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Abstract

Commendably, a number of states have recently approved initiatives to protect workers’ right to participate in a secret ballot election before a labor union can represent them. Reifying liberty and the anti-subordination principle, state secret ballot initiatives prioritize employee protection over national uniformity. Such referenda have the potential to frustrate progressive labor reformers’ policy preferences, which favor collective action and renewed unionization. At the same time progressive scholarship offers potentially useful arguments concerning the need to relax existing labor preemption rules. These arguments may encourage future state and local regulatory diversity and provide an environment conducive to the acceptance and expansion of all sorts of proposals that are protective of workers’ liberty interests.

Optimism about the possibility of doctrinal convergence between the efforts of progressive and classical liberals ought to be tempered; this move is riven with the risk that constraining preemption doctrine may further constrain workers’ freedom and liberty since there is also a corresponding move afoot that favors federalization, centralization and uniformity and can be explained by the pursuit of self-interested rents. This corporatist trend is reinforced by progressive scholarship that espouses a relaxed preemption doctrine subordinated to progressive values and presuppositions. Taken as a whole, attempts to break free from the doctrine of preemption may expose workers to the probability that their liberty interests, will fall prey to the self-interested commitment of labor leaders and their political allies to uniformity.

**INTRODUCTION**

In spite of the growth in government intervention catalyzed by a flurry of statutory innovation that began during President Hoover’s administration<sup>1</sup> and

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<sup>1</sup> See GEORGE C. LEEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT* 7-12 (2005) (arguing that Herbert Hoover was an interventionist who set the stage for even greater government intrusion in the market during the Franklin Delano Roosevelt administration).

currently continues,<sup>2</sup> workers must tackle anxiety that is elevated by allegations of falling or stagnant wages, increasing employment uncertainty,<sup>3</sup> and growing disparities in nonwhite versus white unemployment rates.<sup>4</sup> Angst is reinforced by the shadows shaped by the economic and financial collapse of 2008, one of the most alarming events since the Great Depression.<sup>5</sup> Unease reflects the inability of contemporary policymakers to respond to this crisis without offering fragile solutions that compound the problem.<sup>6</sup> Despite sporadic evidence that the United States is beginning to emerge from one of the most devastating economic slides in its history,<sup>7</sup> current policy failures increase the risk of a future economic collapse. These currents are producing a cascading storm that recalls the massive human and public policy disaster that resulted from the implementation of New Deal programs and policies.<sup>8</sup> Taken together, these developments reify Professor Richard Weaver’s claim that ideas have consequence:<sup>9</sup> under certain conditions, some ideas may inspire greatness, creativity, sacrifice, and human flourishing, while others may lead to extraordinary folly or unspeakable destruction.<sup>10</sup> In the face of contemporary uncertainty and foreboding, both of which are linked to bureaucratic regulation and control that have

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<sup>2</sup> See e.g., Henry H. Drummonds, *Reforming Labor Law By Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LOUISIANA L. REV., 97,154-163 (2009) [hereinafter, Drummonds, *Reforming Labor Law by Reforming Law Preemption Doctrine*](describing a flurry of state and federal employment laws in various arenas, including status discrimination, wage and hour regulation, occupational health and safety, family, parental and medical leave, privacy in the workplace, and wrongful discharge) .

<sup>3</sup> Gene R. Nichol, *Wages, Work, Privilege and Legal Education*, 5 HARV. L & POL’Y REV., 401, 401 (2011). See also Seth D. Harris, *Don’t Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303, 304 (2005) (asserting that real wages have fallen for those with a high school diploma or less).

<sup>4</sup> Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?* 26 QUINNIPIAC U. SCH. OF L, LAW REVIEW, 799, 800 (2008) [hereinafter, Hutchison, *What Workers Want*].

<sup>5</sup> Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to the Great Crash*, 15 NEXUS, CHAPMAN’S J. OF L. & POLICY 5, 5 (2009)[hereinafter, Hutchison, *Racial Exclusion*].

<sup>6</sup> See *id.* at 12-13.

<sup>7</sup> Nichol, *supra* note \_\_\_ at 401.

<sup>8</sup> Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM & MARY L. REV. 595, 650 (2003) (showing how the New Deal created a corporatist process that benefited large economic entities by destroying their smaller and less-politically influential competitors, thereby creating a massive public policy disaster).

<sup>9</sup> JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD*, 40 (2010) (quoting Richard Weaver).

