Rethinking Labor Law Preemption: State Laws Facilitating Unionization

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I want to travel, against the flow of traffic, down what many consider a one-way analytical street. My thesis is that, contrary to prevailing wisdom, the National Labor Relations Act (NLRA)[1] does not wholly preempt the states' ability to adopt laws facilitating unionization and enhancing employee leverage in collective bargaining with employers.

The NLRA extensively regulates unionization and collective bargaining. The Supreme Court's opinions concerning the NLRA's preemptive effect appear to foreclose any deliberate state effort to influence the relative balance of power between employers and unions.[2] Those opinions, responding to state laws that collided with

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1. 29 U.S.C. §§ 151-169 (1982 & Supp. V 1987). I use "NLRA" throughout this Article to refer to the National Labor Relations (Wagner) Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935), and its major amendments, the Labor-Management Relations (Taft-Hartley) Act of June 23, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), and the Labor-Management Reporting & Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 518 (1959).

2. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Lodge 76, Machinists v. Wisconsin Board, 427 U.S. 132 (1976); Wisconsin Dept. of Indus. v. Gould, Inc., 475 U.S. 282 (1986); Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613-18 (1986). Archibald Cox, whose writings heavily influenced the Court's labor preemption jurisprudence, *see infra* notes 139-40, consistently expounded the view that states should never be free to enforce laws that reflect "an accommodation of the special interests of employers, unions, employees or the public in employee self-organization, collective bargaining, or labor disputes." Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972). *See also* Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1330 (1954). The Court's lone departure from this principle is New York Telephone Co. v. New York Dept. of Labor, 440 U.S. 519 (1979), holding that states may award unemployment compensation to strikers. The decisive factor in that case was Congress' declaration in another statute that states were to have free

the regime of collective bargaining created in the NLRA, reached the right result in striking down those laws, but did so through adoption of preemption rules that I will suggest are overbroad. The application of these overbroad rules would lead to the invalidation of state laws that are consistent with and indeed promote the NLRA's collective bargaining regime. The scope of the NLRA's preemptive effect ought to be rethought and redefined, to allow for such state laws.

San Diego Building Trades Council v. Garmon[3] established the vision of the NLRA's preemptive effect that prevails today. In *Garmon*, the issue was whether a state court could award damages under state law to an employer suffering business losses from a union's peaceful picketing. The union argued that because its picketing was aimed at persuading employees to join the union, the NLRA protected it.[4] Under well-settled preemption principles, states cannot exact damages for the exercise of a right protected by federal law.[5]

The employer argued, however, that federal law forbade the picketing, because the union's goal was not to recruit members but rather to compel the employer to sign a contract with the union even though its employees did not want to be represented by the union.[6] The employer invoked an equally familiar preemption principle, that a federal prohibitory law ordinarily does not preclude the states from applying their own laws to regulate the same conduct.[7]

The Court concluded that, depending on the union's purpose, the picketing might be protected by the NLRA (as the union

choice as to the eligibility requirements for unemployment compensation. That explicit evidence of Congress' intent overrode the Court's general presumption that by enacting the NLRA Congress implicitly preempted state law regulating the balance of economic power. The proposition I examine in this Article is that states may act in some instances even without such external congressional support.

3. 359 U.S. 236 (1959).

4. At the time of the picketing in *Garmon*, the NLRA contained no ban on organizational picketing, and such picketing thus was embraced within the protection afforded to organization and union formation by Section 7 of the NLRA, 29 U.S.C. § 157. As part of the Landrum-Griffin amendments in 1959, Congress added Section 8(b)(7)(C), (codified as amended at 29 U.S.C. § 158(b)(7)(C) (1982)), which forbids such picketing beyond 30 days unless the union files a petition with the National Labor Relations Board seeking a certification election, and thereby restricts Section 7 protection to organizational picketing that is consistent with this limit.

5. *See infra* text accompanying notes 87-90.

6. It is an unfair labor practice for a union to secure a collective bargaining agreement from an employer when the union does not represent a majority of the employer's employees in an appropriate bargaining unit. International Ladies' Garment Workers Union v. Labor Board (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961).

7. *See infra* Part II, Section B.

contended) or prohibited by the NLRA (as the employer contended). However, the Court was not content to allow the state courts to resolve that dispute. Congress had created an expert agency, the National Labor Relations Board (NLRB),[8] to identify the fine line that distinguishes protected from prohibited conduct.[9] To allow state regulation would create an intolerable risk to federal interests; state courts might err in locating the line and award damages for conduct the NLRB would deem protected by the NLRA. The very possibility that this might occur would chill the parties' exercise of their protected rights. The solution was the broadly prophylactic rule announced in *Garmon*: states cannot regulate conduct that is either protected or prohibited by federal law, nor even conduct that is arguably protected or prohibited. The NLRB's jurisdiction over such conduct is exclusive.[10]

The *Garmon* rule made good sense with respect to the type of conduct challenged in that case. Picketing lies on a continuum which Congress has regulated in its entirety. In other words, Section 7 of the NLRA protects all picketing except that which Congress has chosen to forbid in Section 8.[11] Congress has drawn a line, and federal interests exist on either side of it. Protecting picketing up to the line serves the federal interest in enhancing employee bargaining power. Prohibiting picketing beyond that line serves the federal interest in insulating neutral parties from economic overkill. The states plainly cannot regulate picketing that federal law protects. To allow states to regulate the portion they think federal law prohibits is to risk that states will mistake the dividing line by prohibiting conduct that in fact is federally protected.

The rule announced in *Garmon*, although adopted in a situation where the challenged conduct was in a field fully occupied by

8. NLRA § 3, 29 U.S.C. § 153 (1982).

9. *Garmon*, 359 U.S. at 242-45.

10. *Id.* at 244-45. The Court thus reversed the decision of the California Supreme Court which had upheld a damage award based on the trial court's determination that the picketing was for the purpose contended by the employer. The California Supreme Court had reasoned that the NLRA does not preempt state law that condemns conduct that is also forbidden by federal law. Garmon v. San Diego Building Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).

11. While picketing is generally protected by Section 7, Congress has identified and expressly outlawed in the NLRA certain categories of picketing that it regards as inimical to national labor policy. *See, e.g.*, NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1982) (so-called "secondary" picketing, *see infra* note 175 and accompanying text); NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (1982) (organizational and recognitional picketing exceeding prescribed limits). The line between protected and prohibited picketing often is unclear. *See infra* text accompanying notes 176-79.

Congress, would by its terms also preempt state regulation of categories of conduct that Congress has chosen to regulate in only a limited way without occupying the field as it has in the case of picketing. In these cases of limited federal intervention, the rule announced in *Garmon* is overbroad. Although part of the conduct is prohibited by the NLRA, beyond a certain point NLRA regulation and the corresponding federal interest cease to exist. The *Garmon* rule is inappropriate in these "non-continuum" contexts.

I borrow here a subject discussed later in this Article to exemplify the distinction. The Supreme Court has construed the NLRA as entitling unions to come onto employer premises during an organizing drive where there is a complete inability for employees to communicate with the union off-premises (*e.g.*, lumber camps). In these limited circumstances, an employer who denies access commits an unfair labor practice.[12] However, in most cases, because off-premises communication is available, the NLRA does not entitle unions to enter employer premises, and an employer therefore does not violate the NLRA by refusing access.

"Occupy the field" preemption analysis would dictate that states are not free to pass laws authorizing unions to come onto employer property, even in instances where such access is not provided by federal law. Implicit in this view is that Congress, in enacting the Wagner Act in 1935,[13] not only created a right of union access in limited circumstances, but also conferred upon employers a right they had not theretofore possessed: to be free of state dedication of private property for union organizing wherever federal law did not create a right of union access. The Wagner Act, in this view, did not merely provide employees a limited organizational tool, it provided employers a tool to resist organization beyond that limit.

However, there is another way of viewing the Wagner Act's treatment of this subject. Congress imposed its will in derogation of state notions of property to the extent it thought federal interests warranted—here, the interest in facilitating employee self-organization. But it did not otherwise intend to disturb the states' existing authority to define property interests. Under this view, Congress' failure to create a more general right of entry signifies not that states may not allow such entry, but rather that the

12. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 109-10 (1956).

13. I refer here, and elsewhere in this Article, to what the 1935 Congress intended, because the prohibitions on employer conduct were laid down in the Wagner Act and have not been altered since. The Taft-Hartley and Landrum-Griffin amendments in 1947 and 1959, respectively, dealt with prohibitions on union conduct.

choice whether to allow such entry remains where it was before the federal enactment, with the states.

Either vision of the Wagner Act is theoretically possible. However, the dynamic of the Wagner Act—its declared goal was the alleviation of the depressed wages of workers by facilitating "full freedom of [union] association"[14]—makes it quite unlikely that Congress intended to protect employers from state law that provided unions greater access for organizing.[15] As the Court observed in another context, some preemption rulings insulating employers from state regulation would "turn . . . the Wagner Act on its head."[16]

My thesis proceeds from the premise that subjects covered by the NLRA fall into two categories. As to some subjects, Congress indeed intended to occupy the field, that is, to protect conduct up to a point and forbid it beyond. I shall describe subjects in this category as being on a continuum of federally regulated conduct, the government's regulation of conduct on the continuum ranging from protection at one extreme to prohibition at the other. For these subjects, *Garmon* states the correct approach: there is no room for parallel state regulation. To allow states to regulate what they think is prohibited creates an unacceptable risk of interference with conduct that the NLRA protects. With the exception of only one case, all of the Court's decisions applying *Garmon* have involved conduct on a continuum.[17]

The second category embraces subjects not on a continuum—subjects where Congress regulated up to a point but was indifferent as to what happened beyond that point. Union access to employer premises is an example of this type. Regarding these non-continuum subjects, I suggest two conclusions at war with traditional NLRA preemption analysis.

14. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753-54 (1985).

15. *See supra* note 13.

16. *Metropolitan Life*, 471 U.S. at 756. The *Metropolitan Life* decision is discussed *infra* note 83.

17. *See infra* note 160. The exception is Marine Eng'rs Beneficial Ass'n v. Interlake Steamship Co., 370 U.S. 173 (1962), where the Court mechanically applied *Garmon* to prohibit state regulation of conduct that was arguably prohibited by the NLRA but that had no claim to NLRA protection. The case involved picketing to enlist supervisors as members; supervisors do not enjoy Section 7 protection, but it was arguable that the union had committed a secondary boycott violative of Section 8(b)(4) of the NLRA by its conduct. *Id.* at 176-77. A claim of arguable NLRA prohibition (and not of arguable protection) was "the only basis upon which the petitioners [have] claimed preemption of state court jurisdiction." *Id.* at 176 n.3. The decision in this case has been substantially undermined by subsequent developments. *See infra* notes 160, 184-87 and accompanying text.

First, Congress did not interfere with the states' preexisting rights to choose the standard applicable in the area beyond that federally regulated. In choosing a standard, states may consciously attempt to affect the relative interests of employers, unions and employees regarding unionization and collective bargaining.

Second, when conduct is not on a continuum, states should be free to apply their own prohibitory laws even in the area that is within Congress' interest, that is, even where the NLRA also prohibits or arguably prohibits that conduct. Ordinarily in American law, a federal prohibition does not preempt parallel state regulation.[18] *Garmon* was an exception. The reasons that prompted *Garmon*'s preemption of parallel state regulation of conduct prohibited by federal law stemmed from the fact that the conduct was on a continuum, and state regulation might interfere with or chill the exercise of conduct that federal law protects. As to subjects not on a continuum, there is no risk of states trespassing on federally protected conduct. Thus, no justification exists for departing from the traditional preemption rule applied in other areas of the law.[19]

The impetus for this reexamination of preemption law will be evident to those familiar with the present state of collective bargaining under the NLRA. As I detail in Part I, the NLRA is not working effectively and the institution of collective bargaining is in decline. The defects in the law have been identified with some precision,[20] but Congress has shown itself too politically paralyzed to make repairs.[21] At the same time, many states are showing increasing enthusiasm for creating law to protect employee interests.[22] These

18. *See infra* Part II, Section B.

19. Applying these conclusions to the property example leads to two conclusions. First, states should be free to provide union access to employer premises in those circumstances where federal law does not provide such access. Second, states should be free to provide such access even where federal law does provide it (employing state procedures and remedies that may be more efficacious than those in the NLRA). *See infra* text accompanying notes 229-34.

20. *See infra* Part I. Briefly, the key defects are that without meaningful sanctions employers may coerce employees not to unionize and that those who do unionize often lack the bargaining power necessary to induce the employer to enter into a collective bargaining agreement.

21. There has been no significant substantive change in the NLRA in 31 years, although unionization in the private sector has dropped from a high of 38% in the 1950s to 13.7% in 1989. *See infra* note 25 and accompanying text. Proposed changes have been before Congress virtually throughout that period, but the only two occasions in which a majority for action existed were frustrated, once by a Senate filibuster and once by presidential veto. *See infra* note 47 and accompanying text.

22. *See infra* note 47.

opposite paths invite inquiry into whether state law may bolster the sagging NLRA.

Because so much of labor law lies on a continuum, where I agree states may not roam, it is not possible to envision a scheme of state laws systematically correcting for all the NLRA's weaknesses.[23] However, enough subjects lie outside any continuum to permit some meaningful facilitation of collective bargaining by the states. Parts II through IV of the Article invite a rethinking of labor law preemption, and suggest a dichotomy between continuum and non-continuum subjects that appears to have gone unnoticed in the decisional law and the literature.

Part II describes the Court's current preemption rules, and questions the analytical underpinnings of *Garmon*'s blanket ban on parallel application of state law to conduct prohibited by the NLRA. As will be seen, the breadth of that ban reflects the general pro-preemption preference of the Warren Court, a world-view far from that which prevailed both earlier (when Wagner and Taft-Hartley were enacted) and today (under decisions of the Burger-Rehnquist Court). Moreover, the Warren Court's pro-preemption preference is inconsistent with constitutional federalism and separation-of-power norms.

Part III then elaborates the non-continuum thesis, showing its application to an important contemporary question: whether states may apply their burgeoning prohibitions against wrongful discharge to discharges of union adherents during union organizing drives. Part IV explores two other applications of the non-continuum thesis: denial of union access to employer property for organizational activities, and refusal of new owners of productive facilities to employ their predecessors' employees.

I. The Decline of the NLRA and the Emergence of State Law Protecting Employees

Two recent phenomena have radically altered the labor relations landscape—the decline in unionization among employees covered by

23. For example, the NLRA's requirement of good faith bargaining, Sections 8(a)(5) and 8(d), balanced as it is by the limit that parties are not obliged to make concessions, Section 8(d), would appear to leave little if any room for state regulation of the *process* of bargaining. 29 U.S.C. §§ 158(a)(5), (d) (1982). Similarly, the economic weapons available to the parties in the event of bargaining deadlock are so comprehensively regulated, in terms both of protection and prohibition, as to create a continuum that is off-limits to state regulation. *See infra* text accompanying notes 95-101.

the NLRA and the growing willingness of state courts and legislatures to intervene in employment relations to enhance employee interests relative to their employers. This conjunction raises the question whether, and to what extent, states are free to shape their laws to facilitate unionization and collective bargaining.

The percentage of private sector employees opting to deal with their employers through collective bargaining[24] has declined from a high of 38% in 1954 to 13.7% in 1989.[25] The percentage of unionization in the private sector is down to about the level that existed when the NLRA was enacted in 1935.[26] I believe that the percentage of private sector workers who would like to deal with their employers through collective bargaining is much higher than current figures reflect,[27] and that many workers have abstained either because employers have bullied them out of the choice, or because they think unionization would not yield bargaining power sufficient to extract concessions from their employers.[28]

Congress, recognizing the potential for employers to discourage union selection through coercive actions, made protection of employee free choice a centerpiece of the NLRA. Section 7 confers upon employees the rights "to self-organization [and] to form, join or assist labor organizations."[29] Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights,"[30] and Section 8(a)(3) makes it unlawful to "discriminat[e]"[31] against employees for union activity or support.[32]

24. The NLRA does not apply to public employers. NLRA § 2(2), 29 U.S.C. § 152(2) (1982). It also does not apply to railroad and airlines, *id.*, which are covered by the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982), nor to agricultural laborers, NLRA § 2(3), 29 U.S.C. § 152(3) (1982), nor to employees of employers whose connection to interstate commerce is too small to merit NLRA coverage. A. COX, D. BOK & R. GORMAN, LABOR LAW, 95-100 (10th ed. 1986).

25. For the 1954 figure, see Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1772 n.4 (1983) [hereinafter Weiler I]. The 1989 figure is reported in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 42 CURRENT WAGE DEVELOPMENTS 7, Table 2 (Feb. 1990) (percent of private non-agricultural wage and salary workers represented by unions).

26. Weiler I, *supra* note 25, at 1771 (13% at time NLRA enacted in 1935).

27. *See id.* at 1769-70.

28. Two articles by Paul Weiler, which I consider to constitute the definitive pathology of the NLRA, reinforce my beliefs. I draw heavily in this section from those articles. Weiler I, *supra* note 25; Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) [hereinafter Weiler II].

29. NLRA § 7, 29 U.S.C. § 157 (1982).

30. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982).

31. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).

32. *See, e.g.*, NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 397-98 (1983).

Despite the protections enacted by Congress more than a half century ago, there is today a veritable epidemic of discharges of employees supporting unionization efforts in non-union workplaces. In 1980, employers discharged roughly five percent of all employees who supported union organization efforts.[33] Data for more recent periods suggest that the frequency of discriminatory discharges is equal to or exceeds that figure.[34]

Why is this happening despite the NLRA's commands? The breadth of the NLRA's proscription is not to blame: all anti-union discharges are unlawful. Rather, the NLRA's remedial scheme is inadequate.

An employer who discharges union activists hopes to secure the economic benefit of a non-union workplace. The employer removes the most important supporters of unionization from the workplace and sends a message to the other employees that they may not safely support the union. The discharges may break the organizing drive and prevent unionization.[35] It is unrealistic to expect that employers will abstain from such discharges, unless the NLRA's remedial scheme fulfills one of two conditions. Either the remedies for such

33. Weiler I, *supra* note 25, at 1781.

34. Weiler derived his five percent figure for 1980 by comparing the number of employees offered reinstatement in resolution of Section 8(a)(3) charges with the total number of employees who voted for unions in NLRB elections. Weiler I, *supra* note 25, at 1780-82. Employing that same methodology, the figure for 1985 would be roughly 10% (102,715 votes for unions, 10,905 reinstatements, 50 NLRB ANN. REP. 151, 178 (bottom line) (1985)) and for 1987, 4% (102,404 votes for unions, 4,307 reinstatements. 52 NLRB ANN. REP. 197, 225 (bottom line) (1987)). These figures likely understate the true extent of discrimination, for many employees will opt to forego reinstatement in return for a settlement that provides them backpay, see Weiler I, *supra* note 25, at 1781, and there has been a marked increase since 1980 in resolutions that provide backpay without reinstatement (arguably suggesting that conditions are now so bleak that fewer discriminates hold out for reinstatement). In 1980, roughly 10,000 received reinstatement with backpay, and another 5,000 received backpay without reinstatement. *Id.* at 1781. In 1987, only 4,307 received reinstatement, but 17,140 received backpay. 52 NLRB ANN. REP. 197-98 (1987).

