppose unionization.30 California and New York have both passed such statutes, as have four counties in California, Allegheny County in Pennsylvania, and Milwaukee County.31 The validity of these laws is in question, however, since the Supreme Court recently found that California’s statute was preempted under Machinists.32 In Chamber of Commerce v. Brown, 554 U.S. 60 (2008), the Court found that Congress expressed an intent to leave noncoercive speech unregulated and that California’s statute was an attempt to “indirectly regulate [employer speech] by imposing spending restrictions on the use of state funds.”33 The Court highlighted the rigorous enforcement scheme of the statute, as well as the “deterrent litigation risks” contained within: “[E]ven if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the burden of defending itself against unions in courts, as well as the risk of a mistaken adverse finding by the factfinder.”34 Ultimately, the Court found that the statute put “pressure on an employer to forgo his free speech right to communicate his views to his employees or else to refuse the receipt of any state funds,” which it

30 2000 Cal. Stats. Ch. 872, § 1 (“It is the policy of the state not to interfere with an employee’s choice about whether to join or be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature to prohibit an employer from using state funds and facilities for the purposes 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.”).

31 The Milwaukee ordinance, Ord. § 31.02, which was passed in 2000, was found to be preempted in 2005. See Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County, 431 F.3d 277 (E.D. Wis. 2005).

32 Litigation regarding whether New York’s statute, New York Labor Law § 211-a(2), should be preempted is still pending in federal court.


34 Id. at 12.
determined impermissibly interfered with the purposes and objectives of the NLRA.\textsuperscript{35}

The long road to \textit{Brown} highlights the expense and uncertainty that generally follows when states attempt to invade the field of labor relations. While the California statute was passed in 2000, it took eight years, a district court decision, three hearings at the Ninth Circuit and Supreme Court litigation to finally get the issue resolved.\textsuperscript{36}

\textbf{C. Save Our Secret Ballot Initiatives}

Although the previous two examples were statutes supported by labor, promoters of local labor legislation sometimes omit that, if permitted to enter the field, states could easily promote pro-management policies with their laws: “Red states like Mississippi, North Carolina, South Carolina, Alabama, and the like are forgotten in this equation. Thus, state legislation could repress workers under this antipreemption scheme and consequently, these ideas are misguided.”\textsuperscript{37} One example of what could be termed an anti-labor movement among states is the recent rash of states putting constitutional amendments on the ballot that would require that all representation elections be conducted by secret ballot.\textsuperscript{38} These initiatives are a direct attempt to proactively address the application of the Employee Free Choice Act to elections in the respective states. Even without EFCA, under the federal labor regime, an employer is currently permitted to voluntarily recognize a union upon a showing sufficient signed authorization cards

\textsuperscript{35} \textit{Id.} at 12-13.

\textsuperscript{36} The district court granted partial summary judgment in favor of the Chamber of Commerce, holding that the NLRA preempted the portions of the statute. The Court of Appeals affirmed the district court twice, and then reversed after an \textit{en banc} hearing.


\textsuperscript{38} See Arizona Proposition 113 (“The right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or required elections, designations or authorizations for employee representation.”). South Carolina, South Dakota, and Utah will have similar measures on their ballots in November (see http://www.stateline.org/live/details/story?contentId=479649). Similar initiatives were proposed in Arkansas, Nevada, Oregon, Missouri and Florida.
in lieu of a secret ballot election.39

The Save Our Secret Ballot movement reveals an additional wrinkle to allowing states to regulate unionization. There is no guarantee that state legislators, who have different constituencies to appease, will be at all concerned about the effect their actions will have on the nation or national economy. Furthermore, it is likely easier for a special interest group to influence a group of state legislatures, than to influence the Board or a sufficient number of federal senators and representatives to amend a longstanding federal statute or policy.

The NLRA was intended to create consistent labor policy, applied uniformly throughout the nation. It allows for innovations and advances through the changing membership of Board and unlimited power of Congress to act in this field. Although Board decisions are often re-examined and reversed when an administration changes, when the Board reverses itself, the change is applied nationally. If states and municipalities are allowed to proactively and reactively pass legislation to thwart Board decisions or federal laws, any consistency will be lost. In ensuring that federal labor policy—whatever it may be—is applied with equal force in Mississippi as in Massachusetts, preemption was intended to prevent the see-saw of regulations that might occur on the state level when the administration changes in Washington.

D. State Court Preemption Challenges

Plaintiffs, both on the management and labor side, have increasingly been attempting to use state law to address issues that should be brought as unfair labor practice charges, or brought under Section 301 and analyzed based on federal law. For example, instead of claiming that their union breached its statutory duty of fair representation, union members have sued their unions for breach of contract, breach of the implied covenant of good faith and fair dealing, for

negligent misrepresentation and for intentional infliction of emotional distress. Instead of pursuing a secondary boycott unfair labor practice charge, employers have argued that bannering and handbilling violates state interference with trade laws. While the claims in the aforementioned cases were found to be preempted, some plaintiffs have succeeded with claims that use state laws to address issues that could likely also be addressed by the Board. In implication of these suits is, again, increased effort and expense to ensure compliance with state laws that could be implicated by labor relations activity, as well as increased litigation.

V. Conclusion

While states, counties, and individual plaintiffs may have good intentions at heart in seeking to expand labor relations regulations, policy, and adjudication beyond of the federal forum, these attempts are likely to result in increased industrial strife, rather than industrial peace. The burden that would result from allowing disparate local labor laws and state law to be used to adjudicate labor related disputes—including confusion, increased and prolonged litigation and compliance costs—is too high. If labor law needs reforming, it should be done on the federal level, to ensure the consistency and predictability that the current regime provides. The protective shade of NLRA preemption benefits both management and labor and it should be preserved.

40 See, e.g., Adkins v. Mireles, 526 F.3d 531 (9th Cir. 2008).
42 See Helmsley-Spear, Inc. v. Fishman, 11 N.Y.3d 470 (2008) (Court found that nuisance claim for bucket drumming should not preempt because private nuisance is different than ULP charge and there is no risk that adjudication will result in “significant risk of misrepresentation” of federal labor law or prohibition or protected conduct); E.I. Dupont de Nemours & Co. v. Sawyer, 517 F.3d 785 (5th Cir. 2008) (employee state law fraud and fraudulent inducement claims not preempted because claim focused on direct communications made post-bargaining). In addition, Section 303 of the NLRA already provides a civil remedy for secondary activity.