<sup>10</sup> *Id.* at 41

created a legal edifice of stunning complexity,<sup>11</sup> labor unionists and their allies, disturbed by the decline in private sector unionization, are in despair and preparing to start over.<sup>12</sup> Responding to a labor decline that indicates that collective bargaining has become nothing more than an abstract anachronism,<sup>13</sup> labor advocates seek salvation through additional regulatory modification and statutory innovation (at both the federal and state levels), which promise to expand the complexity and power of bureaucratic intrusions in labor markets.

Consistent with the trend toward centralization and bureaucratic complexity is the effort to diminish the role and importance of individual actors, premised on the hypothesis that no individual strategy can achieve socially-optimal results.<sup>14</sup> Armed with such claims, labor union advocates and their ideological allies (i.e., political progressives) have launched renewed efforts to expand the role, coordination, participation, and collective action of workers. A number of local governments, essaying to distinguish between direct and indirect regulation of organizing, for example, have, by a combination of ordinances and private agreements, expanded collective bargaining rights on government-funded projects in response to Congress’ failure to alter labor law in a preferred direction.<sup>15</sup> Still other proposals<sup>16</sup> would limit

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<sup>11</sup> Hutchison, *What Workers Want*, *supra* note \_\_\_ at 800.

<sup>12</sup> Michael H. Gottesman, *In Despair, and Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993) [hereinafter, Gottesman, *In Despair and Starting Over*].

<sup>13</sup> Drummonds, *Reforming Labor Law By Reforming Labor Law Preemption Doctrine*, *supra* note\_\_ at 98.

<sup>14</sup> Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1369 (2006) (describing the general trend toward federalization).

<sup>15</sup> Catherine Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL’Y REV. 601, 612-613 & 619 (2011) (showing that indirect efforts to regulate organizing have survived preemption challenges).

<sup>16</sup> Other proposals include: (1) authorization for state level damages for discrimination based on union activity or pro-union speech; (2) allowing states to experiment with restrictions on permanent replacement of striking workers and the use of offensive lockouts during labor disputes; (3) allowing states to experiment with “card check” recognition, with adequate protection for employees to seek an NLRB election to determine representational issues; (4) state-level experimentation with “equal access” rules to make the election fairer to those supporting unions; (5) state regulation of “captive audience” employer meetings with employees to discourage unionization; and (6) authorization for states to allow non-exclusive representation by minority unions for those employees who want it. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_\_ at 190-91.

the free speech rights of employers<sup>17</sup> and increase the access rights of labor unions, enabling them to expand the self-organization of workers.<sup>18</sup>

Perhaps the most contentious proposal is the Employee Free Choice Act (EFCA),<sup>19</sup> which is “the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA).”<sup>20</sup> Motivated by the conclusion that the statutory right to organize has become a sham,<sup>21</sup> promoted on the ossified but largely mistaken basis that employer coercion is the primary obstacle preventing workers from exercising their undisclosed choice to join a union,<sup>22</sup> and seeking to privilege the private interests<sup>23</sup> of labor unions, the EFCA would enable workers to gain representation through a card-check procedure that fails to fully respect employees’ liberty interests in refraining from

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<sup>17</sup> One example of such proposals is the New Jersey Workers Freedom from Employer Intimidation Act, N. J. Stat. Ann. §§ 34:19-9 to 14 (West 2007).

<sup>18</sup> Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337, 346-49 (2005).

<sup>19</sup> Employee Free Choice Act of 2009, H.R. 1409, 111<sup>th</sup> Cong. (2009) (proposed amendment to the National Labor Relations Act).

<sup>20</sup> RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 1 (2009) [hereinafter EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT]. See also, Harry G. Hutchison, *Employee “Free” Choice in the Mirror of Liberty, Fairness and Social Welfare*, 60 CATH. UNI. L. REV. 575 (2011) [hereinafter, Hutchison, *Employee “Free” Choice in the Mirror of Liberty*]; Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, MICH. J. OF RACE & LAW 369, 369-416 (2010) [hereinafter, Hutchison, *Employee “Free” Choice or Employee Forged Choice*] (demonstrating the connection between this legislative proposal and exclusionary hierarchy). Also of note, the NLRB has recently proposed amendments to NLRB election rules and regulations. See e.g., *Proposed Amendment to NLRB election rules and Regulations fact sheet available at <http://www.nlr.gov/print525>* (accessed June 28, 2011).

<sup>21</sup> See e.g., James Gray Pope, Peter Kellman & Ed Bruno, *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers’ Workers’ Rights*, WORKINGUSA: J. LABOR & SOC’Y 125, 125 (2008).