35. Weiler I, *supra* note 25, at 1781, 1788. A prominent study concluded that anti-union discharges do not coerce other employees into voting against unions, but, on the contrary, increase their appetites to vote *for* unions. GETMAN, GOLDBERG & HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 151-52 (1976). However, as Weiler demonstrates, the methodology of the Getman study, and consequently its conclusions, have been subject to widespread challenge. Weiler I, *supra* note 25, at 1783-86. Perhaps most telling, the persistence of massive numbers of discriminatory discharges (which, after all, are not cost-free for employers) suggests that employers do not share the view of the Getman study. As Richard Posner has aptly noted, we should be skeptical of propositions that are inconsistent with the fundamental assumption that employers are rational profit or utility maximizers. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1000-01 (1984). If discriminatory discharges fostered unionization, employers would not resort to them in such numbers.

violations must be sufficiently costly to deter the employer from committing the violations in the first instance, or the scheme must restore the discharged employees to the workplace before the union vote, thus depriving the employer of the desired benefit.[36]

The NLRA's remedial scheme fails on both counts. The ultimate monetary remedy is too small to offset the economic benefit the employer derives from defeating the union.[37] Moreover, employees do not secure reinstatement remedies until long after the group impulse for unionization has been broken.[38]

Even when employees brave these obstacles and select a union, the Act has proven inadequate at facilitating the consummation of a labor agreement for many employees. Section 8(a)(5) does oblige the employer to bargain with the union in good faith. However, the NLRA does not compel the employer to make concessions.[39]

If bargaining fails to produce voluntary agreement, the Act contemplates a battle in which the parties exert economic pressure upon each other to induce settlement.[40] The Act grants employees "protected" rights to resort to economic weapons—strikes, picketing, etc.—to resolve bargaining impasses. The Act prohibits employers from firing workers for such activity. However, the law permits an employer to hire "permanent replacements" for strikers, which enables the employer to continue operating during a strike and to relegate strikers to a waiting list when the strike ends.[41] Further, the Taft-Hartley and Landrum-Griffin Act amendments to the NLRA deprive striking employees of their most effective weapon against an employer who is able to continue operating during a strike—inducing sympathetic workers employed by distributors and retailers to refuse to handle the struck goods.[42] In consequence, employees

36. Weiler I, *supra* note 25, at 1788-93.

37. *Id.* at 1789-91.

38. *Id.* at 1791-93.

39. NLRA § 8(d), 29 U.S.C. § 158(d) (1982).

40. *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960).

41. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938); Trans World Airlines v. Independent Fed'n of Flight Attendants, 109 S.Ct. 1225, 1230-33 (1989).

42. The general rule that striking unions may not appeal to employees of secondary employers not to handle "hot goods" is articulated in Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958). *See* Weiler II, *supra* note 28, at 397-404. There is an important exception for secondary employees whose tasks aid the struck employer's normal operations, an exception that embraces, *inter alia*, employees doing routine maintenance pursuant to a subcontract and truck and railroad employees making regular pickups from and deliveries to the primary employer. Local 761, International Union of Elec. Workers v. NLRB, 366 U.S. 667, 680-82 (1961); United Steelworkers of America v. NLRB, 376 U.S. 492 (1964). However, the exception is not applicable once the employer has successfully released its product into commerce. Local 1976, 357 U.S. at 93.

who are "replaceable," most often the unskilled or semi-skilled, cannot exert real pressure on their employers and tend to see unionization as futile and possibly a prelude to job loss.[43]

Some might be tempted to ascribe the decline of unionization entirely to causes other than weaknesses in the NLRA, such as employee contentment with the terms they are able to secure on their own from their employers, employee resistance to submerging their autonomy to a collective, or employee antipathy to unions as institutions. However, proponents of such views would have difficulty explaining several phenomena. Why are the least skilled, least compensated employees in our society largely unrepresented, while it is the highly skilled who tend more readily to unionization?[44] One would expect the highly-skilled and professionals to be more content with the results of individual bargaining and to prize autonomy more. Accordingly, if weaknesses in the NLRA were not accountable for the decline in unionization, we should expect less-skilled employees to have a higher rate of unionization. That the opposite is the case I attribute to the fact that the highly-skilled, because not easily replaceable, do not fear discharge for unionization and can strike effectively. Why, at the same time that unionization is so rapidly declining in the private sector, is it exploding in the public sector, where union representation exceeds forty percent in all groups from the unskilled to professionals?[45] I suggest that the explanation lies in two facts. In the public sector the employer ordinarily remains neutral during an organizing drive. Moreover, bargaining deadlocks are not resolved through economic force but through either an adjudicatory or political mechanism. Public employees thus opt in far larger numbers to collectivize their relationship with their employer because they are not bullied and because they have a meaningful opportunity to secure bargaining

43. *See* Weiler II, *supra* note 28, at 389-90, 413.

44. Professional employees are unionized in much higher percentages than non-professionals. Rabban, *Can American Labor Law Accommodate Collective Bargaining By Professional Employees?*, 99 YALE L.J. 689, 690 (1990). Motion picture and radio and television performers are unionized, as are athletes in all the major professional team sports. More than a quarter of all faculty members in four-year colleges are covered by union or employee association contracts, and the figure for two-year colleges is 37.6%. Levitan & Gallo, *Can Employee Associations Negotiate New Growth?*, MONTHLY LABOR REVIEW, July 1989, at 5, 9 (Table 2).

45. Nationwide, 43.6% of public employees were represented by unions in 1989. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 42 CURRENT WAGE DEVELOPMENT 7 (1990) (Table 2) (percent government workers represented by unions). It has been estimated that in states with laws hospitable to public employee collective bargaining the figure exceeds 70%. Levitan & Gallo, *supra* note 44, at 6.

resolution. And why, finally, is union representation so much higher in Canada and Western Europe, where occupational distributions do not differ markedly from ours?[46]

If there are flaws in the NLRA, Congress is the obvious place to turn for correction. However, it is most unlikely that Congress will significantly alter the NLRA in the near future. For three decades, Congress has been paralyzed by the competing political demands of labor and management over the shape of labor relations law. On the rare occasions when even modest change garnered a legislative majority, the twin obstacles of filibuster and Presidential veto stifled the initiatives.[47]

Contemporaneous with the NLRA's declining influence has been a growing willingness on the part of state courts and legislatures to fashion norms that assist employees in their dealings with their employers.[48] Much of that law confers benefits directly on employees. Indeed, some academics have opined that collective bargaining will no longer constitute the paradigm for legal protection of employees and that direct statutory conferral of substantive protection will emerge as the predominant solution to the need of employees for

46. Weiler I, *supra* note 25, at 1816-19 (Canada); Bok, *Reflections On The Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1411-14 (1971) (Western Europe).

47. In 1975, legislation was passed by both Houses of Congress that would have amended Section 8(b)(4) to relax the secondary boycott prohibitions at construction worksites. The legislation was vetoed by President Ford. A. COX, D. BOK & R. GORMAN, *supra* note 24, at 624. In 1978, the House passed, by a vote of 257 to 163, a proposed Labor Reform Act that would have substantially amended the NLRA, expediting the procedures for resolving unfair labor practice charges and increasing the remedies for violations. The bill failed in the Senate after a 19-day filibuster. Weiler I, *supra* note 25, at 1770 n.1. The bill's provisions are described comprehensively in Rosen, *Labor Law Reform: Dead or Alive?* 57 U. DET. J. URB. L. 1 (1979), and in part in Weiler I, *supra* note 25, at 1790-91.

48. I do not believe that there is a causal relationship between the NLRA's decline and the emergence of state law protecting employees. The latter is far likelier the outgrowth of two distinct developments in the early 1960's: the publication in 1962 of the Second Restatement of Torts with its encouragement of the creation of new torts and tort duties, and the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e (1982), and of numerous statutes thereafter, which signaled society's willingness to intervene in the workplace to assure fairness to the individual employee and thus made application of new tort law to the workplace seem less revolutionary. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982), the anti-retaliation provisions in the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c) (1982), and in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1140-1141 (1982). There are as well parallel anti-retaliation provisions adopted in many state statutes. *See* 1 H. SPECTER & M. FINKIN, INDIVIDUAL EMPLOYMENT LAW AND LITIGATION § 10.31 (1989).

assistance against employer exploitation of their inferior bargaining power.[49]

However, substantive laws can never address the full range of issues that are of interest to employees—nor would we accept the degree of governmental intrusion that would result if they could. A legislature may fix a minimum wage or prohibit invidious discrimination in the distribution of wages, yet we would never tolerate a permanent scheme of government determination of the wage of every employee, in every job category and for every employer. The same caveat applies to the multitude of other issues covered in a sophisticated collective bargaining agreement. Moreover, direct regulation fails to give employees the opportunity to participate in determining the terms and conditions of their own employment, which is a value in its own right.[50]

These same considerations prompted Congress to opt for collective bargaining instead of direct conferral of benefits when it considered a labor law in 1935.[51] These considerations are no less valid today, notwithstanding the decline of unionization. As a result, there will be continuing interest in the availability of meaningful collective bargaining, for it is the only vehicle through which most employees can participate in the determination of their terms of employment. Since the NLRA has proven unequal to the task of achieving that bargaining for most workers, and since a congressional remedy is unlikely, it is fruitful to explore whether there is any room for the newly-energized states to facilitate collective bargaining.

Consider, for example, the recent explosion of state laws protecting employees against wrongful discharge. Preemption concerns aside, these laws hold the potential to alleviate the epidemic of discharges during organizing campaigns. For a century state courts were committed to the at-will doctrine, which held that employees lacking an express written contract for a term could be discharged "for good cause, for no cause or even for cause morally

49. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10-11 (1988); Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1027-29 (1984).

50. Summers, *supra* note 49, at 26-27.

51. H.K. Porter Co. v. NLRB, 397 U.S. 99, 103-04 (1970). Of course, Congress has, in the half century since the Wagner Act was adopted, enacted several important statutes dictating substantive outcomes. *See supra* note 48. However, it remains true that most of the items embraced within the term "wages, hours, and terms and conditions of employment" are not regulated substantively by federal law.

wrong."[52] However, courts in over 40 states have recently recognized some exceptions to the at-will doctrine.[53]

Both contract and tort concepts underlie these changes. The common law held that employment was at-will unless there was an express promise in a written contract that employment would continue for a specified term.[54] In contrast, courts in more than 30 states are now prepared to find an enforceable promise of continued employment in less explicit provisions of written contracts, in representations made orally, or in generalized statements of policy in employer handbooks or manuals.[55] Furthermore, for the vast majority of employees who lack even this broadened claim to contractual protection, courts in 36 states will find discharges tortious if the reason for dismissal offends public policy.[56] These judicial incursions on the at-will doctrine may be the forerunners of more comprehensive legislative prohibitions against discharge without "good cause." Montana adopted such a statute in 1987.[57] The

52. Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-20 (1884). *See generally* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, 272-73 (1872). The courts brooked no exceptions to that rule until well into the 1970s. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521 (1976); St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 58-59 (1988).

53. As of August, 1989, courts in 44 states had indicated that, in at least some circumstances, a discharge would be invalidated although there was no express contract specifying a term. Individual Employment Rights Manual (BNA) 505:51 (1989) [hereinafter IERM](state-by-state table); *id.* at 505:101-911 (describing court rulings in each state). *See also* H. SPECTER & M. FINKIN, *supra* note 48, §§ 1.28, 2.14, 10.33.

54. H. SPECTER & M. FINKIN, *supra* note 48, §§ 2.09-2.12.

55. IERM, *supra* note 53, 505:51, 101-911. H. SPECTER & M. FINKIN, *supra* note 48, § 1.28.

56. IERM, *supra* note 53, 505:51, 101-911.

57. Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 (1987). The impetus for this legislation came from surprising quarters. The Montana statute was drafted and championed by the Montana Association for Defense Counsel, and was in effect a "tort reform" law. The Montana Supreme Court had adopted implied contract, tort, and covenant of good faith exceptions to at-will employment, and had applied them so broadly that they were tantamount to blanket protection against discharge without just cause. Gates v. Life of Montana Ins. Co., 638 P.2d 1063 (Mont. 1982); Nye v. Dep't of Livestock, 639 P.2d 498 (Mont. 1982); Gates v. Life of Montana Ins. Co., 668 P.2d 213 (Mont. 1983); Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984); Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984). What is more, in these cases the Court had approved broad-based remedies including not merely lost wages, but damages for emotional suffering and punitive damages. Substantial jury verdicts ensued, and prompted the successful defense-bar quest for ameliorative legislation. For the history of the statute's introduction and development, see Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMPL. REL. L. J. 387 (1988).

The Montana statute grants blanket protection against discharge without good cause, but preempts all other actions at common law except express written contract. It limits remedies to lost wages, fringe benefits, and in narrowly defined circumstances punitive

Commissioners on Uniform State Laws are considering a draft of a Uniform Employment Termination Act containing a blanket condemnation of discharges lacking good cause.[58]

Were states to apply their public policy tort doctrines or statutory good cause requirements to protect workers in unorganized workplaces discharged in retaliation for support of a union organizing drive, they could provide remedies overcoming the structural weaknesses of the NLRA.[59] Consider some differences

damages, while expressly forbidding pain and suffering, emotional distress, and other compensatory damages. §§ 39-2-904, 905. More draconian still, the Montana statute does not provide for reinstatement, yet limits compensation for lost wages to a maximum of four years. *Id.* at § 905. The Montana experience lends support to the prediction of one observer, in 1984, that statutory protection against wrongful discharge would come only when employers in a state decided it was preferable to the judge-made alternative. Peritt, *Employee Dismissals: An Opportunity for Legal Simplification*, 35 LAB. L. J. 407, 413 (1984).

58. The current draft is reprinted at IERM, *supra* note 53, 540:51. The Reporter to the Commission is Professor Theodore J. St. Antoine, who has written extensively on wrongful discharge. *See generally* St. Antoine, *The Revision of Employment-at-Will Enters A New Phase*, 36 LAB. L. J. 563 (1985); St. Antoine, *supra* note 52. The AFL-CIO Executive Council has endorsed the movement to secure legislation furnishing meaningful protections to workers against discharge without just cause. AFL-CIO, Statement approved at Executive Council meeting, Bal Harbor, Florida (Feb. 16-20, 1987).

59. Would states deem discharges for union organizing against public policy? There are significant indicators that, were it not for prevailing notions about NLRA preemption, many would. Most states have labor relations acts paralleling the NLRA that apply to employees not covered by the NLRA and to public employees, and that declare such discharges unlawful. *See* Brower & Sanchez, *The Duty of Fair Representation in Farm Labor Legislation: Cultivating the Seeds of Individual Rights*, 56 UMKC L. REV. 239, 244 n. 43 (1987); *see generally* Bethlehem Steel Co. v. N.Y. State Labor Bd., 330 U.S. 767, 777 (1947) (Frankfurter, J., concurring) ("Little Wagner Acts" enforce the same policies as NLRA by same means). These indicators of state legislative policy might furnish the predicate for state courts concluding that discharges of NLRA-covered employees also offend state public policy and thus are tortious. *See also*, Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249, 254 (Mo. 1963) (discharge of employee for attempting to form union violates state constitution). Despite the prevailing assumption that the NLRA does not allow such state regulation as to NLRA-covered employees, there have been some efforts by states and local governments to promote unionization. For example, a Wisconsin procurement law forbade firms that were recidivist violators of the NLRA from doing business with the state (held preempted in Wisconsin Dep't of Indus. v. Gould, 475 U.S. 282, 291 (1986)); the Los Angeles City Council conditioned renewal of a taxicab firm's franchise upon its settling a strike by its drivers and agreeing to a collective bargaining agreement with them by a specified date (held preempted in Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986)); a New York City policy resolution limited bids for certain of the City's printing business to unionized firms (upheld in Image Carrier Corp. v. Beame, 567 F.2d 1197 (2d Cir. 1977), *cert. denied sub nom.* Image Carrier Corp. v. Koch, 440 U.S. 979 (1979) (query whether this decision remains viable after *Gould* and *Golden State*)).

59. A bill the Maine legislature passed in 1989 would have forbidden employers from hiring permanent replacements during the first 45 days of a strike, but the Governor vetoed it after the Maine Supreme Judicial Court issued an advisory opinion that the bill was preempted by the NLRA. *See Maine Gov. McKernan Vetoes Labor Bill*, 131 Lab. Rel. Rep. (BNA) 375 (July 17, 1989); *Opinion of the Justices*, Maine Sup. Ct., Docket No. 0J-89-2 (June 28, 1989).

between NLRA actions and possible actions under hypothetical state tort or wrongful discharge laws.

First, under the NLRA, the discharged employee does not control her claim. She may file a charge with the Board, but the decision whether to issue and prosecute an NLRA complaint rests entirely within the discretion of the NLRB General Counsel.[60] The Board's General Counsel conducts an investigation before making that decision, but the scope of the investigation may be less extensive than that conducted in discovery by a self-interested employee's attorney. The General Counsel's decision not to issue a complaint is unreviewable,[61] and budgetary and other institutional constraints may prompt him not to pursue complaints of arguable merit where the interested employee would make the contrary choice. Were a state cause of action available, the discharged employee would control her claim. The union she supports would have a powerful incentive to prosecute the claim on her behalf, both to prevent the employer from destroying the organizing drive and to demonstrate to other employees the union's capacity to be an effective advocate for their interests.[62]

Second, relief under the NLRA is likely to be long-delayed, even when ultimately forthcoming. The prosecution of an NLRB charge to an enforceable reinstatement order in a Court of Appeals averages three years, by which time the impetus for unionization will long since have died.[63] This delay is the Achilles heel of the NLRA remedial scheme.[64] The Board has power to seek an injunction from federal district court pending its resolution of the claim,[65] but it rarely exercises that power. The volume of discharge cases filed with the Board each year makes it inconceivable that the Board would seek injunctions in more than a tiny fraction of those cases. In 1987, for example, there were 11,548 charges filed with the Board alleging violation of Section 8(a)(3).[66] The Board sought Section 10(j)

60. *See* NLRA §§ 3(d), 10(b), 29 U.S.C. §§ 153(d), 160(b) (1982).

61. Vaca v. Sipes, 386 U.S. 171, 182 (1967); NLRB v. United Food & Commercial Workers, Local 23, 484 U.S. 112, 114, 118-19 (1987).

62. The union can do no more before the NLRB than file a charge, urge the General Counsel to issue a complaint, and, if a complaint does issue, participate as an intervenor but without a right to prevent the General Counsel from settling the case by dismissing the complaint. *United Food & Commercial Workers*, 484 U.S. at 112-19.

63. Weiler I, *supra* note 25, at 1795-97. The more recent data are not materially different. In 1987, the median days from filing of charge to NLRB decision were 709, with appellate enforcement proceedings still to come. 52 NLRB ANN. REP. 250 (1987).

64. Weiler I, *supra* note 25, at 1797.

65. NLRA § 10(j), 29 U.S.C. § 160(j) (1982).

66. 52 NLRB ANN. REP. 191 (1987).

injunctions in only 17 of those cases.[67] In contrast, state law could provide access to a temporary restraining order or preliminary injunction at the behest of the discharged employee or the union.[68] Plainly, the labor movement lacks the resources to prosecute 10,000 temporary restraining order (TRO) actions each year. However, successful quests for TRO's in even a fraction of the cases would be a significant deterrent to discharges during organizing campaigns. A TRO does not merely erase the employer's desired gain, it is a serious setback for the employer, since his employees will have witnessed first-hand the benefits of unionization.[69] The union and employees are in the best position to make an informed decision whether the stakes and prospects for success warrant the expenditure of resources that would be required in seeking preliminary relief.

Third, relief under the NLRA, if forthcoming, is extremely limited. At best, the employee will receive reinstatement and lost salary minus interim earnings; no full compensatory or punitive damages are available.[70] These remedies are too small to furnish a significant economic deterrent to an employer who sees economic value in defeating unionization.[71] State law could award double

67. *Id.* at 247.

68. Whether state law will provide access to preliminary relief is, of course, for the state to decide. Neither the Montana statute nor the draft Uniform Employee Termination Act authorizes preliminary relief. But such relief ordinarily is available in common law actions.

69. Weiler I, *supra* note 25, at 1793. Section 10(j) injunctions secured by the NLRB also would have a significant deterrent effect, but the Board seeks them so rarely that the effect is not realized. 29 U.S.C. § 160(j) (1982 & Supp. V 1987). *See supra* note 67 and accompanying text.

70. NLRA § 10(c), 29 U.S.C. § 160(c) (1982). *See* Weiler I, *supra* note 25, at 1788-89.

71. Weiler I, *supra*, note 25, at 1789-91. Indeed, while acknowledging that preliminary relief would be effective, Weiler doubts that any quantum of delayed monetary relief could effectively stem the tide of employer discharges. He suggests instead that the cure should be provision for elections within three to five days of union demand accompanied by authorizations from a majority of employees. Weiler reasons that this would deprive employers of the time to destroy the organizing drive. *Id.* at 1805-19. However, Weiler's prescription has little chance of enactment, as it would deprive employers of the opportunity to oppose unionization and would deprive employees of the opportunity to learn the case against unionization from the employer, the only party likely to have both the incentive and the capacity to state that case. *Id.* at 1812-13, 1815. Similar considerations prompted Congress to add NLRA § 8(c), 29 U.S.C. § 158(c) (1982), to the statute in 1947. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969); NLRB v. Golub Corp., 388 F.2d 921, 926-927 (2d Cir. 1967). Weiler's approach is followed in Canada. Weiler I, *supra* note 25, at 1806-08, 1816-18.

One can envision other possible ways to address the problem. Congress could forbid employers to discharge employees during the NLRB election period, except in emergency circumstances. Such a prohibition would not significantly injure employers, who could lawfully discharge after the election. Alternatively, Congress could declare discharges during the election period to be presumptively invalid and authorize the issuance of TROs

backpay, compensation for mental and emotional suffering, punitive damages, attorneys fees to prevailing plaintiffs, or any combination of the above. Any of these remedies would substantially increase the cost of wrongful discharge and alter some employers' economic calculi sufficiently to deter some discharges.

Given the states' potential ability to help repair the damaged NLRA process, I want to demonstrate that there is an analytical road that would legitimate such state involvement. I do not know whether states will find the road worth travelling. However, they are unlikely to begin the journey as long as the assumption persists that state initiatives of this type are preempted.[72]

I must address one threshold concern before embarking on my analysis. In the absence of congressional action, why should we rethink and redefine well-established preemption rules? The reason is that the landscape today is totally different from that of the 1959-71 period in which the Court forged the NLRA preemption doctrines that survive today. During that era, the Court viewed the NLRA positively, as succeeding in its objective to enhance employee interests through collectivization.[73] At the same time, it saw the states as generally unsympathetic to promoting employee interests through

routinely unless the employer makes a clear and convincing showing that the discharge is lawful. Whether these suggestions would be any more politically viable is conjectural.

72. When state and local lawmakers contemplate such efforts employers invariably present them with preemption arguments. The literal breadth of the Court's opinions lends apparent weight to that contention. Further, to the union rejoinder "legislate now, and let the courts decide later whether your handiwork is preempted," there is now a compelling reply. The Court has recently held that employers injured by some types of governmental action preempted by the NLRA may have a cause of action under 42 U.S.C. § 1983 (1982) for damages for the injury. Golden State Transit Corp v. City of Los Angeles, 110 S. Ct. 444 (1989) (*Golden State II*). There are substantial limits upon potential liability of state and local governments and their officials, owing to the Eleventh Amendment, *see* Edelman v. Jordan, 415 U.S. 651 (1974); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989), the absolute immunity enjoyed by judges, legislators and prosecutors, see Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (legislators); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors), the qualified immunity for executive officials where the federal obligation is not clearly established, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), and the absence of *respondent superior* liability for municipalities under Section 1983, see Monell v. Dep't of Social Servs., 436 U.S. 658 (1978); St. Louis v. Prapotnik, 485 U.S. 112 (1988). Still, potential state actors will be looking for an indication that the state action sought does not offend clearly established preemption doctrine.

73. That optimism is reflected in opinions contemporaneous with *Garmon*. *See, e.g.*, United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574 (1960); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296-97 (1959).

law. The state laws generating those preemption rulings most often were intended to restrict the assertion of collective employee power.[74]

The question is whether preemption rules forged in that climate will continue to dictate outcomes in this quite different era, in which the NLRA is not working for the vast majority of America's employees, and in which state initiatives may seek to promote, rather than impede, collective bargaining.

My thesis is modest. I do not contend that the NLRA means something different in 1990 than it did when enacted.[75] Rather, I contend that the NLRA was never intended to foreclose the state initiatives that I will discuss. The Court has built the NLRA preemption rules without explicit guidance from Congress as to its intent. I will argue that the rules the Court announced were appropriate to the particular state initiatives then before it; these state laws were seeking to regulate conduct on a continuum of protected-prohibited conduct. However, I will also argue that the Court's articulation of the rules was overbroad in that it would preempt state regulation of conduct not on such a continuum, a result Congress did not intend. With one insignificant exception my proposals are consistent with the outcomes of the Court's cases to date. Thus, Congress' failure to "overturn" *Garmon* should not mean that *stare decisis* forecloses the reexamination I wish to undertake. Congress cannot be expected to legislate in response to the Court's overbroad rhetoric, but rather to its more narrow holdings. Furthermore, the Court has not yet applied the overbroad rhetoric of *Garmon* to invalidate the types of state action that I discuss in this

74. *See* cases cited *infra* notes 180, 182.

75. The growing school of "new legal process" scholars argues that statutes are susceptible to differing interpretations over time in light of changing circumstances. They would likely see this as an occasion for "dynamic statutory interpretation." Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). That doctrine posits that "original legislative expectations should not always control statutory meaning . . . especially . . . when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways." *Id.* at 1481. *See also* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Statutory Interpretation and the Principle of Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989). These scholars might reason that even if Congress "intended" implicitly to preempt state law when it enacted the NLRA, that intention would have been predicated on an expectation that the Act would succeed in institutionalizing collective bargaining. Because the Act has failed its purpose, and because the Court imputed the preemption rules in the absence of any express provision, it would be appropriate for the judiciary to reexamine, free of obligation to the intent of a long-gone Congress, the wisdom of according the Act so sweeping a preemptive effect. My view on NLRA preemption is different from those of the new legal process scholars. Under my thesis the judiciary would implement Congress' original intent, not substitute a different outcome of the judiciary's own devising.

Article. I now turn to an analysis of the Court's rhetoric and holdings in its preemption decisions.

II. The Supreme Court's NLRA Preemption Rules and the Overbreadth of the Ban on Parallel State Regulation

This Part describes the rules the Supreme Court has announced for determining the NLRA's preemptive effect, places those rules in the context of the Court's general jurisprudence respecting federal preemption, and shows the overbreadth in *Garmon*'s blanket ban on parallel state regulation of conduct prohibited by the NLRA. Section A describes the NLRA preemption rules as they are applied today. Section B shows that the breadth of *Garmon*'s ban on state regulation of NLRA-prohibited conduct was not inevitable. The presumption in favor of preemption applied by the Warren Court in *Garmon* departed from the anti-preemption presumption that prevailed when Wagner and Taft-Hartley were enacted. The Burger-Rehnquist Court has since returned to this anti-preemption presumption. In Section C, I argue that the choice between pro- and anti-preemption presumptions is one of constitutional dimension: only an anti-preemption presumption fits the scheme of balance of powers and federalism laid out in the Constitution.

A. *The Current Preemption Rules*

Preemption is a question of congressional intent. In exercising its Commerce Clause power, Congress is free to decide whether state law is to be restricted, and if so in what ways.[76] However, the Court has concluded that Congress was silent as to its intention respecting the NLRA's preemptive effect. The Court has found nothing on the face of the statute, nor in the legislative history, that reflects an express decision by Congress one way or the other respecting the survival of state laws.[77]

76. Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491, 501 (1984).

77. *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 735 (1985); *Brown v. Hotel Employees*, 468 U.S. at 501; Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971). These decisions reflect a view that has held since *Garmon* was decided in 1959. In decisions prior to *Garmon*, the Court professed to find evidence of a congressional intent to allow parallel state regulation of conduct prohibited by the NLRA. *See infra* text accompanying notes 126-32.

The Court has remained steadfast that, despite this silence, congressional intent controls the NLRA's preemptive effect.[78] However, lacking any explicit guidance from the legislative materials, the Court has found it necessary to imply a set of preemption rules from the statute's purpose and scheme.

From the start, the Court recognized that the NLRA could neither be all non-preemptive nor all preemptive.[79] The easy assumption that the Act's silence meant state law was unaffected foundered on the obvious point that employee conduct protected by the Act could not be left vulnerable to invalidation by the states. Conversely, it was equally evident that Congress had not occupied the field of labor relations by its enactment of the NLRA and thereby deprived the states of all power to act. For the latter would have required assumptions about congressional intent too bizarre to be tenable. Violence on a picket line would have been outside the reach of state criminal and tort law, even though the Wagner Act created no federal prohibition at all against violent union and employee activities, and the sole remedies added by the Taft-Hartley Act for picket line violence were a cease and desist order and backpay for lost work.[80] Similarly, the Wagner Act contained no mechanism for enforcing collective bargaining agreements (this was changed by the enactment of Section 301 as part of Taft-Hartley)[81] and thus for the first 12 years of the Act's life, collective bargaining agreements would have been unenforceable but for the availability of state law. The point is simple: as the Court has consistently declared, the NLRA "leaves much to the states, though Congress has refrained from telling us how much."[82] "We must spell out from

78. *See, e.g., Metropolitan Life*, 471 U.S. at 747; International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391 (1986) (citing cases).

79. Garner v. Teamsters Local No. 776, 346 U.S. 485, 488 (1953); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 773 (1947).

80. Taft-Hartley added the right to refrain from union support and concerted action to Section 7's enumeration of employee "rights," and created for the first time a set of union unfair labor practices, the first of which is coercion and restraint of employees who exercise their Section 7 rights. NLRA § 8(b)(1)(A), 29 U.S.C. §158(b)(1)(A) (1982). Violence on a picket line in retaliation for employee exercise of the right to refrain, if committed by persons acting as the union's agents, is a violation of Section 8(b)(1)(A). A. COX, D. BOK & R. GORMAN, LABOR LAW 696 (10th ed. 1986). Because the Act does not authorize compensatory damages, *see infra* text following note 198, the lone remedy for this violation is a cease and desist order, or, if employees are intimidated from working, backpay. In no event could employees recover for physical harm.

81. 29 U.S.C. § 185 (1982).

82. *Garner*, 346 U.S. at 488. *See also*, Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491, 501 (1984).

conflicting indications of congressional will the area in which state action is still permissible."[83]

Accordingly, the Court has had to construct a more complex mosaic. Insofar as is pertinent to our inquiry,[84] that construction has required the resolution of two analytically distinct questions. First, to the extent that Congress through the NLRA affirmatively protected conduct, are states free to interfere with or impede the exercise of such conduct? Second, to the extent that Congress prohibited conduct in the NLRA, are states free to enact and enforce state laws that also prohibit that same conduct, perhaps with different or greater penalties than the NLRA provides?[85]

Garmon lumped these "protected" and "prohibited" questions together and provided a single answer for both. My thesis requires that the two be examined separately.

1. *Protected Conduct*

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .[86]

83. *Garner*, 346 U.S. at 488. The most recent dramatic examples are the Court's holdings that states may dictate "minimum standards," such as mental health-care benefits and severance pay, that must be provided by employers in unionized as well as non-union workplaces. *Metropolitan Life*, 471 U.S. at 755-56; Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987).

84. Some NLRA preemption questions do not involve the regulation of private conduct as such, and thus are beyond the scope of this Article. For example, in two early decisions the Court held that the NLRB's authority to conduct elections and certify exclusive bargaining representatives preempted the states' rights to perform similar tasks. La Crosse Tel. Corp. v. Wisconsin Employment Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947).

85. These questions ask whether states may *prohibit* conduct that federal law protects or prohibits. One might also ask whether states may *protect* conduct that federal law protects or prohibits. How would states "protect" conduct? They would do so by forbidding other parties from interfering with that conduct. Thus, whether states may "protect" conduct that federal law protects is the same question as whether states may prohibit conduct that federal law prohibits. The question whether states may protect conduct that federal law *prohibits* has not arisen, presumably because it is obvious that for states to do so would be inconsistent with the Constitution's Supremacy Clause.

86. NLRA § 7, 29 U.S.C. § 157 (1982).

It was settled early in the Act's history—and long before *Garmon*—that state law is preempted if it regulates conduct that is protected by Section 7.[87] In the familiar words of *Garmon*, recapitulating settled law:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, . . . due regard for the federal enactment requires that state jurisdiction must yield. . . .[88]

This preemption of state laws that would interfere with interests protected by Section 7 of the NLRA is not controversial. A core purpose of the Constitution's Supremacy Clause is to insulate from state interference those activities that Congress, acting within its enumerated powers, elects to foster or protect.[89] It seems inevitable that Congress, by declaring employee "rights" in Section 7, intended, at least implicitly, to preempt state rules that collided with those rights.[90]

More controversial is *Garmon's* holding that states may not regulate conduct that is *arguably* protected by Section 7:

> When an activity is arguably subject to § 7 . . . of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if

87. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., Div. 988 v. Wisconsin Employment Relations Bd., 340 U.S. 383, 398-99 (1951); Hill v. Florida, 325 U.S. 538, 542-43 (1945).

88. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

89. Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491, 500-04 (1984). *See generally* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

90. *Brown v. Hotel Employees*, 468 U.S. at 503-04. Dissenting from the decision in which the Court first announced this holding, Justice Frankfurter suggested that the Court was reading too much into the NLRA; as Section 8(a)(1) forbade only employer interference with Section 7 rights, the Court should not construe the NLRA to foreclose state interference with those rights. Hill v. Florida, 325 U.S. at 547 (Frankfurter, J., dissenting). It is hardly surprising that the Court found this reasoning unpersuasive. The law was enacted out of dissatisfaction with state treatment of labor relations, and Section 7 stands as a declaration of "rights" independently of the prohibitions on employer interference appearing in Section 8. If Congress had meant to secure those rights only against employer interference, it could have done so in Section 8(a)(1) and would have had no need to create the separate Section 7. Justice Frankfurter ultimately came around to the same view, as his opinion for the Court in *Garmon* reflects.

> the danger of state interference with national policy is to be averted.[91]

This is a departure from the preemption rules applied with respect to other federal statutes. Ordinarily, a contention that a state law claim is preempted because the challenged conduct is protected by a federal statute will be resolved in the first instance by the court entertaining the state law claim, and if that court concludes that the conduct is not federally protected it can proceed directly to adjudicate the state law claim.[92] *Garmon's* "arguably protected" rule imposes greater restrictions on state courts with respect to labor disputes: so long as the assertion of NLRA protection is not frivolous, the state court is without authority to proceed, *even though ultimately the NLRB might determine that the challenged conduct is not federally protected.*[93]

The "arguably protected" rule rests on two assumptions. First, that Congress, having created an expert agency to construe Section 7 of the NLRA, intended that the scope of the protection afforded by Section 7 would be defined exclusively by that agency. Second, that permitting state courts to act solely on their own estimates of what conduct the NLRB would hold unprotected would pose unacceptable risks of interference with conduct that *is* protected. Thus, state courts cannot proceed until the expert agency has certified that the conduct in question is not protected.[94]

91. 359 U.S. at 245.

92. Cox described this "difference" between *Garmon* and "the normal processes of accommodating alleged federal-state-law conflicts." Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1361 (1972). *See also id.* at 1367 (contrasting *Garmon's* "arguably protected" holding with what the Court "has always done outside the field of labor-management relations").

93. However, the Court has insisted that the claim to protection be credible; a frivolous claim of protection will not preempt. *Garmon* declared for preemption "[i]n the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts." 359 U.S. at 246. This formulation appears to have been changed somewhat, in a way less likely to result in preemption, in International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 396 (1986) ("[T]hose claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.")

94. The Court has carved out one categorical exception to the "arguably protected" doctrine—instances where state courts will be permitted to decide in the first instance whether challenged conduct *is* protected. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 199-207 (1978). The exception is applicable only where both (1) the party whose conduct is challenged has access to the NLRB to secure a ruling on the conduct's protected status, but elects not to invoke it, while the party challenging the conduct does *not* have access, and (2) the claim to protected status is weak. *Id.* The state court's freedom to act will terminate if the party whose conduct is challenged

The "protected conduct" story is not complete without noticing another chapter. Section 7 protects only conduct of employees, not of employers. Indeed, the Act nowhere vests employers with protected rights; on its face, it forbids certain employer actions, but protects none.[95] If the "protected conduct" story ended here, states would be free to prohibit any conduct of employers that is not prohibited by Section 8 of the NLRA. For example, states could systematically disarm employers in labor disputes by forbidding them from hiring replacements for strikers or even from operating at all during strikes.[96]

The Court came to recognize that implicit in the NLRA's scheme was a congressionally intended zone for the "free play of economic forces."[97] In *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*,[98] the Court held that in enacting the

files an unfair labor practice charge with the NLRB which would enable the NLRB to determine the conduct's protected status. *Id.*

95. To be sure, the Act declares certain union conduct to be unlawful, and to that extent gives employers a sort of "right" to be free of such conduct. The question addressed in the text is whether, beyond this, the Act *implicitly* protects certain employer conduct from state regulation. The Act does insulate certain employer speech from being condemned as an unfair labor practice, § 8(c), 29 U.S.C. § 158(c), and this likely would be a predicate for inferring federal "protection" of such speech against state regulation. That question arises as well with respect to some forms of union action that are neither protected by Section 7 nor prohibited by Section 8, such as slowdowns, sit-down strikes, and acts of disloyalty while remaining at work. Does Congress' failure to place such conduct in either category leave the states free to regulate? *See infra* note 101.

96. Conversely, states could weaken unions by forbidding those actions which Congress, albeit not protecting in Section 7, conspicuously refrained from prohibiting in Section 8. *See supra* note 95; *infra* notes 98, 101.

97. *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976), quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

98. 427 U.S. 132 (1976). *Machinists* involved a concerted refusal by employees to work overtime in order to put pressure on the employer to come to terms on a renewal of the collective bargaining agreement. Employee "slowdowns," and other forms of disruption by employees while still taking a salary, are not considered protected activity under Section 7, but neither do they violate Section 8. *See generally* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960) (refusals to solicit new business or to perform certain work assignments or other "customary duties," reporting late, etc.). In an earlier decision the Court had held that as such conduct fell outside both the "protected" and "prohibited" prongs of the NLRA, the states were free to regulate it. UAW v. Wisconsin Employee Relations Bd. (*Briggs-Stratton*), 336 U.S. 245 (1949). *Machinists* expressly overruled *Briggs-Stratton*. 427 U.S. at 151.

While *Machinists* involved conduct by a union, its real importance lies with respect to employer conduct. Most union conduct, if not prohibited by Section 8, is protected by Section 7 and thus insulated from state regulation by *Garmon*. But as employers have no Section 7 protection, except for the *Machinists* principle their exposure to state regulation could be widespread. The Court in *Machinists* recognized the significance of its decision to employer conduct:

NLRA—which has as its centerpiece the availability of economic force as the means for resolving negotiating deadlocks—Congress meant to leave available to the parties economic weapons not expressly protected by Section 7 nor prohibited by Section 8.[99] Conduct thus fenced off from state control is said to enjoy *Machinists* protection.

The *Machinists* doctrine depends upon a startling supposition for those familiar with the climate that spawned the Wagner Act: that Congress intended, in passing that Act, to "protect" employers from state law disarmament. Still, the doctrine seems defensible in the limited context that gave it birth, *viz.*, the right of parties to exercise economic weapons against each other free of state interference. Congress armed employees for economic battle on the assumption, then accurate, that employers already enjoyed their weapons (for example, hiring replacements for strikers and continuing to operate despite the strike), because states had not chosen to forbid them.[100] Congress' failure expressly to confer "protected" status on employer weapons likely reflects that it never occurred to Congress that states might attempt to forbid their use. According to *Machinists* doctrine, as Congress armed employees on the assumption that employers were already armed, the statutorily intended balance depends on the truth of that assumption.[101]

> Although many of our past decisions concerning conduct left by Congress to the free play of economic forces address the question in the context of union and employee activities, self-help is of course also the prerogative of the employer because he too may properly employ economic weapons Congress meant to be unregulable . . . . "[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, *American Ship Building Co. v. NLRB*, 380 U.S. [300], at 317 [(1964)] . . . and the State may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees.

Id. at 147, quoting Cox, *supra* note 92, at 1365.

99. The decision in *Machinists* had been presaged, as is noted, 427 U.S. at 144-47, by decisions in *Garner*, 346 U.S. at 499-500, and Local 20, Teamsters Union v. Morton, 377 U.S. 252, 258-60 (1964), although those decisions had not expressly recognized that they were creating a fount of preemption law analytically distinct from the *Garmon* line.