<sup>22</sup> For a deftly executed evisceration of the employer hostility thesis, see Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 695-97 (2003). During the 1990s, labor economists Farber and Krueger reported that “demand-side factors” are almost wholly responsible for the entire decline in the union membership rate since 1977. Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, available at <http://ssrn.com/abstract=1353305> at 6 (March, 2009). (quoting Henry Farber and Alan Krueger, *Union Membership in the United States: The Decline Continues* 32 NBER Working Paper No. W4216, (1992)).

<sup>23</sup> DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 28-29 (2011) (explaining the equality principle wherein law pursuant to the Constitution declined to place peculiar burdens or grant peculiar benefits or privileges to others). Labor law may be a form of “class legislation.” See *id.* at 74 (discussing this claim in the context of the plaintiff, *Lochner*’s brief in the famous *Lochner* case).

representation.<sup>24</sup> Reliance on a card-check selection process instead of secret ballots, coupled with the likely elimination of private ordering regarding the first labor contract between management and labor, gives rise to objections that resonate deeply with the American tradition and the public.<sup>25</sup> Other difficulties emerge with the presumption that the EFCA is constitutional since the proposal raises First Amendment considerations with respect to card-check and interest arbitration.<sup>26</sup> One commentator insists that the EFCA controversy illustrates the need for more labor relations policy-making in the states.<sup>27</sup> In reality, of course, the EFCA is simply part of a larger debate, an exemplar of the raft of reform efforts percolating throughout the academy.<sup>28</sup> Although the EFCA raises legitimate questions,<sup>29</sup> its importance for the purposes of this Article is as a metaphor for an expansive dispute over the efficacy of federal and state labor law reform efforts, a dispute that triggers responses by partisans on both sides of the labor law reform divide. This division is reinforced by quite different views on the conditions necessary for justice and human flourishing. Adequately responding to such issues begins by considering the intimidating range of questions regarding what justice should require and permit, to which contending individuals and groups within contemporary society offer alternative and incompatible answers.<sup>30</sup> Consistent with the existence of America’s ideological partition, and sponsored by competing groups, some states have taken up the card-

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<sup>24</sup> See e.g., National Labor Relations Act, 49 Stat. 449 (1935); 29 U.S.C. §157 (stating that “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 such activities . . .”).

<sup>25</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 147.

<sup>26</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_ at 157.

<sup>27</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 135-154.

<sup>28</sup> For a description of some these efforts, *see id* at 190-91.

<sup>29</sup> Among the questions are: (1) what process should exist for unions to legitimately demonstrate their majority support; (2) what process should exist for resolving bargaining disputes; and (3) whether employer should face stronger remedies when they commit unfair labor practices such as anti-union discrimination. *Id.* at 135.

<sup>30</sup> ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 1 (1988, reprinted, 2008).

check unionization mantle,<sup>31</sup> while other states aim to throttle such a move in their own jurisdiction.

This dispute has been enlarged by members of Congress, who have responded to the introduction of the EFCA by offering the Secret Ballot Protection Act (SBPA)<sup>32</sup> in a transparent effort to thwart union card-check. The SBPA would amend the National Labor Relations Act (NLRA) to ensure that workers have the right to a secret ballot election<sup>33</sup> conducted under the auspices of the National Labor Relations Board (NLRB) before a labor representative is selected for a bargaining unit.<sup>34</sup> This proposal is designed to ensure that workers’ decision making remains free of coercion, intimidation, irregularity, or illegality.<sup>35</sup> This conception of human flourishing insists that voting is a fundamental right and guarantees a true expression of opinion as a quintessential component of workers’ liberty interests. The SBPA has been joined by various state constitutional efforts that are aimed at preserving secret ballot union representation elections for residents of various jurisdictions.

Passed with overwhelming approval, a number of states have changed their constitutions to safeguard secret ballot elections before their workers can be represented by a labor union.<sup>36</sup> Leaving political progressives and labor hierarchs in high dudgeon, such proposals reflect the weight of public opinion favoring the classical liberal value of individual human freedom embodied in workers’ liberty

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<sup>31</sup> The California legislature recently passed a measure, S. B. 789 (2007) that would have allowed unionization through a card-check process. The Bill was vetoed by the governor. Fisk, *supra* note\_\_ at 619 n. 71.

<sup>32</sup> See e.g., Secret Ballot Protection Act of 2011, H. R. 972, 112<sup>th</sup> Cong. (2011) (proposed amendment to the National Labor Relations Act (NLRA)). See also, Secret Ballot protection Act of 2011, S. 217, 112<sup>th</sup> Congress (2011) (proposed amendment to the NLRA).