100. Thus, the Wagner Act's declaration of purpose noted an "inequality of bargaining power" between employees and employers, and proposed to "restore equality of bargaining power" by furnishing rights solely to employees. NLRA § 1, 29 U.S.C. § 151 (1982) (second, third and last paragraphs).

101. It is perhaps more controversial that the Court reached the same conclusion as to union conduct neither protected by Section 7 nor prohibited by Section 8. *See supra* notes 95, 97. Congress' failure to protect such conduct might signify that Congress was indifferent to the conduct's availability and thus that state law prohibition would not invade federal interests. Indeed that was the Court's first conclusion in *Briggs-Stratton*, 336 U.S. 245. However, the Court later decided that Congress' real intention was to leave such conduct to the "free play of economic forces." *Machinists*, 427 U.S. at 140 (quoting NLRB v. Nash-

However legitimate its birth, *Machinists* has the potential to grow into an overweight delinquent. The danger inherent in the *Machinists* doctrine is that it infers preemption based on rights that the Court discerns although they are nowhere expressed in the statute. *Garmon*, on the other hand, infers preemption from the rights that *are* stated. Under *Machinists*, although the NLRA nowhere explicitly states a policy preference for parties' freedom to engage in particular forms of conduct, the Court declares that these rights exist despite congressional silence, and then declares that state law is preempted if it interferes with these rights.

The mischievous potential of an unconstrained *Machinists* doctrine is magnified because, unlike *Garmon*, there is no expert agency to inform the process. As the rights protected by the *Machinists* doctrine are not expressed in Sections 7 or 8, they are beyond the NLRB's jurisdiction. Questions of arguable *Machinists* protection are resolved entirely by the courts, and ultimately, if it chooses to involve itself, the Supreme Court. An activist Court could radically alter the landscape by inferring expansive "rights" from the Act's silence.

2. *Prohibited Conduct*

Section 8 declares a variety of acts by employers and unions to be unfair labor practices. Employers are forbidden, *inter alia*, to coerce, restrain or interfere with employees' Section 7 rights, to discriminate against employees for engaging in union activities, and to refuse to bargain in good faith with a properly selected union.[102] Unions are subject to obligations that parallel these[103] and are also forbidden to engage in secondary boycotts and certain forms of organizational and recognitional picketing.[104]

Apart from the Act's preemption of state regulation of conduct the Act protects, the Court in *Garmon* ruled that the Act also preempts state regulation of conduct that the act prohibits or arguably prohibits in Section 8:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate . . . constitute an unfair

Finch Co., 404 U.S. 138, 144 (1971)). Employers could respond by discharging the perpetrators (as the conduct was not protected by Section 7), but states were not free to upset the balance of economic force. *See id.* at 151, which expressly overrules *Briggs-Stratton*.

102. NLRA § 8(a)(1), (3), (5), 29 U.S.C. § 158(a)(1), (3), (5) (1982).

103. NLRA § 8(b)(1), (2), (3), 29 U.S.C. § 158(b)(1), (2), (3) (1982).

104. NLRA § 8(b)(4), (7), 29 U.S.C. § 158(b)(4), (7) (1982).

> labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .
>
> . . . .
>
> . . . When an activity is arguably subject to . . . § 8 of the Act, the States . . . must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted.[105]

In light of the absence of explicit congressional intent respecting preemption, *Garmon*'s blanket ban on parallel state regulation of conduct prohibited by the NLRA is quite remarkable. Ordinarily, the Court has not assumed that Congress, by passing a federal law that prohibits conduct, meant to preempt state law that regulates the same conduct.[106] Nor had the Court discerned such a blanket ban in its NLRA decisions prior to *Garmon*. Rather, it had 'previously addressed on a case-by-case basis whether parallel state regulation of the particular conduct at issue would do violence to interests embodied in the NLRA.[107] Four Justices disagreed with this portion of *Garmon*,[108] and there were still four dissenters a dozen years later when the *Garmon* formula was challenged but reaffirmed by a 5-4 Court.[109]

The Court has in recent years developed a line of exceptions to the ban on parallel state regulation of conduct prohibited in Section 8—instances where states may apply their own law although the conduct in question may also be a violation of Section 8. However, the exceptions have all been of a type: the state is enforcing a general law that happens to be applicable in a labor dispute, not a law focused specifically on labor relations.[110]

105. *Garmon*, 359 U.S. at 244, 245.

106. *See infra* Part II, Section B.

107. *See, e.g.*, United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 65 (1954); UAW v. Russell, 356 U.S. 634 (1958); Machinists v. Gonzales, 356 U.S. 617 (1958). *Garmon* acknowledged this. 359 U.S. at 241.

108. *Garmon*, 359 U.S. at 249-50.

109. *See Lockridge*, 403 U.S. at 302, 309, 332 (1971) (dissenting opinions).

110. Thus, the Court has allowed state law to operate only where the conduct to be regulated "touches interests deeply rooted in local feeling" or is of but peripheral federal interest, and (1) the state rule is one of general applicability, not created specifically to effect a balance of employer-union interests; and (2) the discrete issues the state would decide in resolving the state law claim are significantly different from those the NLRB would decide in resolving the NLRA claim. *See* Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 193-97 (1978); Belknap v. Hale, 463 U.S. 491,

To date, the Court has allowed the following causes of action under state "generic" laws even though the challenged conduct also violated or arguably violated the NLRA: damages and injunction for violence or threat of violence,[111] damages for malicious defamation,[112] damages for intentional infliction of emotional distress,[113] injunction against trespass,[114] and damages for misrepresentation and breach of contract.[115] However, while allowing these exceptions, the Court has in dicta professed continued allegiance to *Garmon* regarding labor-specific state laws that forbid what the NLRA forbids.[116]

B. Garmon's *Ban on Parallel State Regulation of Conduct Forbidden by the NLRA Was Not Inevitable, Nor Is It In Step With The Present Court's General Approach to Preemption.*

It is by no means automatic, simply because Congress has declared conduct unlawful and prescribed consequences for its exercise, that states are no longer free to regulate that same conduct pursuant to state law and with state remedies.[117] Indeed, the availability of state enforcement and state sanctions should have the

509-12 (1983). Not all generic laws will pass muster under this line of exceptions. Some state laws, although not aimed specifically at labor relations, reflect "state policy which seeks specifically to adjust relationships in the world of commerce," International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 297 (1959), and when applied to labor relations implicate the same interests that animate the NLRA. *See, e.g.*, Weber v. Anheuser Busch, Inc., 348 U.S. 468, 481 (1955), discussed in *Teamsters v. Oliver*, 358 U.S. at 297 (state antitrust law); Local 100, United Ass'n of Journeymen v. Borden 373 U.S. 690, 692 (1963)(state tort of interference with right to contract).

111. UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 65 (1954); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

112. Linn v. Plant Guard Workers, 383 U.S. 53 (1966). In order that the prospect of defamation damages not "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act," *id.* at 64, the Court "limit[ed] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice," that is, were "published with knowledge of their falsity or with reckless disregard of whether they were true or false," *id.* at 64-65.

113. Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977).

114. *Sears*, 436 U.S. at 190-98. Because some trespassory picketing is protected by the NLRA, the Court placed stringent limitations on the state's authority to enjoin trespassory picketing. *See supra* note 94.

115. *Belknap*, 463 U.S. at 509-12.

116. *See, e.g., Sears*, 436 U.S. at 196-98; *Belknap*, 463 U.S. at 510-12.

117. As Howard Lesnick has put it: "As to prohibited acts, it is of course clear that only the NLRB may enforce the unfair practice provisions of the Act. A state court plaintiff, however, relies on a state-created cause of action, and it is not immediately apparent why the existence of a similar wrong under § 8 of the federal law should displace state law." Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 474 (1972).

effect of increasing the deterrence of federally prohibited conduct, an effect that seems wholly compatible with the federal interest.[118]

To understand how *Garmon* came to announce a contrary rule, we must review some legal history. Prior to the advent of the Warren Court, the Supreme Court took a cautious approach to the question of whether, when a statute and legislative history are silent, a federal prohibition should be construed as implicitly preempting parallel state prohibitions. In the pre-Warren era, the Court presumed from congressional silence that Congress intended parallel state law to survive. This presumption could be overcome only by a concrete demonstration that the federal scheme would malfunction unless the states were quieted.[119] Blanket preemption rulings were avoided, and the Court instead decided on a case-by-case basis whether state law would be in "actual conflict" with federal law.[120]

This jurisprudence of preemption was well established both in 1935, when Congress enacted the Wagner Act, with its prohibitions of employer conduct, and in 1947, when Congress enacted the Taft-Hartley Act, with its prohibitions of union conduct.[121] Nothing then extant could have forewarned Congress that its silence in these

118. *Cf.* Norris v. Lumbermen's Mutual Casualty Co., 881 F.2d 1144, 1151 (1st Cir. 1989) (whistleblower provision of Energy Reorganization Act does not preempt state wrongful discharge claim; in fact, state law "indirectly promotes" the federal interest by furnishing a stronger deterrent to violation). *See also* English v. General Electric Co., 58 U.S.L.W. 4697 (U.S. June 4, 1990) (Whistleblower provision of Energy Reorganization Act does not preempt state law claim of intentional infliction of emotional distress in retaliation for whistle-blowing).

The statement in the text assumes that there is no concept of "efficient breach" under the NLRA, that is, that employers and unions are not welcome to violate the Act so long as they furnish the prescribed remedies. That the NLRA does not tolerate "efficient" breaches is shown in the text preceeding and accompanying *infra* notes 193-97.

119. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626-28 (1975) [hereinafter, Note, *Shifting Perspectives*].

120. *Id.* at 626-28, 636. *See, e.g.*, Savage v. Jones, 225 U.S. 501, 529-39 (1912) (citing numerous cases; no preemption absent "actual conflict" between federal and state law, *id.* at 533; reaffirming, as the "general principle" that "[i]t should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the state . . . unless its purpose to effect that result is clearly manifested . . . [T]he repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together," *id.* at 537, quoting Reid v. Colorado, 187 U.S. 137, 148 (1902)); Mintz v. Baldwin 289 U.S. 346, 350 (1933) (for Court to infer preemption, Congress' "intention to do so must definitely and clearly appear"); Kelly v. Washington, 302 U.S. 1, 10 (1937) ("The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'"); Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939) (Court will never find preemption unless Congress' purpose to preempt is "clearly manifested").

121. *See* cases cited *supra* note 120.

Acts respecting preemption would generate the sweeping, blanket prohibition of parallel state regulation that *Garmon* later decreed. The contemporary jurisprudential backdrop would have produced the opposite congressional expectation: parallel state regulation, to the extent not in conflict with the NLRA, would survive unless the statute expressly declared otherwise.

The 1935 Congress[122] had enough worries about whether the NLRA's core regulatory scheme would survive a challenge that it was unconstitutionally usurping state prerogatives, without needlessly enlarging that risk by ousting the states from parallel jurisdiction that did not in fact conflict with the federal scheme. Existing Supreme Court decisions in 1935,[123] with which Congress was intimately familiar as it considered the Wagner Act, created serious doubt that the Commerce Clause empowered Congress to regulate the labor relations of employers (other than interstate carriers) at all.[124]

The Wagner Act invaded state sovereignty, and, to the extent state law conflicted, Congress must have expected the state law to

122. The 1935 statute, the Wagner Act, is of particular importance to this Article, because the prohibitions that would preempt the state initiatives discussed herein were enacted in Wagner and have not been changed since.

123. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542-50 (1935); *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918). The Court continued to invalidate federal labor legislation for want of Commerce Clause authority even after the NLRA was enacted. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating, *inter alia*, provisions of Bituminous Coal Conservation Act of 1935 regulating wages, hours, and terms and conditions in bituminous coal mines).

124. "Under the philosophy of constitutional interpretation prevailing prior to 1937, . . . for all practical purposes . . . industrial relations were governable only by the states." Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1298 (1954). Even as Congress debated the bill that would become the NLRA, the Court in *Schechter* struck down the National Industrial Recovery Act on the ground, *inter alia*, that the Commerce Clause gave Congress no power to regulate intrastate acts that indirectly affect interstate commerce. *Schechter*, 295 U.S. at 542-50. Opponents in Congress warned repeatedly that the bill would be held unconstitutional. *See, e.g.*, 79 CONG. REC. 7676-80 (1935) (statement of Sen. Hastings); 79 CONG. REC. 9680 (1935) (statement of Rep. Eaton); 79 CONG. REC. 9691-92 (1935) (statement of Rep. Halleck). So did witnesses for American industry. *See, e.g.*, 1 NLRB, LEGISLATIVE HISTORY OF NAT'L LABOR RELATIONS ACT, 1935, at 431-34; 2 NLRB, LEGISLATIVE HISTORY OF NAT'L LABOR RELATIONS ACT, 1935, at 1630. Indeed, it was not until NLRB v. Jones & Laughlin Corp., 301 U.S. 1 (1937), upholding the constitutionality of the Wagner Act itself, that a bare majority of the Court for the first time announced a more expansive view of the Commerce Clause. The turn-about resulted from Justice Roberts, who had been in the majority in *Schechter* and *Carter*, now voting with Justices who had been dissenters in those cases. The new dissenters in *Jones & Laughlin* protested: "The Court, as we think, departs from well-established principles followed in *Schechter Corp. v. United States*, 295 U.S. 495 (May, 1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (May, 1936)." 301 U.S. at 76.

fall. However, if we attempt to "reconstitute the gamut of values"[125] that prevailed in 1935, we are not likely to find the preemption of parallel state regulation where there is not an actual conflict. To argue that congressional intent respecting preemption went this far, when Congress was insecure even that the core legislation would survive Commerce Clause challenge, is to attribute to Congress, with no support in the legislative materials, an appetite for gratuitous provocation of the judiciary and endangerment of the entirety of the Wagner Act.

Following passage of the NLRA, the NLRA preemption rulings until *Garmon* reflected the more cautious interpretative approach that had prevailed at the time of enactment. As Archibald Cox has written, "until 1947 there was pretty general agreement that Congress had enacted no significant inhibition" on the applicability of state labor laws.[126] Even thereafter, the cases until *Garmon* determined on a case-by-case basis whether the precise form of state regulation would infringe upon federal interests and preempted only where it did.[127] In *United Construction Workers v. Laburnum Constr. Corp.*,[128] for example, decided five years before *Garmon*, the Court upheld a damage award under state law in favor of an employer who abandoned certain projects employing non-union personnel when threatened with violence by union officials. The rationale in the Court's opinion was not that violence was a matter of uniquely local interest and that the state law was generic rather than labor-specific (the revisionist rationales for the *Laburnum* opinion proffered by the *Garmon* Court[129]), but rather that Congress contemplated parallel state regulation of federally prohibited conduct unless federal interests would be threatened by that course.[130] The *Laburnum* Court relied in part upon the following language in Section 10(a) of the NLRA, which it understood to make the federal remedy supplementary to other remedies then extant:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice

125. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620 (1967).

126. Cox, *supra* note 124, at 1299. The Court prior to 1947 had held that state law regulating conduct protected by the NLRA was preempted. *See supra* note 87. Cox was referring to state laws regulating conduct *prohibited* by the NLRA.

127. *See supra* note 107 and accompanying text.

128. 347 U.S. 656 (1954).

129. 359 U.S. at 248-49 n.6. The dissenters in *Garmon* declared the majority "mistaken" in identifying those as the rationales of *Laburnum*. *Id.* at 250.

130. 347 U.S. at 666-69.

> (listed in section 158 of this title) affecting commerce. This power *shall not be affected by* any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.[131]

This language appeared in the Wagner Act and has not been changed since. It plainly declares the independence of the NLRA remedy from any other. But the *Laburnum* Court reasoned that this provision would not have been drafted in this way if Congress contemplated that the NLRA remedy would be not only independent of state law, but exclusive and preemptive of state law; the language reflects an expectation that parallel state regulation would continue.[132] "There is no declaration that this procedure is to be exclusive."[133]

The turnabout in *Garmon*, issued a quarter century after Wagner was enacted, reflected the more adventurous judicial approach to preemption questions that the Warren Court was then ushering in. As one writer has observed, this "activist era witnessed the birth of additional preemptive bases premised on considerations of extrastatutory policies which the Court imputed to Congress."[134] The

131. 29 U.S.C. § 160(a) (1982) (emphasis added) (discussed in *Laburnum*, 347 U.S. at 667).

132. *Laburnum*, 347 U.S. at 667 n.9. The *Laburnum* Court also relied upon the absence of any "declaration" in the statute that the enforcement procedure of Section 10 "is to be exclusive," *id.* at 667; legislative history of the Taft-Hartley Act suggesting that Congress understood Section 10 to be supplementary to existing state law, *id.* at 667 n.9, 668-69; and the unlikelihood that Congress in prohibiting conduct meant to "immuniz[e]" the regulated parties against state law which went beyond the federal floor, given that states had until enactment been free to regulate and the purpose of the Act was to "increase, rather than decrease, the legal responsibilities of" those regulated. *Id.* at 666-67. None of these indicators of congressional intent were mentioned in *Garmon*, nor have they been noticed in the Court's post-*Garmon* jurisprudence.

Only a year before *Garmon*, the Court characterized as "wooden logic" the proposition that parallel state regulation of conduct that is an unfair labor practice under the NLRA is automatically preempted. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). An employee had lost his job because he had been expelled from union membership on grounds that might be actionable under both state law and the NLRA. The Court, noting that the Board could award only backpay, while the state could award "damages for mental or physical suffering," was unwilling to find the state claim preempted. The key was that, although there was federal-state overlap, the risk of interference with national labor policy was "remote" and the Court would not find preemption "without a more compelling indication of congressional will." *Gonzales*, 356 U.S. at 620-21. *Gonzales* was later criticized and limited to the point of virtually being overruled, in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), and rightly so, for the union's conduct was arguably protected and thus was on a continuum. I cite it as a reflection of the Court's cautious pre-*Garmon* attitude, not for the wisdom of the precise holding.

133. *Laburnum*, 347 U.S. at 667.

134. *See* Note, *Shifting Perspectives*, *supra* note 119, at 634.

issue was no longer whether conflict between state and federal policy was "actual" but whether it was "potential." There was now a presumption *in favor of* preemption wherever there was "potential conflict," which could be overcome only by "an affirmative congressional indication of tolerance of concurrent state regulation."[135] In discerning potential conflict, the Court's deference to the intent of Congress was "strained at best"; the Court, in an "implicit assumption of independent preemptive authority," resolved preemption issues by an explicit evaluation of policy considerations.[136] And "[t]he most consistent and extensive resort to policy rationales occurred in the labor law cases," with *Garmon* perhaps the most dramatic instance.[137] The following passage from *Garmon*, rationalizing prior decisions from the Court's new perspective, is typical of the Warren Court's adventurous disposition:

> To be sure, in the abstract these problems [of NLRA preemption] came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase,

135. Note, *Shifting Perspectives*, *supra* note 119, at 636-38. While labor cases are the most dramatic evidence of this shift in emphasis, *see* notes 137 and 138 and accompanying text, the shift is also evident in contemporaneous non-labor cases. *See, e.g.* Pennsylvania v. Nelson, 350 U.S. 497, 502-507 (1956); Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959).

136. Note, *Shifting Perspectives*, *supra* note 119, at 635-38. *See* cases cited notes 135, 137, 138.

137. Note, *Shifting Perspectiver*, *supra* note 119, at 634, 636 & n.83. The Warren Court was, at the same time, accomplishing equally sweeping preemption of state law with respect to other aspects of federal labor law. From the simple declaration in Section 301 of the LMRA that federal courts could entertain suits for breach of collective bargaining agreements, the Court inferred that Congress intended the courts to fashion a common law of substantive rules to regulate such agreements, Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), and then held that that federally-determined common law preempted entirely the application of state law to such agreements, Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). From the NLRA's imposition upon unions and employers of a duty to bargain collectively over wages, hours, and other terms and conditions of employment, coupled with Section 8(d)'s declaration that that duty does not require either side to make concessions, the Court implied preemption of state laws that would dictate terms and conditions of employment for unionized workplaces. "We believe that there is no room in this scheme for the application . . . of . . . state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state." International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959) (citations omitted). As indicated in notes 83 and 162, the Burger-Rehnquist Court's changed attitudes have led to decisions that substantially narrow the holding of *Teamsters v. Oliver*.