<sup>33</sup> See e.g., Barasso: *Protect Workers’ Secret Ballot*, US Senator John Barasso: Press Office, available at <http://barasso.senate.gov/public/index.cfm?FuseAction=PressOffice.OpinionEditorials&C...> (accessed 5/23/2011).

<sup>34</sup> Secret Ballot Protection Act of 2011, H. R. 972, 112<sup>th</sup> Cong. (2011).

<sup>35</sup> *Id.* (expressing the belief that the recognition of a labor organization by way of a private agreement, rather than a secret ballot election supervised by a neutral third party threatens an employee’s right to choose whether or not to be represented by a labor organization).

<sup>36</sup> Richard Vanderford, *NLRB Sues Ariz. Over Union Secret Ballot Amendment*, LAW360, 1, 1-2 (May 6, 2011) available at <http://www.law360.com/articles/243843/print?section=topnews> (accessed June 23, 2011) (describing proposals passed in Arizona, South Carolina, South Dakota and Utah).

interests,<sup>37</sup> which are guaranteed by Section 7 of the NLRA and presumably secured by the Constitution. By potentially enabling voters to impose heightened constraints on political elites<sup>38</sup> and reifying the anti-subordination principle, state secret ballot initiatives prioritizes employee protection over national uniformity.<sup>39</sup> These initiatives are part of a burgeoning clash of values that indicate the dissolution of America’s shared traditions and values.

While supporters of state and federal secret ballot protection measures may take comfort in the conclusion that their cause—the pursuit of human liberty—is just, or that they are simply protecting the Section 7 rights guaranteed to workers by the NLRA, such efforts must confront labor law’s preemption doctrine, as well as federalism’s acceptance of federal supremacy. Consistent with this observation, efforts of card-check opponents have not gone unnoticed by the NLRB<sup>40</sup> since the Board views state referenda as an attempt to set up a parallel, state-run enforcement mechanism for a federal law that challenges its own authority.<sup>41</sup> Viewed from this perspective state and local labor relations innovation may be precluded.<sup>42</sup> Since ballot initiatives appear to directly regulate what is within a domain that is protected by the National Labor Relations Act (NLRA), it is difficult to disagree with the NLRB’s assessment. If the NLRB is correct, then any number of state regulatory forays into the labor law arena ought to be eviscerated, consistent with the view that judicially-created broad preemption doctrines ensnarl all states in a stifling and exclusive, yet strikingly inconsistent, federal law regime.<sup>43</sup>

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<sup>37</sup> As used here, liberty refers to a moderate means-ends approach with a presumption in favor of liberty, which can be overcome, as opposed to a more radical laissez-faire constitutionalism, wherein the presumption in favoring liberty is absolute. *See e.g.*, MAYER, *supra* note \_\_\_ at 43-67 (explicating this distinction).

<sup>38</sup> Somin, *supra* note \_\_\_ at 598.

<sup>39</sup> For a discussion of the anti-subordination principle that prioritizes employee protection over national uniformity, *see generally* Fisk, *supra* note \_\_\_ at 621-628.

<sup>40</sup> Vanderford, *supra*, note \_\_\_ at 1-2.

<sup>41</sup> *Id.*

<sup>42</sup> *But see*, Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154-1155 (2011).

<sup>43</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 99.

The issues examined by this Article do not depend upon whether specific state ballot initiatives can survive current challenges posed by both the NLRB and the doctrine of preemption. Rather, the pertinent question is whether states can and should break free from this stiflingly murky federal law regime and expand the rights of employees within the theoretically liberating space provided by federalism. After all, data in the U. S. and other developed countries shows that workers are increasingly likely to disfavor traditional unions; therefore legal innovation designed to strengthen unions may not be in the best interest of either the workers or the states.<sup>44</sup> Although, progressive scholars do not appear to have noticed that the transnational decline in private sector union penetration continues apace,<sup>45</sup> suggesting that workers worldwide have become dissatisfied with unionization.<sup>46</sup> Hence, supporters of the state referenda and federal statutory amendments that protect workers’ liberty appear to be responding to an important transnational trend signaling that traditional labor unions, shorn of the coercive power of government, may have a limited future. At the same time, progressive scholarship offers conceptually useful arguments about the need to relax existing labor preemption rules.<sup>47</sup> These arguments, if persuasive, may encourage future state and local variation and provide an environment conducive to the acceptance and expansion of all sorts of initiatives that are protective of workers’ liberty interest. Thus understood, it may be possible to view efforts by progressives and by classical liberals as part of a doctrinal convergence that benefits both sides of the labor law divide, expands state autonomy, and strengthens vertical federalism. To the extent that such