> "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, 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.[138]

The turnabout did not spring full-born from the Court. It was presaged by the work of a new school of scholars who championed a more activist judicial role enlarging federal power at the expense of the states. Prominent among these was Archibald Cox, who, in a series of brilliant articles[139] that profoundly influenced the Court's labor preemption jurisprudence,[140] advocated the presumption in favor of NLRA preemption. His argument was a clarion call for judicial knitting of a federal labor policy that preempted without authorization from Congress, indeed in open defiance of what Cox assumed was the mind-set of the legislators who had enacted the statute.

Cox disdained the "fashion" of Supreme Court cases to "treat" the "intent of Congress," as "the controlling consideration in determining what state regulation has been superseded by federal law."[141] He warned that any "attempt to find evidence of some specific legislative intent [respecting the preemptive effect of the NLRA] in the statute, committee reports, or debates on the floor . . . is doomed to failure. . . ."[142] Those who voted for the NLRA,

138. *Garmon*, 359 U.S. at 239-40.

139. Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950) [hereinafter Cox (1950)]; Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954) [hereinafter Cox (1954)]; Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958) [hereinafter Cox (1958)]; Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) [hereinafter Cox (1972)]; Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L. J. 277 (1980) [hereinafter Cox (1980)].

140. Four of the Court's most important preemption rulings, *Garner*, *Garmon*, *Machinists*, and *Sears*, each adopted precisely the change in course that Cox had previously advocated in his articles.

141. Cox (1950), *supra* note 139, at 224.

142. Cox (1954), *supra* note 139, at 1314-15. The quoted passage ended with the words "save in a few inconsequential cases," an allusion to the express legislative history that underpinned the anti-preemption ruling in Algoma Plywood Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949) (states could outlaw a particular form of conduct otherwise protected by the NLRA, the closed shop), and the express anti-preemption provision in Section 14(b) of the statute, 29 U.S.C. § 164(b) (1982) (allowing states to ban the union shop). Because these were limitations on conduct otherwise protected by Section

if they were to have focused on the preemption issue, which likely they did not, would have been divided, some wanting Section 8 to be the exclusive source of the regulated party's obligations, others wanting states to be free to regulate in tandem with Section 8.[143] He opined that if one were "to guess at the spontaneous answer that would have been given by an imaginary composite congressman to whom the question was put" at the time of the statute's consideration, "we should all have to agree that there was no intent to forbid the states to apply common law decisions or statutes. . . ."[144] But "all such explanations . . . are highly speculative—too speculative to base adjudication upon them."[145]

Instead, Cox advocated, the Court was free to decide itself about preemption so long as Congress had not expressly declared a contrary intent. For Cox, the "intent of Congress" was a "metaphor" that served as a "useful reminder" that if Congress had made its intention "reasonably discernible," the Court was required to follow it.[146] But where the legislative intent was not discernible, "policy considerations ought to be decisive."[147]

There can be little doubt as to the persuasiveness of Cox' thinking to the Court. Cox invited the Court to preempt in the name of a comprehensive federal labor policy which he elegantly portrayed,[148] and to do so without the need for congressional validation. The presumption, for Cox, ran the other way: "[T]he states should be excluded from the entire area except where

7, express evidence of congressional intent to allow state action was required, in order to overcome the assumption the Court has *always* applied that states are not free to regulate conduct protected by federal laws, *see supra* text accompanying notes 87-90.

143. Cox (1950), *supra* note 139, at 224-27.

144. Cox (1954), *supra* note 139, at 1314-15.

145. Cox (1950), *supra* note 139, at 227.

146. Cox (1954), *supra* note 139, at 1348.

147. *Id.* at 1308 n.39. "Problems of federalism ought to be decided upon explicit consideration of the factors entering into a determination of policy, viewed from the standpoint of one sympathetic to the national labor policy embodied in existing legislation." *Id.* at 1348. Cox, then, was a clear forerunner of the "new legal process" scholars whose thesis I have previously described. *See supra* note 75.

148. Ironically, Cox was more persuasive than he intended. While his vision of preemption embraced only subjects that had at their core the relation between employers and unions, the Court in *Lockridge* took his formula and carried it over to a dispute that touched the employment relationship only peripherally while at its core involving the relationship between a union and its members. Motor Coach Employees v. Lockridge, 403 U.S. at 292-97 (1971). Cox lamented this "woodenly mechanical" application of his thesis to an area in which it had no "rational basis in policy." Cox (1972), *supra* note 139, at 1370.

Congress has explicitly *authorized* them to intervene."[149] The Court in *Garmon* adopted the rule of preemption Cox had proposed.[150]

Cox' thesis, and the *Garmon* rule, depend on a view of judicial activism that is contrary to the present Court's thinking. The Burger-Rehnquist Court, with its greater sensitivity to state interests, has returned to the attitude of the pre-Warren Court on questions of preemption generally.[151] The Court starts with a presumption that when Congress legislates on subjects that have been traditionally regulated by state law and says nothing about the preemptive effect of its legislation, Congress intends its prohibitions to supplement those existing under state law, not to displace them.[152] The presumption can be overcome, but only by a "persuasive" demonstration that the congressional scheme would be significantly frustrated by parallel state regulation; that showing must be made and is not assumed.[153]

C. *The More Cautious Approach of the Current Court to Preemption Issues Is Constitutionally Correct*

Cox viewed the choice between presumptions for or against preemption as a matter of "fashion," of judicial preference rather than constitutional dictate. I submit that this view is not correct. Important constitutional interests, respecting not only federalism but also the proper roles of the legislative and judicial branches of the federal government, dictate that only a presumption *against* preemption is proper. I suggest that the following considerations demonstrate that the present Court's approach is faithful to the constitutional scheme, while that of the Warren Court, championed by Cox, was not.

149. Cox (1950), *supra* note 139, at 230 (emphasis added).

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

151. Note, *Shifting Perspectives*, *supra* note 119, at 642-49.

152. There is a "presumption against finding preemption of state law in areas traditionally regulated by the States." California v. Arc America Corp., 109 S.Ct. 1661, 1665 (1989). *See also* Exxon Corp. v. Maryland, 437 U.S. 117, 130-32 (1978); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978); Merrill Lynch v. Ware, 414 U.S. 117, 139 (1973).

153. *See, e.g.*, English v. General Electric Co., 58 U.S.L.W. 4679 ("preemption is ordinarily not to be implied absent an 'actual conflict'"); *Merrill Lynch*, 414 U.S. at 139 (preemption requires "persuasive reasons"; if Congress has not "unmistakably so ordained," it requires a showing "that the nature of the regulated subject matter permits no other conclusion"); Chicago & N.W. Transp. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981); Commonwealth Edison v. Montana, 453 U.S. 609, 634 (1981); *Arc America*, 109 S.Ct. at 1665 (no preemption "unless that was the clear and manifest purpose of Congress"); *Exxon Corp.*, 437 U.S. at 130 (Court's decisions "enjoin seeking out conflicts between state and federal regulation where none clearly exists").

First, in our federal system, so long as a state law is consistent with the federal Constitution, the state is free to enforce it. The state may do so unless Congress, exercising its enumerated powers, decides to preempt it. There is no place in our system for federal courts to veto enforcement of constitutionally valid state law. If a state law is to be preempted, then, it can only be because Congress "intended" to displace state law.

Second, when Congress intends to preempt parallel state regulation, it has the power to say so. When it enacts a statute, Congress focuses on an express subject area and surely knows the status of the states' regulation in that area. It should take powerful evidence to persuade us that Congress, without saying so, intends to abrogate a state's right to forbid conduct within its borders on a subject historically within its control. The likelihood is that Congress would have said so were that its intent.[154]

Third, the presumption against silent preemption is more than just a predictor of Congress' unexpressed intent, it is also a means of compelling Congress to focus on federalism concerns in the legislation it enacts. When a statute is silent as to preemption, there is a significant chance that Congress did not think about the question whether state law should survive, *and thus did not vote on the question*.[155] (That is, in fact, what Cox and the Court in *Garmon* assumed to be the case as to the NLRA.[156]) But if Congress does not vote, the authority from the one branch of government authorized to invalidate state legislation is absent. For the Court to guess that Congress intended preemption is to run the risk, if the guess is wrong, that constitutionally permissible state law will be invalidated without a decision by Congress and solely by a branch that lacks constitutional power to dictate such a result.[157]

154. Consider, in this light, the language of Section 10(a) of the NLRA. *See supra* text accompanying note 131.

155. I readily acknowledge that Congress often *implicitly* votes to preempt by enacting a federal law with which state law is incompatible. For this reason there is only a "presumption" against silent preemption, not a ban. The text addresses the common situation where the two might subsist side-by-side without violence—as I will later show is the case with non-continuum subjects under the NLRA.

156. *See* text accompanying *supra* notes 138, 143-44.

157. This point applies more generally than just to preemption cases. It applies whenever Congress by a statute prohibits private action that until then was unregulated. The Court has no independent authority to forbid private action. When it construes a regulatory statute more broadly than Congress intended, it "legislates" prohibitions in contravention of the separation of powers. Accordingly, statutes of this type—those that withdraw private autonomy—should be construed with appropriate caution.

This thesis best explains the Court's decision in United Steelworkers v. Weber, 443 U.S. 193 (1979). Prior to 1964, voluntary private affirmative action was lawful. The issue in

Finally, the costs to federalism values are greater when the Court guesses wrongly in favor of preemption than when against. Of course, the Court must choose one way or the other when the statute is silent. But when the Court guesses wrongly against preemption, the only institution injured is Congress, whose "intent" has been thwarted. The states are not harmed, for their laws remain in force. Congress can right the injury to itself by acting again, supplying the explicit evidence of preemptive intent that was lacking in its initial legislation. Certainly, institutional factors sometimes bar Congress' reenacting a proposition once thwarted by the Court—especially in a field as politically charged as labor law—but those barriers are internal to the injured body and within its own control.[158]

By contrast, when the Court chooses wrongly in favor of preemption, it thwarts not only Congress' will, but also the will of the states whose legislation the Court invalidates. And the states are without power to repair the damage the Court has done. Congress could enact a statute reinvesting states with power to act, but the same institutional barriers would stand in the way, and in this case they would frustrate not only Congress but the states as well. Unless Congress can be energized to act affirmatively, the Court will have succeeded in overturning valid state law. This will be true even if Congress would never have voted to overturn that state law.[159]

Weber was whether Congress, by its enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1982), had intended to extinguish private parties' freedom to engage in that practice. To the limited extent that the legislative history focused on that question at all, it appeared to point against such a prohibition. 443 U.S. at 207 n.7 (quoting Rep. MacGregor). More importantly, the emotive "punch-line" of the *Weber* opinion appears to have embraced the interpretative approach advocated here: "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. at 204, (quoting 110 CONG. REC. 6552 (1964) (statement of Sen. Humphrey)).

158. The objection may be voiced that Congress might reenact the statute yet the President veto it, thus depriving Congress of unilateral power to reinstate its earlier will. But, of course, Presidential acquiescence was needed and obtained the first time as well. This fact simply highlights the need for a slight refinement in the point I make in the text. The "institution" with power to preempt state law is Congress plus (or overriding the veto of) the President, *viz.* the two elected branches. That is the institution that acted the first time, and the same institution can reenact. The refinement in no way weakens the main point, which is that the non-elected judiciary has no independent power to preempt.

159. The text understates the degree of the difference. When the Court errs against preemption, all Congress need do is reenact a law that (by hypothesis, else the Court would not have erred) it already intended to enact once before. When the Court errs in favor of preemption, Congress must for the first time vote to empower the states (for Congress simply did not address the question the first time around).

The foregoing is not to say that the Court was wrong in *Garmon* in cutting a wide swathe for conduct that states would not be free to regulate. This Article challenges the opinion's methodological approach, not the result reached on the precise issue before it. Even the more cautious approach to preemption that prevails today with respect to federal laws generally would justify preemption when conduct is on a protected-prohibited continuum. Thus, the Court was right to preempt the state laws that were challenged in *Garmon* and its progeny, because those laws were directed at conduct which is on a continuum. However, the breadth of the preemption *rule* belatedly adopted in *Garmon* is not sacrosanct, and continued inquiry as to possible overbreadth is entirely appropriate.

III. The Non-Continuum Thesis Elaborated in the Context of Discharges of Union Activists during Organizing Campaigns

The structure of my basic argument is as follows. The rationales for federal preemption of state labor law given in the cases elaborating the *Garmon* doctrine have force only when applied to state regulation of conduct on a protected-prohibited continuum. These rationales do not justify preemption of state regulation of NLRA-prohibited conduct that is not on such a continuum. Because no case has yet tested the preemptive force of *Garmon* in non-continuum contexts,[160] one may easily mistake the overbroad rhetoric of *Garmon* for a holding that state regulation of non-continuum conduct is also preempted.[161] However, I hope that

160. The only case that does not fit my thesis is Marine Eng'rs Beneficial Ass'n v. Interlake Steamship, 370 U.S. 173 (1962). *See supra* note 17. In that case, the union's conduct was arguably prohibited but had no claim to NLRA protection, yet the Court held state regulation preempted. The holding in *Interlake* was substantially undermined in a later decision arising out of the same organizational campaign, where the Court for the first time realized that the principal rationale underpinning *Garmon* is absent when the challenged conduct has no claim to NLRA protection. For a discussion of Hanna Mining Co. v. Marine Eng'rs Beneficial Ass'n, 382 U.S. 181 (1965), see *infra* notes 184-87 and accompanying text.

161. The Burger-Rehnquist Court has not had occasion to confront the overbreadth of *Garmon*'s declaration that state laws consciously regulating labor relations may not be enforced if the conduct they regulate is prohibited by Section 8. In only one recent case has that principle led to preemption, and that case would also be preempted under the narrower approach I suggest in this Article. Local 926, International Union of Operating Eng'rs v. Jones, 460 U.S. 669 (1983). Because the conduct in *Jones* was also arguably protected, 460 U.S. at 683, and because it lay on a protected-prohibited continuum, it would be preempted under the approach I suggest. The Court has not recently had a case in which the conduct in question, while violative of Section 8, had no claim to protection under the NLRA. It is just such a case that, because it would not be on a continuum, would present for consideration the overbreadth of *Garmon*'s ban on parallel state regulation.

my analysis will unmask that mistake and indicate to state courts and legislatures the permissibility of regulating non-continuum conduct. This analysis also indicates that federal courts should consider reconciling *Garmon*'s broad rhetoric with its narrow rationales when such state initiatives are challenged.[162]

To recapitulate the meaning of two key terms: conduct on a continuum is conduct that the NLRA protects up to a point and prohibits beyond that point. A classic example of conduct on a continuum is picketing, which the NLRA prohibits in certain respects but otherwise protects. *Garmon* correctly holds that state regulation of picketing is preempted because of the risk that state adjudicators will draw the line between protection and prohibition differently from the NLRB. Conduct not on a continuum is conduct that the NLRA regulates, but not in this particular manner. Conduct not on a continuum is prohibited in some of its manifestations, but federal law does not protect it otherwise.

I present as our paradigmatic example of conduct not on a continuum the following case of anti-union discharge. An employee at a non-union workplace, who has openly supported the union during an organizing drive, is discharged on the stated ground of sloppy work practices. The employee believes that the reason given is a pretext and that the true motivation behind the discharge is her support of the union. She sues in state court on a tort cause of action, alleging that a discharge motivated by anti-union animus violates the state's public policy.

This suit unquestionably would be preempted under traditional *Garmon* analysis. If anti-union animus is proven, the alleged conduct would constitute a violation of Sections 8(a)(1) and 8(a)(3). To resolve this claim, a state court would have to regulate conduct which is prohibited or arguably prohibited by the NLRA. Traditional

162. The Burger-Rehnquist Court's changed approach to preemption has already resulted in two incursions on the sweep of *Garmon*. The Court has created exceptions to the rule that state courts cannot resolve claims of "arguable protection," see *supra* notes 93-94 and accompanying text, and has greatly broadened the areas in which states may enforce "generic" laws that regulate the same conduct as is prohibited by Section 8 of the NLRA. *See supra* notes 110-15 and accompanying text. In both instances, vociferous dissents have chronicled the erosion of the pro-preemption preference that underlay *Garmon*. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 215 (1978) (dissenting opinion of Brennan, J.); Belknap v. Hale, 463 U.S. 491, 528-36 (1983) (Brennan, J. dissenting). The changed attitude is also reflected in the Court's substantial departure from the holding of Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959), in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) and Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). *See supra* notes 83 and 137.

Garmon analysis declares such regulation to be beyond the state's reach.[163]

However, discharge for union activism differs from those subjects previously found preempted under *Garmon* analysis. The employer's conduct is not on a continuum of federal interest. Congress has forbidden certain types of discharges, but has not protected the rest. The NLRA forbids discharges motivated by anti-union animus and those in retaliation for concerted activity. However, the NLRA does not protect the employer's right to discharge during organizational drives for reasons other than those condemned by federal law.[164] Even the most extreme proponent of federal preemption would not suggest that Congress in 1935 intended to mark out union and concerted action as the sole impermissible grounds for discharge and to confer upon employers blanket protection against state law that would prohibit discharges on grounds unrelated to the NLRA. The states are free to forbid discharges for any number of reasons, such as refusal of sexual advances, whistle-blowing, refusing to violate the law, and filing workers' compensation claims. Suppose that a state legislature imposed extreme limits upon employers; for example, it declared that sloppy work practices is not a ground for discharge. While employers would have an appealing case against the reelection of those legislators, they would have none for federal preemption of the law.

Nonetheless, because the NLRA does prohibit some types of discharge, the literal words of the *Garmon* rule would still apply to our hypothetical situation: the regulated conduct is arguably prohibited by the NLRA. However, the considerations that impelled that rule do not apply. To understand why, we must recount the rationales that the Court put forward for *Garmon*'s blanket preemption of parallel regulation of prohibited conduct, and we must explore whether those rationales justify preemption of state regulation of discharges in retaliation for union organizational activity.

Garmon announced a rule of general applicability: conduct prohibited by Section 8, equally with conduct protected by Section 7, is beyond the reach of state law. Not one sentence in *Garmon* suggested a distinction between the two. The absence of separate treatment is remarkable, for four Justices concurred in the holding of *Garmon* solely on the ground that "the Union's activities . . . may

163. *See supra* notes 10, 105 and accompanying text.

164. Except for a narrow and segregable category. *See infra* note 188.

fairly be considered *protected*."[165] The four concurring Justices expressly disagreed with that portion of the majority opinion which held that, in the absence of a claim to federal protection, preemption would be warranted simply because conduct was federally prohibited.[166]

A dozen years later, the Court provided in *Motor Coach Employees v. Lockridge*[167] a more explicit defense of preemption based on federal prohibition. In another 5-4 decision, the majority did not accept what it understood to be the dissenters' argument that at least in some cases state power to regulate conduct "that is within the compass of the [NLRA] should be unlimited, except by the obvious qualification that States may not punish conduct affirmatively protected by federal law."[168] The *Lockridge* majority repeated and amplified the rationales that *Garmon* had given for preemption of parallel state regulation of prohibited conduct.

Lockridge cited administrative convenience and judicial economy as one more rationale for the blanket ban on parallel state regulation. Conceding that there might be at least some instances where such state regulation would not jeopardize federal interests, the *Lockridge* majority reasoned that a clear, predictable preemption rule would be preferable to case-by-case determinations of whether state regulation would impair federal interests:

> Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. The Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.[169]

The *Lockridge* Court's concern for predictable rules and prevention of repeated Supreme Court involvement is now obsolete. The Court in subsequent decisions has wholly undermined this concern by making numerous incursions on *Garmon*. In recent years

165. 359 U.S. at 249 (emphasis added) (Harlan, J., joined by Clark, Whittaker and Stewart, JJ.).
166. *Id.* at 250.
167. 403 U.S. 274 (1971).
168. *Id.* at 288 n.5.
169. 403 U.S. at 289-90.

the Court has undertaken, if not a case-by-case, certainly a category-by-category analysis of types of state regulation, and has declared states free to regulate in a number of areas which overlap with NLRA prohibitions.[170] These results have emerged from the process of close scrutiny that the *Lockridge* Court had hoped to pretermit. Exemplifying the current attitude is this passage from *Farmer*:

> [T]he cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. . . . [O]ur cases demonstrate that the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the national labor policies of concurrent judicial and administrative remedies.[171]

If *Lockridge*'s administrative convenience rationale were not obsolete, it would constitute an argument *against* preemption of non-continuum cases. In such cases, the Court cannot declare blanket preemption. For example, the states certainly are free to regulate a wide range of discharges. The most that a fanatic adherent of *Garmon* could claim is that states cannot regulate those discharges that *are* prohibited or arguably so by the NLRA. However, if the Court were to preempt those and only those, line-drawing would be inevitable. Courts regularly would be required to separate the permissible zone of state regulation from the impermissible. In non-continuum cases, declaring *against* preemption is the likelier path to legal clarity and ease of judicial administration.

If such cases are to be preempted nonetheless, it must be for more substantial reasons. I turn, then, to the substantive reasons for preemption articulated in *Garmon* and *Lockridge*. The first rationale declared in *Garmon* was a concern that the conduct the state court thought prohibited by the NLRA—picketing by a union—might actually be protected by the NLRA. The *Garmon* Court found that parallel state regulation on an assumption of federal prohibition posed a serious threat to arguably protected conduct. Thus, the Court mandated that the state was not free to regulate until the

170. *See supra* notes 110-15 and accompanying text.
171. Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 300-01 (1977).

NLRB had located the status of the picketing under the NLRA.[172] The Court later declared that this risk of state infringement on protected activity is "the greatest threat against which the *Garmon* doctrine guards. . . ."[173]

However, the Court in *Garmon* and *Lockridge* inferred from the NLRA's enforcement scheme another, broader reason for preemption. Congress had not only declared prohibitions; it also had created a unique mechanism for enforcing those prohibitions, a mechanism which relied upon an expert administrative agency, unusually short time limits, carefully prescribed procedures, and constricted remedies. The Court in *Lockridge* inferred a preemptive intent from Congress' decision to channel enforcement of the NLRA's prohibitions through such a mechanism:

> Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.
>
> Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. . . . The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the [NLRA] . . . .
>
> . . . Thus, that a local court . . . may purport to apply legal rules identical to those prescribed in the federal Act . . . . does not mean that all relevant potential for debilitating conflict is absent.[174]

172. For a fuller discussion, see *infra* notes 182-83 and accompanying text.

173. Hanna Mining Co. v. Marine Eng'rs Beneficial Ass'n, 382 U.S. 181, 193 (1965). Cox, writing a year before *Garmon* and discussing how *Garmon* ought to be decided, observed that "the main risk of allowing parallel remedies is that state tribunals would forbid labor activities upon the ground that the state law duplicated the federal statute, when in truth the activities would not have been unlawful under the NLRA." Cox (1958), *supra* note 139, at 1067.

174. *Lockridge*, 403 U.S. at 287-89 (quoting Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953)). Howard Lesnick, writing shortly after *Lockridge*, has provided the most lucid articulation of this facet of the Court's reasoning. Lesnick, *Preemption Reconsidered*, *supra* note

But Congress' creation of a specialized scheme for enforcing the NLRA's prohibitions does not justify concluding that non-continuum cases cannot also be processed under parallel state law through distinct state processes. In *Garmon* and *Lockridge* it was the consequence of dual regulation that concerned the Court—that state courts and the NLRB might reach different outcomes, provide different remedies, or allow different time limits in the prosecution of cases. Each of the Court's concerns was entirely warranted in the context of conduct on a continuum but is not warranted in the context of wrongful discharge.

I turn first to the Court's concern that the outcome of state court adjudication might differ from that of the NLRB. That concern might be stated as follows. If states are allowed to engage in parallel regulation there is a risk that they will invalidate conduct that federal law does not prohibit and exonerate conduct that federal law condemns. In *Garmon* and *Lockridge*, the Court echoed this concern specifically in the context of conduct that the union claimed was protected by the NLRA, but that its adversary claimed was prohibited by the NLRA. The Court reasoned that a state court might mistakenly conclude that federal law prohibits conduct which it in fact *protects*. As a fine line divides prohibited from protected conduct, it would be sheer fortuity if a state tribunal were to locate the line as the NLRB would. Every divergence would risk an interference with protected conduct that Congress plainly meant to avoid. Moreover, the mere possibility that states might mistakenly regulate protected activity could chill a party's willingness to engage in protected activity.

The risk of error when conduct is on a continuum in labor law is enormous. In many areas under the NLRA, the line between protection and prohibition is hard to locate. This demarcation is particularly difficult in cases of picketing and boycotting—the very conduct that gave birth to the *Garmon* rules. The Taft-Hartley Act amendments to the NLRA made "secondary" activity violative of Section 8 while preserving the protected status of "primary" activity.[175] The Court has explained that "[i]mportant as is the

117, at 476.

175. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1982). In simplest terms, "primary" activity is the application of economic pressure upon the employer with whom the union has its dispute, while "[a]t its core, the secondary boycott is the application of economic pressure upon a person with whom the union has no dispute regarding its own terms of employment in order to induce that person to cease doing business with another employer

distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line."[176] Resolution of such cases requires "the drawing of lines more nice than obvious," and there is no "quick, definitive formula" that provides a "comprehensive answer."[177] Nor will lines always be drawn in the same place: the Supreme Court has on occasion radically altered the calculus that appeared to have been established by its prior decisions,[178] and the NLRB's penchant for reversing its own legal interpretations is notorious. Parties thus often must act without certainty of the legal principles that will govern their conduct.[179] It is little wonder that in *Garmon* and its progeny the Court declined to allow states to regulate conduct the states deemed to be prohibited by the NLRA; the risk that they would be regulating *protected* conduct was substantial.

with whom the union does have such a dispute." A. COX, D. BOK & R. GORMAN, LABOR LAW 617 (10th ed. 1986).

176. Local 761, International Union of Elec. Workers v. NLRB, 366 U.S. 667, 673 (1961).

177. *Id.* at 674.

178. *Compare* NLRB v. Fruit & Vegetable Packers (*Tree Fruits*), 377 U.S. 58 (1964) *with* NLRB v. Retail Store Employees Union (*Safeco*), 447 U.S. 607 (1980); NLRB v. International Rice Milling Co., 341 U.S. 665 (1951) *with* International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) *with* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

179. Beyond this, parties must also grapple with uncertainty as to how the Board will find the facts should their conduct be challenged. Frequently, the outcome of a challenge to an employer's or union's behavior will turn upon the "object" for which the party has undertaken the activity, or upon whether there was a "business necessity" (and not merely a business convenience) for the actions taken. The NLRA may protect or prohibit the same conduct depending upon an ultimate finding as to state of mind, or as to the strength of an economic justification.

Thus, Section 8(b)(4) declares picketing and boycotting unlawful only where, *inter alia*, the union has acted with an "object" proscribed in that Section. Moreover, in a broad category of cases, employer conduct that is not impermissibly motivated, but is inherently destructive of employee rights, will stand or fall depending upon the strength of the employer's business justification. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

Indeed, some NLRA doctrines compel parties to decide whether to act in circumstances where they are unlikely to know or to be able to find out the facts that will ultimately determine whether the Board will adjudge their contemplated conduct to be protected or unlawful. For example, a union is entitled to picket in front of a neutral retail store asking customers to refrain from buying a struck product sold in that store, *Tree Fruits*, 377 U.S. 58 (1964), unless the picketing "reasonably can be expected to threaten neutral parties with ruin or substantial loss," *Safeco*, 477 U.S. at 614 (1980). "Resolution of the [latter] question in each case will be entrusted to the Board's expertise." *Id.* at 615 n.11. In a wide range of cases, even a party possessed of all the relevant information would be uncertain whether picketing would be protected or unlawful. The union's problem is compounded because it does not possess all the information that the Board might deem relevant in determining the severity of the prospective loss to the neutral retailer or others.

The analytical groundwork for *Garmon*'s preemption of parallel state regulation of prohibited conduct was laid in Justice Jackson's earlier opinion for the Court in *Garner*.[180] There, a union was engaged in picketing at an unorganized workplace—picketing that might, depending on its purpose, violate the NLRA. The picketed employer sought an injunction in state court on the ground that the picketing violated a state labor relations statute. The Supreme Court held that the picketing was preempted. The Court determined that the conduct might be unlawful under federal law, and it might not; if not, it was picketing that Congress meant to protect, at least in the sense that it was to be free of state prohibition. To allow state regulation on the state court's determination that the picketing was prohibited by federal law would create an unacceptable danger. The Court reasoned that "experience gives no assurance" that states "will always agree" with the ruling the NLRB might make "as to whether the picketing should continue," and that "there is no indication that the statute left it open for such conflicts to arise."[181]

Garmon, which also involved picketing, was a case of the same character, as I have earlier described.[182] The state courts believed that the union's conduct was prohibited by federal law. On that premise, the state courts felt themselves free to award damages pursuant to state law. In reversing, the *Garmon* Court voiced the consideration that undermined the state courts' premise:

180. Garner v. Teamsters Local 776, 346 U.S. 485 (1953). *Garmon* found the roots of its thesis in *Garner*, see 359 U.S. at 242-43, as did *Lockridge*, 403 U.S. at 287; *Sears*, 436 U.S. at 192-93; and International Longshoremen's Ass'n v. Davis, 476 U.S. at 389-90.

181. *Garner*, 346 U.S. at 499. Cox, too, understood *Garner* to be premised on the concern that states might mistakenly think conduct to be prohibited by the NLRA that is in truth protected. Cox (1958), *supra* note 139, at 1066-67.

182. *See supra* notes 3-10 and accompanying text. With one exception (see *supra* note 17), the Court's other applications of the *Garmon* rule to conduct arguably prohibited by the NLRA involved conduct that also was arguably protected and thus on a continuum. Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963), involved a union's operation of a hiring hall. Such operation would be protected unless the union discriminated on the basis of union membertship in making referrals. In that event, the operation would be prohibited. *Lockridge* involved a union's securing the discharge of an employee for non-payment of dues. 403 U.S. at 277-81. This securing would be protected unless the union had erred in concluding that the employee was delinquent or unless the union discriminated on the basis of union allegiance in compelling payment of dues. In either of those instances, the union's conduct would be prohibited. Local 926, International Union of Operating Eng'rs v. Jones, 460 U.S. 669 (1983), involved a union's effort to prevent the employment of a supervisor whom the employees disliked. These efforts would be protected unless the supervisor's responsibilities included adjusting grievances. In that instance, the efforts would be prohibited, because Congress chose to insulate an employer's choice of grievance-adjustors from union pressure. Local No. 207, International Ass'n of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U.S. 701 (1963), involved the same continuum as *Jones*. 460 U.S. at 677-80.

> The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When 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 National Labor Relations Board if the danger of state interference with national policy is to be averted.[183]

The importance that the Court's concern about risk of state trespass on *protected* conduct played in the development of the *Garmon* doctrine is most dramatically evidenced in the Court's subsequent opinion in *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n*.[184] A union attempting to organize an employer's *supervisors* picketed the employer, and the employer sought an injunction against the picketing under state law. The Court held this application of state law not preempted. The Court began by noting that, as supervisors are not "employees" entitled to the protection of Section 7, "activity designed to secure organization or recognition of supervisors *cannot* be protected by Section 7 of the Act, arguably or otherwise."[185] The Court thus recognized that preemption here could be predicated only on the possibility that the conduct might be forbidden by federal law. With the state court injunction in *Hanna* posing no danger to protected activity, the Court found no justification for preempting the state's prohibition of the union activity. The Court thought remote the possibility that the union's conduct violated Section 8, but reasoned that even if it did, "central interests served by the *Garmon* doctrine are not endangered by a state injunction. . ."[186] This was so because

183. *Garmon*, 359 U.S. at 245. Cox, writing while *Garmon* was pending before the Supreme Court, urged the Court to preempt on this ground: "[S]uch state actions would create substantial risk of imposing liability for conduct which the federal government intended to be legal. . . . Every misinterpretation [of the NLRA by state judges] would involve a small impairment of national labor policy." Cox (1958), *supra* note 139, at 1072.

184. 382 U.S. 181 (1965).

185. *Id.* at 188 (emphasis added).

186. *Id.* at 192-93.

> none of the conduct is arguably protected [by Section 7] nor does it fall in some middle range impliedly withdrawn from state control [*i.e.*, what later came to be known as *Machinists* protection]. Consequently, there is wholly absent the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered.[187]

The Court's opinion in *Hanna* suggests that the concern about conflicting results does not apply to non-continuum conduct.

Let us assume the worst about our hypothetical case, that the state finds a discharge during an organizing campaign to have been motivated by anti-union animus and thus violative of state law, when the NLRB would have found the employer motivated by disapproval of the employee's sloppy work practices. The state would accordingly reinstate the employee and compensate her where the federal tribunal would not.

Despite this outcome, the state's parallel regulation of wrongful discharge does not jeopardize any federal interests because discharges do not lie on a protected-prohibited continuum. While one objective of the NLRA is to prohibit discharges motivated by anti-union animus, the NLRA has no corresponding objective to *protect* discharges.[188] Thus, if a state prohibits discharges that it

187. *Id.* at 193 (footnote omitted). Cox, writing a year before *Garmon*, suggested that this same consideration explains the Court's decision against preemption in *Gonzales* (described *supra* note 132). "In the *Gonzales* case it was conceded that the defendant's action did not involve the exercise of a federal right. The opinion [was] undoubtedly written and should be read in [that] context." Cox (1958), *supra* note 139, at 1062.

188. *Machinists* preemption does protect certain employer discharges. *See supra* notes 98, 101. Some might conclude that this fact means that discharges for union activity lie on *Garmon's* protected-prohibited continuum, and thus are preempted. This conclusion would be in error. *Machinists* protection of employer discharges involves factual and legal contexts very different from those explored in this Article.

During union organizing drives, some employees may resort to economic weapons that the NLRA neither protects nor prohibits, in order to compel employer recognition of the union. *Machinists* states that when employees use these "unprotected" weapons, the employer is privileged to discharge them. *Machinists*, 427 U.S. at 148-49; *see also* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960). The federal interest is in "the free play of economic forces" in these circumstances. *Machinists*, 427 U.S. at 147. The employer's right to discharge is protected by the NLRA only when responsive to this particular type of employee conduct, not protected universally.

My argument here hypothesizes that an employer claims to have discharged the employee for sloppy work practices (*see supra* text preceding note 163), not for engaging in unprotected economic activity. Thus, such a discharge does not implicate *Machinists* protection, but is predicated on interests that are protected, if at all, entirely by state law. *See* text accompanying and following *supra* note 164.

concludes are motivated by anti-union animus, there is no risk, even if it errs in making that determination, that it will prohibit discharges that the NLRA is meant to protect. The error may invalidate a discharge actually motivated by sloppy work practices, but the NLRA does not protect an employer's right to discharge on that ground and the interference would be entirely with state-based interests.

For like reasons, preemption cannot be justified by the fact that employers might be more reluctant to discharge employees for "valid" business reasons out of fear that state tribunals will mistakenly attribute anti-union motivations to them. This state deterrent effect would not offend federal interests. What weight to assign these employer interests is a matter for state legislative determination. Presumably, by enacting state laws prohibiting discharge for union activity, states will have decided that employee protection outweighs any resulting deterrence of employer prerogatives—prerogatives that are enjoyed solely at the leave of the states.[189]

189. One final objection to my thesis might be that states, through skewed decision-making, might increase the level of unionization. Even were that to happen, the objection would be without merit. There is no federal interest in particular outcomes in organizing or bargaining contests between employers and employees. The NLRA does not seek any particular level of unionization in the aggregate, nor any substantive standard of working conditions at individual workplaces. If a state adopted a system of deciding cases that differed from the NLRB's in a way that skewed outcomes in favor of unionized employees, such a result would not for that reason be preempted.

For example, what if the state presumed anti-union animus when discharges occur during an organizing drive and mandated that employers disprove anti-union animus? Presumably, the result would be more frequent reinstatements of discharged union supporters and, conceivably, more union election victories. Even such an unusual law would not run afoul of federal labor policy merely because it upset the results of contests between unionizing employees and employers, so long as the conduct regulated did not lie on the NLRA's protected-prohibited continuum.

Employers have no federally protected interest in a union-free workplace. The federal interest is that the choice as to unionization reflect the preferences of those who are in fact employed. If a state decides to reinstate an employee it conscientiously believes to have been wronged, it deprives no party of an interest that the NLRA protects. The case is no different than if a state reinstated an employee that it found to have been discharged during an organizational campaign for some other reason offensive to state interests, for example, whistle-blowing. That employee might be a union supporter, and her reinstatement might increase the chances of a union victory. However, no one would suggest that this fact would preclude the state from acting.

At some point, of course, a state that systematically compelled employers to employ unionized workers in preference to non-union workers would, by making union joinder a practical necessity for securing employment, interfere with the employees' Section 7 right to abstain from unionism. However, the skew in decision-making that we are discussing here does not implicate the Section 7 rights of non-union employees. That an occasional union supporter would be reinstated to the job she had held until fired during a union campaign would not materially affect the market of job opportunities available to non-

I turn now to the second concern expressed in *Garmon*: that even if the state court arrived at the same outcome, it might prescribe remedies different from those authorized by the NLRA. The *Garmon* doctrine does more than guard against the risk that state courts might mistakenly judge truly protected conduct to be prohibited and thus regulable under state law. In *Garmon* and *Lockridge*, the Court declared that even after the NLRB determines that conduct indeed is prohibited by the NLRA, the state courts are without power to regulate that conduct under state law. The *Garmon* Court observed that, even if conduct is unquestionably prohibited by federal law, "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict [with federal policy]."[190]

Why would heavier penalties under state law for conduct the NLRB determines to be prohibited be of federal concern? One might reason that those penalties, by increasing deterrence, would serve rather than disserve federal interests.[191] However, if we focus on conduct of the type that falls on a protected-prohibited continuum, as the conduct in *Garmon* did, the Court's concern about inconsistent remedies becomes clearer. Greater penalties under state law for prohibited conduct located on a protected-prohibited continuum pose the risk of deterring parties from engaging in conduct on the protected portion of the continuum.

The Court observed in *Garmon* that "[t]he obligation to pay compensation can be, indeed, is designed to be, a potent method of governing conduct . . ."[192] In deciding whether to utilize particular economic weapons, parties of course are conscious that if they cross the line from licit to illicit they will be accountable for whatever remedies are prescribed for the latter. However, the line between licit and illicit under the NLRA often is obscure. Parties will be less likely to approach the line, even with conduct they believe to be lawful, if the consequences of overstepping are greater. State remedies more potent than those provided by the NLRB thus may chill the exercise of conduct protected by the NLRA.

The concern about state remedies competing with those of the NLRA thus has a legitimate role in NLRA preemption law. However, that concern is well-placed only in the context of conduct that lies

union employees.

190. *Garmon*, 359 U.S. at 247.

191. *See supra* note 118.

192. *Garmon*, 359 U.S. at 247.

on a protected-prohibited continuum. Only in that case could increased penalties deter parties from engaging in protected conduct. Congress has forbidden discharges motivated by anti-union animus or concerted activity but has not protected other types of discharge. Hence, if increased state penalties were to deter other types of discharge, no federal interest would be impaired.

Apart from the chilling effect, are there other ways in which different remedies might affect federal interests that would be applicable to wrongful discharge? In particular, because Congress created only reinstatement and backpay as remedies for discharges violative of the NLRA, should we infer that Congress found other remedies inconsistent with federal interests?

Evidence that Congress had rejected other remedies for reasons of substance would warrant close attention. For example, if the NLRA contained a concept of "efficient breach," condoning employers' electing between compliance and paying the prescribed remedies, stiffer state remedies would deter the exercise of a congressionally-intended option. However, it is evident that the NLRA does not sanction employers having the choice to fire union activists, break the organizing drive, and compensate the individuals thereafter. The declared purpose of the statute is to "eliminate" such practices;[193] they are branded "unfair";[194] the Board is "empowered . . . to prevent any person from engaging in [them]";[195] judicial orders "restraining" such practices *pendente lite* are authorized;[196] and the Board, upon ultimately finding such practices to have occurred, "shall issue . . . an order requiring such person to cease and desist from such . . . practice[s]."[197]

Similarly, if Congress had concluded that compensatory or punitive damage remedies against employers or unions might jeopardize harmonious labor relations, there would be reason to preempt parallel state regulation. However, there is no evidence that Congress held that view, and indeed the Court has approved both compensatory and punitive damage remedies against unions under state law in other actions held not preempted, although the Court

193. NLRA § 1, 29 U.S.C. § 151 (1982) (fifth paragraph).
194. NLRA § 8(a), 29 U.S.C. § 158(a) (1982).
195. NLRA § 10(a), 29 U.S.C. § 160(a) (1982).
196. NLRA § 10(j), 29 U.S.C. § 160(j) (1982).
197. NLRA § 10(c), 29 U.S.C. § 160(c) (1982).

assumed that the union's conduct was also prohibited by the NLRA.[198]

Moreover, a search of the legislative materials furnishes no hint of any substantive objection to more extensive remedies. Rather, the legislative materials indicate why the remedial arsenal was as limited as it was. From the start of the legislative process, the proponents of the Wagner Act desired to commit its enforcement to an administrative agency that could bring specialized expertise to the eradication of the practices against which the bill was aimed—a choice that meant there would not be jury trials. They tailored the bill's remedial provision accordingly, specifically providing remedies that did not require a jury trial. One episode during the debates on the bill confirms the nexus between the seventh amendment concerns and the shape of the remedy provision. The bill as introduced authorized "restitution" as a remedy.[199] Industry opponents protested vigorously at hearings on the bill that it would be unconstitutional to authorize monetary remedies without a jury trial.[200] The sponsors then amended the bill, changing the remedy to "reinstatement, with or without backpay."[201] In due course, Congress' decision to limit the monetary remedy to backpay accompanying reinstatement enabled the Supreme Court in *NLRB v. Jones & Laughlin* to reject the ensuing seventh amendment challenge on the familiar ground that the amendment "has no

198. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 657, 666 (1954); UAW v. Russell, 356 U.S. 634, 641-42 (1958). Two of the Court's decisions, which otherwise reject preemption, do direct state courts to limit their compensatory remedies to true injury. Linn v. Plant Guard Workers, 383 U.S. 53, 64-65 (1966) (defamation); Farmer v. United Bld. of Carpenters, Local 25, 430 U.S. 290, 304 (1977) (intentional infliction of emotional distress). However, in both cases the Court was permitting the state to decide in the first instance whether conduct was protected or not, and the state cause of action cut close to the bone of protected activity. The limitation on remedies minimized the risk that the state regulation the Court was allowing might "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act." *Linn*, 383 U.S. at 64-65. Even with these limitations, the states were left free to award remedies that are not available under the NLRA.

199. S. 1958, 74th Cong., 1st Sess., § 10(d), 79 CONG. REC. 2368, 2369 (1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NAT'L LABOR RELATIONS ACT, 1935, at 1302 (1985).

200. *National Labor Relations Board: Hearings on S. 1958 Before the Committee on Education and Labor*, 74th Cong., 1st Sess., at 847-48 (1935) [hereinafter *Hearings on S. 1958*] (statement of James A. Emery), *reprinted in* 2 NLRA, LEGISLATIVE HISTORY OF THE NAT'L LABOR RELATIONS ACT, 1935, at 2233-34 (1985) [hereinafter NLRA LEG. HIST.]; *Hearings on S. 1958*, *supra*, at 447-49 (statement of Robert T. Caldwell), *reprinted in* 2 NLRA LEG. HIST., *supra*, at 1833-35; *Hearings on S. 1958*, *supra*, at 244 (statement of James A. Emery), *reprinted in* 2 NLRA LEG. HIST., *supra*, at 1630.

201. 79 CONG. REC. 7648, 7651, § 10(c), *reprinted in* 2 NLRA, LEG. HIST., 1935, at 2352 (1985).

application to cases where recovery of money damages is an incident to equitable relief."[202] Hence, Congress' limiting the remedies as it did in order to commit enforcement to an administrative agency furnishes no justification for inferring an intent to preclude stronger remedies in court actions under state law.

In the absence of concrete evidence that remedies were restricted for substantive reasons apart from the Seventh Amendment, there is no warrant for assuming that the Congress that enacted the Wagner Act intended to insulate employers from stronger state remedies for wrongful discharge. Given the Act's declared purpose to protect workers' rights to unionize,[203] it would "turn . . . the Wagner Act on its head"[204] to construe it as preempting stronger state remedies for discharge motivated by anti-union animus.

I turn last to consideration of the NLRA's unusually short (six month) time limit. Does that express a federal interest that would be subverted were states allowed to regulate discharges under lengthier statutes of limitations? The Court has explained that Congress chose such a short time limit in order to "stabilize existing bargaining relationships"[205] by assuring prompt resolution of challenges "to collective bargaining or dispute settlement under a collective bargaining agreement."[206]

The discharge cases we are considering do not arise in the context of bargaining or agreement enforcement; rather they arise at unorganized workplaces. Thus, they do not raise this concern. It *is* the case that a challenge to such a discharge under the NLRA still would be governed by the six-month time limit. Congress was motivated by only a fraction of the cases governed by the statute in selecting a time limit, but the limit nonetheless applies to all. However, it does not follow that a state law with a longer time limit for challenging the discharge of a union activist in an organizing drive would conflict with a value deemed important by Congress.

202. 301 U.S. 1, 48 (1937).

203. NLRA § 1, 29 U.S.C. § 151 (1982) (fifth paragraph).

204. *See supra* notes 14-16 and accompanying text.

205. Local 1424, International Ass'n of Machinists v. NLRB, 362 U.S. 411, 419, 425 (1960). The Court also cited a congressional desire "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" *Id.* at 419 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 40 (1947)). However, it is difficult to conceive that a time limit so short would have been chosen for this reason alone, and later decisions have focused on the interest in stabilizing bargaining relationships as the key to the congressional decision. *See* cases cited *infra* note 206.

206. Reed v. United Transp. Union, 109 S. Ct. 621, 629 (1989). *See also*, DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 168-72 (1983).

The considerations impelling Congress to select a short time limit are not contravened by our case, and there is no collision of federal and state values that could warrant preemption. It is absurd to conceive of the Wagner Act as a law enacted to shorten the period in which employers could be called to account under state law for wrongfully firing employees who attempt to organize.

The Court has drawn a similar distinction in addressing a somewhat analogous question—the time limit to govern those other federal labor causes of action for which Congress prescribed no time limits. Where the federal cause of action involves a challenge to a collective bargaining agreement or to a dispute resolution under the agreement, the Court has found an NLRA action more analogous than any state action and hence has imposed the NLRA's six-month time limit.[207] However, when the federal cause of action is "not directly related in any way to collective bargaining or dispute settlement under a collective bargaining agreement," even though the cause may resemble one cognizable under the NLRA, the Court has held that a state time limit should be used.[208] The Court reasoned that Congress' choice of a six-month time limit should not control a cause of action that "implements a federal policy . . . that simply had no part in the design of a statute of limitations for unfair labor practice charges."[209] *A fortiori*, that time limit should neither control nor preempt a state cause of action that is otherwise wholly consonant with federal policy.

In sum, none of the factors that have been advanced to justify preemption of parallel state regulation applies to wrongful discharge during a union organizing drive. Unless such factors exist, preemption of wrongful discharge claims cannot be justified on the ground that they overlap NLRA prohibitions. This is but an instance—albeit a very important instance—of the larger proposition which this Article asserts: NLRA prohibition of certain conduct does not justify preempting parallel state regulation of that conduct, unless the conduct lies on a continuum some part of which is protected by the NLRA.

207. *DelCostello*, 462 U.S. at 170-72.
208. *Reed*, 109 S. Ct. at 628-29; *see also id.* at 630 n.7.
209. *Id.* at 629.

IV. Other Applications of the Non-Continuum Thesis: Employer Premises and Successorship

This Part discusses two other issues that lend themselves to reevaluation under the non-continuum thesis. The first is whether states may furnish unions access to employer premises during organizing drives. The second is whether states may preserve employees' job rights despite ownership changes. Neither issue lies on a protected-prohibited continuum. In each case, the federal interest is in protecting employees' rights of self-organization: there is no countervailing federal right for employers. Any such employer rights are derived from state law, and the choice whether to constrict them thus should lie with the states.

A. *State Provision of Union Access to Employer Premises*

This Section shows that the non-continuum thesis establishes that states may, without being preempted, empower unions to enter employers' premises to communicate with employees during organizing drives.[210] The conduct here is not on a federal continuum. As we have already seen, when this is the case there is not adequate justification for federal preemption either in the area beyond federal reach or even in the area that the NLRA does regulate.

The availability of state-provided access is of great practical significance. The NLRA provides access only in a limited range of circumstances. Moreover, even where the NLRA *does* provide a right of access, the absence of any meaningful sanction upon employers

210. An example of such a statute is Section 552.1 of the California Penal Code, which provides that California's industrial trespass law does not prohibit, *inter alia*:

> [a]ny lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, . . . employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof.

This provision was applied to prevent a prosecution of union representatives for trespass in *In re* Catalano, 29 Cal. 3d 1, 623 P.2d 228, 171 Cal. Rptr. 667 (1981). Might California courts enforce such non-trespassory access by injunction? In a somewhat analogous situation, the California Supreme Court, having determined that there was a right of access under the California Constitution, declared the propriety of an injunction enabling high school students to solicit support on shopping center premises for their opposition to a United Nations resolution against "Zionism." Robbins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

who violate that right induces refusals of access. Due to the slowness of Board procedures, in all but a handful of cases unions will not obtain relief until the organizing impulse has long passed.[211]

As in the case of wrongful discharge, federal law forbids certain employer actions that prevent organizational activities on their premises. However, federal law is indifferent to whether employer actions beyond that prohibition are allowed or not. While there is a zone of federal prohibition, there is no zone of federal protection of an employer's right to exclude. If states wish to go further in restricting the employer's property rights, no federal interest is implicated.

The NLRA does not expressly obligate employers to allow union organizing on their premises in any circumstances. Ordinarily, property rights are defined exclusively by state law.[212] An employer seeking to protect its property against the intrusion of a union organizer (or any other individual) would not look to federal law for assistance, but yrather would invoke state trespass law.[213] As this reflects, the source of the employer's right to exclude is state property law.[214] However, the NLRB determined from the start

211. If denial of access is found to be an unfair labor practice, the NLRB orders the employer to cease and desist from denying access. *See, e.g.*, Jean Country, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988); Sentry Markets, Inc., 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989). In appropriate cases, the Board may seek an injunction in federal district court pending Board resolution, NLRA § 10(j), 29 U.S.C. § 160(j) (1982). But such injunctions are rarely sought and even more rarely granted. Moreover, the lengthy investigative process that the Board must complete before even seeking a Section 10(j) injunction is likely to render the proceeding moot. Weiler I, *supra* note 25, at 1799-1801.

212. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Bishop v. Wood, 426 U.S. 341, 344 (1976). The Takings Clause of the federal constitution places some constraint upon the states, see *infra* note 214.

213. *See, e.g., In re* Catalano, 29 Cal. 3d 1, 623 P.2d 228, 171 Cal. Rptr. 667, (1981); Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 183 (1978).

214. The Court in *NLRB v.* Babcock & Wilcox, Co., 351 U.S. 105 (1956), discussed *infra* notes 218-26 and accompanying text, stated that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. This could be read as reflecting the Court's belief that the limit it imposed on NLRA-conferred union access was dictated by a federal interest in "preserv[ing]" property rights. However, that reading would be illogical. The Court's opinion provided no additional amplification or explanation of that statement. Most likely it was an allusion to the Constitution's Takings Clause (government cannot take private property without just compensation).

However, the Court more recently has held that there is no Takings Clause violation in state-provided access for union organization. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court, finding that the permanent installation of a cable TV antenna on the property owner's premises was a taking, distinguished labor organizer access in these terms:

that some use of employer premises is implicit in the NLRA's Section 7, which grants employees the right to engage in self-organization.[215] To that extent, the NLRA marks a federal-law intrusion upon state property rights. The extent of that intrusion was the subject of two early Supreme Court decisions laying down enduring principles.

In *Republic Aviation Corp. v. NLRB*,[216] the Court ruled that the right to self-organization conferred by Section 7 of the NLRA entitles *employees* to engage in union solicitation on employer premises during the periods they are not expected to be working (*e.g.*, lunch breaks, rest periods, in locker rooms and parking lots), except when such solicitation would interfere with the employer's interests in production and discipline. Under *Republic Aviation*, an employer rule that forbids protected employee solicitation violates Section 8(a)(1), and a discharge for violation of such a rule violates Sections 8(a)(1) and 8(a)(3).[217]

> Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see *e.g.*, . . . *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), is . . . misplaced. As we recently explained:
>
> > [T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited.

Loretto, 458 U.S. at 434 n.11 (quoting Central Hardware Co. v. NLRB, 407 U.S. 539, 544-45 (1972)). This analysis is not weakened by the subsequent decision in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987), which held that temporarily depriving the property owner of "*all* use of its property" is a constitutional taking, but limited the holding to such "all use" cases. *Id.* at 321 (emphasis added).

215. Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943).

216. 324 U.S. 793 (1945).

217. *Id.* at 797, 805. The Court's literal holding in *Republic Aviation* was that the Board had acted reasonably in adopting the rule described in the text. *Id.* at 804. While that formulation seemingly left room for the possibility that the Court might also have upheld a contrary rule, the later opinion in NLRB v. Babcock & Wilcox, 351 U.S. 105, 112-13 (1956) describes this result as a "rule[] of law" not committed to Board discretion.

The Court in *Republic Aviation* also approved the Board's ruling that employers may adopt and enforce rules prohibiting solicitation during the periods employees are expected to be working, so long as the rules are not enforced discriminatorily against union activity. 324 U.S. at 802 n.8., 803 n.10, 804.

In *NLRB v. Babcock & Wilcox Co.*,[218] the Court addressed the related question of whether and when union organizers are entitled to come upon employer property to talk to the employees. The Court recognized that although Section 7 confers no rights upon unions or union organizers, the rights granted to *employees* by Section 7 would entitle employees to have union organizers on the premises in limited circumstances:

> The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.[219]

The Court in *Babcock & Wilcox* rejected the Board's position that union organizer access should be treated the same as employee access, so that the only limit on union organizer access would be interference with employer production or discipline. Rather, the Court reasoned, Congress intended that the organizational rights granted by Section 7 be balanced against the employer's pre-existing property rights. The balance tips in favor of the employer's property rights "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."[220] Thus, an employer's obligation to permit union organizer access is the exception, not the rule. The exception applies so rarely that it is of little practical significance. *Babcock & Wilcox* established the narrowness of the exception. The Court concluded that the facts in *Babcock* did not trigger a right to union access, even though the union could not feasibly communicate with employees on

218. 351 U.S. 105 (1956).

219. *Id.* at 113. Consequently, the failure to adhere to this obligation is a violation of Section 8(a)(1), which forbids interference with Section 7 rights.

220. *Id.* at 112. The decision has been widely criticized for exalting an immaterial property right Congress did not mention over the interest in encouraging self-organization expressly declared in the statute. J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 60-62 (1983); Note, *Still as Strangers: Non-employee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 167-72 (1983); Note, *Property Rights and Job Security: Workplace Solicitation By Non-employee Union Organizers*, 94 YALE L.J. 374, 379-80 (1984). *See also* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 283 (1978). The Court in *Babcock & Wilcox* did recognize an exception where the employer discriminated against the union by allowing access for other outside solicitors. 351 U.S. at 112.

the public land immediately adjacent to the employer's premises,[221] and the employees' homes were scattered over a 30-mile radius.[222] The Court found that union representatives could "use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees;"[223] thus the employees' homes were in "reasonable reach."[224]

Only in a case of "employees isolated from normal contacts,"[225] such as lumber camps,[226] does the balance tip in favor of allowing union organizer access to the employer's property. Only then would the employer violate the NLRA by refusing access.

More recently, the Board has addressed the question of organizer access in a circumstance not considered in *Babcock & Wilcox*--where the employer has invited the general public onto its property, *e.g.*, in shopping centers. The Board initially concluded that the invitation to the public so weakens the employer's claim to quiet enjoyment of its property that it must allow union access for organizing without regard to whether the union would otherwise suffer communicative inconvenience.[227] Subsequently, the Board has retreated and concluded that *Babcock & Wilcox* makes inadequacy of alternative

221. The Court accepted the Board's finding that traffic conditions at the entrance to the employer's parking lot precluded union organizers from communicating with employees inside their cars. 351 U.S. at 107.

222. *Id.* at 106, 113.

223. *Id.* at 111.

224. *Id.* at 113. The Court apparently overlooked or ignored the fact that the union had been able to communicate with only one-fifth of the employees. *Id.* at 107 n.1. A subsequently-adopted principle entitles a union to a list of employee names and addresses once it has filed a petition with the Board seeking an election. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 709 (1969). However, a union cannot file an election petition until it obtains authorization cards from at least 30% of the employees. Consequently, the union still does not get the names and addresses when it needs them most. Incidentally, the application of the non-continuum thesis described in this part of the paper would equally vindicate a state law that required employers to give unions lists of employee names and addresses at an earlier stage of the organizing campaign, indeed upon union demand at any time.

Names and addresses are never a wholly adequate substitute for the union's presence at the workplace. Before a majority of the employees will vote for a union, they must be persuaded to commit exclusive control over their bargaining interests to the union. Unless the union has a personality, the employees will vote on the basis of an abstraction, and some likely will be less willing to confer such control upon an unseen stranger. Further, many employees will not bother to travel to a meeting called by the union, and union efforts to meet people in their homes will be intrusive to many. As numerous commentators have observed, this is no substitute for in-plant communication. *See, e.g.*, Note, Property Rights, *supra* note 220, at 392-93.

225. *Babcock*, 351 U.S. at 111.

226. *Id.* at 109.

227. Fairmount Hotel Co., 282 N.L.R.B. No. 27, 123 L.R.R.M. (BNA) 1257, 1260 (1986).

union opportunities for communication a *sine qua non* of any NLRA right of union access to employer premises.[228] Accordingly, the decisional law regarding union access in shopping centers remains in flux.

State law might materially assist union organizing by providing in-plant access in circumstances where the NLRA does not, and by providing quicker access even where the NLRA does.[229] Such a state law would, under my thesis, survive the NLRA's preemptive sweep.

In order to assess the NLRA's preemptive effect on a state law granting union access to employer premises, it is useful to analyze separately two distinct situations: first, where the employer's denial of access is an unfair labor practice, or arguably an unfair labor practice, under the NLRA, and second where the denial is clearly not an unfair labor practice.

In the first analytical situation, the employer arguably violates Section 8 by refusing access, as in the case of a lumber camp or shopping center.[230] In this circumstance, *Garmon*'s ban on parallel state regulation would clearly be applicable by its terms. However, by reexamining *Garmon* in light of the non-continuum thesis, the NLRA should not preempt state laws granting access to employer property. Unlike picketing doctrine, which evidences congressional intent to regulate an entire spectrum of union conduct, *Republic Aviation* and *Babcock* reflect no similar occupation of the field of access to employer property.

If Congress provided access only in exceptional circumstances because it thought that unions and employees ought not to communicate too freely or that employers should be protected against any broader intrusion on their premises, that would constitute a form of *Machinists* protection that states would not be

228. Jean Country, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201, 1202-05 (1988).

229. Whether state courts would grant preliminary relief in such cases is of course conjectural. State courts have shown themselves ready to enforce other state norms by temporary restraining order, *e.g.*, picket line violence, and it does not seem implausible that if access were made a state norm it would be enforced by TRO.

230. The analysis would be the same if the denial of access is by the shopping center owner or manager rather than the immediate employer. Only "employers" can commit unfair labor practices, but the NLRA's definition of "employer" includes "any person acting as an agent of an employer, directly or indirectly," NLRA § 2(3), 29 U.S.C. § 152(3) (1982). Shopping center owners and managers denying access often will meet the test. Jean Country, 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201, 1207 (1988) (shopping center manager is agent of lessees).

free to override.[231] However, if Congress provided limited access merely because it did not think the federal interest in union-employee communication warranted any greater intrusion on the state's sovereign prerogative to define property interests, there would be no reason to construe the NLRA as preempting state laws providing broader access.

Congress did not confer upon employers a federal right to fence out organizers. The NLRA provided unions only a limited right of access, not because Congress wanted to put a lid on the quantum of communication between employees and unions or to federalize property rights and invest employers with the quiet enjoyment of their premises, *but rather because Congress did not want to infringe upon the states' control of property rules beyond the limited extent that the federal interest in facilitating union organization warranted.*

Properly understood, the holding in *Babcock* was that Congress chose to preempt state property law only to a limited degree, and went no further in deference to state sovereignty over property rights. If states choose to modify their property laws, and to subtract from the owner's bundle of property entitlements, the federal interest in access then pushes against an open door.[232] There is no federal justification for barring states from allowing access when the only reason federal law did not provide the access was a deference to supposed state law opposing it.

In the second category, the conduct at issue is not even "arguably prohibited" by the NLRA. In these cases, *Garmon* by its own terms does not preempt parallel state regulation.[233] The NLRA does not even arguably prohibit an employer's refusal of access in the typical

231. *See supra* note 98. It would be for a state court to decide this question when a union sought to secure an injunction conferring access and the employer resisted on preemption grounds. The NLRB cannot resolve *Machinists* preemption claims: the courts must decide those claims in the first instance. *See supra* text following note 101.

232. Indeed, when the state has redefined property in this manner, there is nothing left for the Board to balance against the employees' interest in communication. Thus the Board should decide Section 7 and Section 8(a)(1) cases differently in states that have made this choice. *Cf. Jean Country*, 129 L.R.R.M. at 1204 n.7 (employer resisting finding of Section 8(a)(1) violation for denial of access must show as a threshold matter that it has "an interest in the property"). Even were the Board to do so, the preemption question would remain important, for state regulation holds the promise of affording unions prompter access to employer property than is available under the NLRA. *See supra* notes 211, 229 and accompanying text. Moreover, the fact that the Board might shape federal law to fit state definitions of property is no reason to find state law preempted. Quite the contrary, it shows that there is not a federal interest that justifies depriving the states of their freedom to act. After all, how could the Board accommodate state law if the state were not free to adopt its law?

233. *Cf. supra* note 105 and accompanying text.

industrial plant. Therefore, even under current *Garmon* doctrine, states may enhance unions' access to industrial workplaces and withstand preemption challenge.[234]

States should therefore be free to redefine property interests to allow unions greater access to employer property for organizing than the NLRA provides. Moreover, states should be free to enforce these state laws even in the area of overlap with the NLRA, thus creating the possibility of quicker and broader court-ordered access than is now generally available under the NLRA.

B. *State Law Protecting Employees' Jobs Across Changes of Ownership*

We live in an era of innumerable transfers of ownership of productive facilities from one corporation to another. In many such transfers, the new owner bypasses the seller's workforce and staffs the facility predominantly with new employees. Employees understandably wish for a law that tempers "the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers" with "some protection to the employees from a sudden change in the employment relationship."[235] However, as will appear shortly, federal law provides no job security to employees of an enterprise whose assets are sold, even when the purchaser continues in the same essential line of business. The question I consider is whether states may furnish that protection. State laws that protected employees' jobs would benefit employees in both unionized and non-union workplaces. However, in the former case such laws would have effects beyond merely assuring job retention. If states could require the purchaser to retain the seller's employees, purchasers would be obliged under the NLRA to recognize and bargain with the union and perhaps would be bound by the seller's collective bargaining agreement with the union.

In this Section I will argue that the NLRA does not preempt state laws that forbid purchasers of productive facilities from terminating the incumbent employees, including where those employees are unionized. In so arguing, I will once again rely upon the non-continuum thesis: while federal labor law prohibits purchasers from refusing to employ the seller's employees for reasons of anti-union animus, it neither establishes nor protects a

234. The only conceivable argument for preemption in this second category is that the NLRA conferred a federal right upon employers to bar union access. This claim to *Machinists* access is not tenable. *See supra* note 231 and accompanying text.

235. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

countervailing right of purchasers to refuse to employ the seller's employees for other reasons.

My analysis will proceed from the following paradigm case. A state, as part of a statute generally prohibiting discharge without good cause,[236] prohibits purchasers of corporate facilities from discontinuing the employment of incumbent employees except for good cause. A large corporation that operates a nationwide chain of hotels purchases a hotel from a small corporation. The hotel staff was unionized under the prior ownership. In defiance of the state law, the successor hires a predominantly new work force at less favorable terms and conditions of employment than the prior owner paid, and refuses to recognize the union on the ground that the new employees have never selected the union as their representative. The successor does not contend that there was "good cause," within the meaning of the state statute, for discontinuing the predecessor employees. It contends, rather, that the state statute is preempted by the NLRA. May the state court entertain an action by displaced employees seeking reinstatement to their jobs with backpay pursuant to the state statute?

To assess this preemption issue, we must examine first, how federal law regulates this scenario, and second, what impact there would be on federal entitlements were the state free to compel the successor to employ the predecessor's employees. As a general matter, federal law does not require a purchaser of productive facilities to employ the predecessor's employees.[237] The purchaser's hiring freedom is qualified by federal law in only one respect: the employer may not bypass the predecessor's employees in order to avoid having to recognize their union, because Section 8(a)(3) prohibits employment decisions motivated by anti-union animus.[238] In our paradigm case, whether the successor has violated Section 8(a)(3) depends on the NLRB's finding regarding the successor's motivation for bypassing the predecessor's employees.

Our preemption assessment must take account of another consideration. If states are permitted to compel the hiring of a predecessor's unionized employees, states may thereby lock successors into NLRA obligations they otherwise would not have had. A

236. *See supra* text accompanying notes 57 and 58.

237. NLRB v. Burns Sec. Serv., 406 U.S. 272, 280 n.5 (1972); Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union, 417 U.S. 249, 261 (1974); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40 (1987).

238. *Burns*, 406 U.S. at 280 n.5; *Fall River*, 482 U.S. at 40.

successor hiring a new workforce has no obligation to bargain with a union unless and until a majority in that workforce vote for union representation.[239] However, if a successor selects a majority of its employees from its predecessor's unionized workforce, the NLRA obliges it to recognize and bargain with the union that represented the predecessor's employees.[240] The employees have manifested their desire for such representation while working for the predecessor, and if enough are hired by the successor the NLRA presumes the union's continued majority status.[241]

Even where a bargaining obligation arises in this manner, federal law ordinarily does not oblige the successor to maintain the seller's terms and conditions of employment pending bargaining. The NLRA generally prohibits employers from making changes in employment terms without first bargaining to impasse with the union representing their employees, but the Court has declared that rule inapplicable to successors.[242] The Court has reasoned that the successor's bargaining obligation does not attach until it has completed hiring a representative workforce, for only then is it determinable that a majority came from the predecessor's workforce.[243] Thus, the successor is free of any bargaining constraint in setting the initial terms and conditions that are offered and accepted by the employees it hires. The new terms will be the status quo at the point that the union later becomes entitled to recognition; the employer's duty will be to bargain with the union before unilaterally changing those terms.

However, the Court has identified one exception to the successor's freedom to establish initial terms and conditions of employment. If it is clear from the outset that the successor will retain all of the predecessor's employees, the bargaining obligation will attach from the outset, and bargaining will be required before

239. *Burns*, 406 U.S. at 280-81; *Fall River*, 482 U.S. at 40-41.

240. *Burns*, 406 U.S. at 279-81; *Fall River*, 482 U.S. at 37-41.

241. *Fall River*, 482 U.S. at 37-41.

242. *Burns*, 406 U.S. at 295 (NLRA rule that unionized employers may not make unilateral changes in terms and conditions of employment without first proposing the changes to the union and bargaining about them to impasse not applicable if it is "not . . . clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union"). If there was a collective bargaining agreement between the seller and the union, it will not be binding on the successor unless voluntarily assumed or, perhaps, if the successor was committed from the outset to utilizing the predecessor's employees. *See infra* notes 251-52 and accompanying text, and note 257.

243. *Burns*, 406 U.S. at 295.

the successor fixes initial terms.[244] Indeed, it is possible that such an advance commitment to retaining the predecessor's employees might trigger an obligation for the successor to adhere to the predecessor's collective bargaining agreement with the union.[245]

Our paradigm state law thus intersects with the NLRA in two ways. First, it forbids *all* refusals (absent cause) to employ a predecessor's employees, which would include refusals motivated by anti-union animus that are also prohibited by the NLRA. *Garmon*'s ban on state regulation of conduct "arguably prohibited" by the NLRA thus might be literally applicable. Second, by requiring the successor to retain the unionized employees, the state law would lock every successor automatically into NLRA obligations that, but for the state law, would not automatically attach: to recognize and bargain with the union that represented the predecessor's employees, to consult with that union before fixing initial terms and conditions, and perhaps to adhere to the predecessor's collective bargaining agreement. Neither of these considerations justifies NLRA preemption of our paradigm state law.

That the state law's prohibition overlaps with the NLRA's is not a proper ground for preemption unless the subject lies on a protected-prohibited continuum. My analysis of *Garmon* in this case is identical to that respecting anti-union discharge which I give in Part III. Federal law forbids non-hiring of the predecessor's employees where the ground is the successor's hostility to unionization. However, unless federal law protects the successor's right to bypass the predecessor employees when *not* so motivated, there is no justification for *Garmon* preemption: there is no risk that parallel state regulation might prohibit or chill conduct that federal law protects. Therefore, the outcome under my thesis turns on whether federal law invests purchasers of corporate assets with a right to select their workforces free of any state-imposed obligation to the predecessor's employees.

Nothing in the NLRA, nor indeed elsewhere in federal law, purports to regulate generally the grounds upon which employees may be retained or dismissed by their employer. As previously noted, the explosion of state protection against wrongful discharge,

244. *Id.* at 294-95 ("Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms").

245. *See infra* note 257.

and the absence of any challenge to its application, except when an anti-union motive is implicated, reflects the states' freedom in this respect.[246] Nor is there any reason to think the situation different when the question is whether the state may protect the employees' jobs in the face of a change in ownership of productive facilities. Federal law nowhere explicitly creates a right in successors to hire a new work force, nor even hints at such a right. Indeed, antitrust and securities considerations aside, the legal path from old to new ownership is governed generally by state contract and corporate law. It could not seriously be argued that the NLRA preempted the application of our paradigm state law to a non-union plant. As this reflects, a successor's decision to retain the predecessor's employees is not on a federally regulated continuum, and therefore Congress has not fully occupied this field. Thus the choice whether to protect employees by constraining successor employers' hiring choices is left entirely to the states.

Nevertheless, there is language in the Supreme Court's opinion in *Howard Johnson Co. v. Hotel Employees*[247] that could be read as recognizing a federal right in purchasers to be free to hire new employees in preference to the old. Declaring that "new employers must be free to make substantial changes in the operation of the enterprise,"[248] the Court twice referred to the successor's "right" to select its own workforce.[249] In context, however, it is clear that these were merely careless reiterations of the principle, established in *Burns*, that federal law does not *require* the employer to hire the predecessor's employees. The *Howard Johnson* Court formulated the principle correctly at an earlier point in the opinion:

> We found there [in *Burns*] that *nothing in the federal labor laws "requires* that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor. . . ."[250]

That the *Howard Johnson* Court did not intend to preempt state law compelling retention of predecessor employees is evident from

246. *See supra* text following note 163.

247. 417 U.S. 249, 255, 262, 264 (1974).

248. *Id.* at 255.

249. *Id.* at 262 ("Clearly, *Burns* establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired"). *See also id.* at 264 ("The new employer's right to operate the enterprise with his own independent labor force. . ."). *Id.* at 264.

250. *Id.* at 261 (quoting *Burns*, 406 U.S. at 280 n.5) (emphasis added).

the Court's treatment therein of an earlier opinion, *John Wiley & Sons, Inc. v. Livingston*.[251] There the Court had ordered the survivor of a corporate merger to arbitrate grievances under the collective bargaining agreement of a business entity that completely disappeared as a separate entity in the merger. The *Howard Johnson* Court distinguished *Wiley* from the case before it on the ground that "the merger in *Wiley* was conducted 'against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation,' . . . which suggests that holding Wiley bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties."[252] The *Wiley* Court was interpreting and applying Section 301 of the NLRA, which the Court has held occupies the field respecting the enforcement of collective bargaining agreements.[253] If the Court defers to state choices in that area, *a fortiori* it would defer to state choices when the state law involves an area that Congress has not fully occupied, as is true of our paradigm case.

If my analysis is right, employers enjoy no federal "protection" to bypass their predecessors' employees in defiance of state law. Accordingly, there is no protected-prohibited continuum of federal interests. Because there are federal interests on only one side of the line (prohibiting certain failures to hire), there is no risk that a state court enforcing state prohibitions could jeopardize federal interests on the other side of the line. In the absence of a continuum, states ought to be free to regulate not only the zone beyond federal interest but also to regulate, in parallel, the conduct that federal law prohibits.

I turn now to consideration of the second possible ground for preemption of the paradigm state law. Is the state law preempted because, by requiring retention of the predecessor's employees, it would lock the successor into an NLRA bargaining obligation and preclude its setting initial terms without first bargaining?[254] The

251. 376 U.S. 543 (1964).

252. *Id.* at 257 (quoting *Burns*, 406 U.S. at 286).

253. *See infra* note 257, discussing Section 301.

254. Certainly, federal law could be interpreted so that the consequences ordinarily triggered by a successor's retention of the predecessor's workforce are not triggered when the retention is compelled by state law. But such an interpretation of federal law would not make sense. These legal consequences have been held to flow from retention of the predecessor's workforce because they are thought to contribute to the NLRA's goal of industrial peace. *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38-56

employer might claim that federal law entitles successors to avoid such bargaining by hiring without commitment to the predecessor's employees. However, federal law confers no such right on employers. Employers have no right to be union-free, nor to hire to achieve that outcome. They have no right to escape bargaining with a union that has been selected by their employees. Our paradigm state law may produce more situations in which successors incur bargaining obligations, but that would not harm federal interests. Federal law is concerned only that the choice respecting unionization of those actually employed be honored; it does not confer a right upon successor employers to be free of unionization, and indeed punishes their efforts consciously to achieve that result through their hiring decisions.[255] The Court has held that the successor has a bargaining obligation from the moment it has hired a "substantial and representative complement" of the ultimate workforce, if a majority of the employees come from the predecessor's unionized workforce.[256] Therefore, in our paradigm case, the federal interest is in providing employees a bargaining right as soon as it is known that a majority of the successor's employees come from the predecessor's workforce. Our state law would merely establish from the moment of purchase that a majority come from the predecessor's workforce.

(1987). That interest remains constant no matter what has caused the retention of the predecessor's workforce.

255. *See supra* note 238 and accompanying text. As argued earlier, a state law that systematically compelled employers to prefer unionized to non-union workers would offend Section 7's protection of the latter's right to refrain from joining unions. *See supra* note 189. However, a law that simply compels retention by successors of existing employees at both union and non-union workplaces hardly is of that character. No one disputes that a successor is free to retain an existing unionized workforce; if a successor makes that choice, it will not be held to have discriminated against non-union candidates for employment. For like reasons, a state compelling that retention does not offend interests of non-union candidates protected by the NLRA.

256. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46-52 (1987). The Court held that a bargaining obligation will attach notwithstanding that it might still be theoretically possible that by the time the successor has completed its hiring there would not be a majority from the predecessor's workforce. *Id.* at 46-52. The Court explained the policy considerations that dictated not waiting for the full complement to be hired:

> This approach [waiting for a full complement] . . . fails to take into account the significant interest of employees in being represented as soon as possible. . . . [That] interest is especially heightened in a situation where many of the successor's employees, who were formerly represented by a union, find themselves after the employer transition in essentially the same enterprise, but without their bargaining representative.

Id. at 49.

Therefore, our paradigm state statute would be valid, because the states are free to require successors to retain their predecessors' employees. Where the predecessors' employees were unionized, the statute's effect would be the triggering of obligations under the NLRA to recognize the union and bargain with it over the setting of initial terms of employment, and perhaps to adhere to the predecessor's collective bargaining agreement.[257]

257. The Court held in *Howard Johnson* that successors will not be bound involuntarily to collective bargaining agreements if they do not hire the predecessor's employees. 417 U.S. at 260-65. *Howard Johnson* implied that a different rule would apply to successors who do hire the predecessor's workforce intact. *Id.* at 258-59, 262-64 (distinguishing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) on that ground). A state law compelling retention of the predecessor's employees—the paradigm discussed in the text—would create the factual setting to which such a different rule would apply. As the Court noted in *Howard Johnson*, one who purchases an operating facility in the face of such a state law may be deemed to have knowingly assumed the collective bargaining agreement. *See supra* note 252 and accompanying text.

There is one other way in which states can attempt to protect employee job rights in the event of changes in ownership of productive facilities: ordering purchasers to honor the sellers' collective bargaining agreements. Massachusetts has enacted such a law. MASS. GEN. LAWS. ANN. ch. 149, § 20E (West 1990). Laws of this type implicate a branch of labor preemption—Section 301 preemption—that is beyond the scope of this paper. However, I discuss the issue briefly because the non-continuum thesis may be instructive there as well.

The Court has repeatedly held that federal law, fashioned pursuant to Section 301, is the exclusive law governing rights under a collective bargaining agreement. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-03 (1962); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220-21 (1985); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 853-59 (1987). This is classic "occupy the field" preemption, as the Court has found no room for state law that would define such rights.

Unless the Court were to reverse well-settled jurisprudence, there is no way that the Massachusetts statute could be implemented as a matter of *state* law. Whether purchasers will be bound by their predecessors' agreements is a question of *federal* law emanating from Section 301. The Court held in *Wiley* that, under Section 301, such an agreement survived a *merger*. *Id.* at 548. Moreover, in *Howard Johnson* it explained the *Wiley* holding as premised largely on the fact that state law declared the surviving corporation in a merger bound to honor the agreements of entities absorbed in the merger. *See supra* notes 252-53 and accompanying text. If there is no federal interest that is frustrated by survival of the agreement, and the Court's general reluctance to construe Section 301 to bind successors to agreements is driven by a desire not to intrude upon interests established by state law, the non-continuum thesis suggests that there is no reason why a state's decision to alter the rule that purchasers of business assets are not bound by predecessors' agreements should not equally be honored. Thus, the federal law of Section 301 would be that purchasers of assets are not bound by predecessors' collective bargaining agreements unless state law declares the state preference to be that purchasers are bound. This is conceptually the same as my suggestion that the NLRB should hold union access to employer property protected by Section 7 wherever the state declares that unions are entitled to such access. *See supra* note 232 and accompanying text.

Conclusion

The central thesis of this Article is that states are free to regulate labor relations, in parallel with the NLRA and beyond, except where state law conflicts with an interest protected by the NLRA or where there is a continuum of federal protection-prohibition across the subject area to which the state law applies. I have suggested three applications of this thesis—three areas where despite NLRA regulation there is not adequate justification for declaring parallel state regulation preempted. These are merely examples, and I would expect that there are many others. It is my hope that this Article will provoke a reexamination of the monolithic vision of NLRA preemption that has prevailed in the 30 years since *Garmon*, and in consequence will stimulate creative thinking about other ways in which states might revitalize the faltering bodies of unionization and collective bargaining.