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<sup>44</sup> Freeman and Medoff conclude that unions may contribute to a reduction in Gross Domestic Product (GDP) of 0.40%, which would translate into a loss of \$57 billion in national output, suggesting at least one reason why states may be reluctant to encourage unionization. *See* Layne-Farrar, *supra* note\_\_\_ at 11-12 (quoting Freeman and Medoff). In addition, unions are likely to slow the rate of innovation and the rate of capital formation. *Id.* at 12. Lastly, unions appear to reduce the rate of growth in employment. *Id.* at 10.

<sup>45</sup> Layne-Farrar, *supra* note\_\_\_ at 6 (quoting Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV., 38 (Jan 2006)) (data from 14 developed countries supports the inference that private sector unionization across all countries has been strongly declining since the 1970s).

<sup>46</sup> A recent Zogby poll found that only sixteen percent of non-unionized American workers would definitely vote for a union, *See e.g.*, Sharon Rabin Margalioth, *The Significance of Worker Attitudes*, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41, 41-49 (Samuel Estreicher ed., 1998).

<sup>47</sup> Fisk, *supra* note\_\_\_ at 621.

endeavors succeed in weakening labor preemption doctrine, they have the potential to both strengthen and threaten workers’ liberty.

Part I of this Article provides background on the current debate regarding efforts to relax preemption doctrine. Part II examines the intersection of labor relations and preemption doctrine, and speculates on the promise and limits of federalism. Part III examines the evolution and reach of labor law preemption doctrine and offers a more specific assessment of Arizona’s highly doubtful constitutional amendment. Part IV considers the pursuit of balance within the state and federal power paradigm in the context of direct, indirect, and subterranean efforts by states to regulate various aspects of the labor and employment arena; it also assesses the potential viability of state lawmaking in the realm of labor relation. Part V accepts the premise, lucidly articulated by Professor Henry H. Drummonds, that Congress ought to consider a Labor Law Preemption Clarification Act, without being bound by his goals and objectives.<sup>48</sup> For a number of reasons including my understanding of the *Lochner* case, I urge caution before accepting this offer.

**I. BACKGROUND: THE POTENTIAL BENEFITS AND RISKS OF RELAXING PREEMPTION DOCTRINE**

Correctly appreciated, state referenda have the potential to frustrate progressive labor reformers’ policy preference that favors collective action and renewed unionization. The introduction of state referenda into the labor law reform lexicon corresponds with the possibility that there are benefits and costs associated with both encouraging and widening state-level statutory innovation as a counterweight to federal law. This is a risk that some progressive commentators clearly understand and are prepared to take.<sup>49</sup> Nonetheless, coherent with Alexander M. Bickel’s discourse on the morality of consent, which asserts that (A) failure to recognize any “values at all is to deny a difference between ourselves and other particles that tumble in space”<sup>50</sup>

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<sup>48</sup> See e.g., Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_ at 189-191.

<sup>49</sup> Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing States in Labor-Management Relations Policy*, 19 CORNELL J. L. & PUB. POL’Y 83, 141-143(2009) [hereinafter, Drummonds, *Beyond the Employee Free Choice Act*].

<sup>50</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT*, 5 (1975).

and (B) the law is the principal institution through which well-socialized Americans can assert their values, state secret ballot proposals claim to protect long-existing federal rights.<sup>51</sup> In opposition to coerced consent by labor unions, state referenda have become part of an escalating fight over union card-check and the proper scope of preemption doctrine. Lurking below the surface of efforts to change preemption rules is a plethora of other issues that have the potential to stir the labor pot.

Before examining the confusing scope of labor law preemption, it will be useful to briefly consider the potential benefits and costs of relaxing preemption doctrine’s current vise-like grip on a proliferating and conflicting range of state and local labor relations proposals. It will also be worthwhile to examine how this emerging debate responds to the presumptive need for a new approach to labor and employment law preemption doctrine<sup>52</sup> as local governments attempt to transform bad jobs into good ones,<sup>53</sup> or as states transgress preemption doctrine in order to reconstruct federal law in tripartite ways with the purpose of intervening in matters reserved for federal control,<sup>54</sup> or, alternatively, as states advance policies that are protective of their workers’ liberty. Recalling the strong public opposition to labor unions during the 1930s,<sup>55</sup> recent state initiatives have arisen from states’ legitimate interest in reducing the amount of coercion and intimidation associated with unionism. In the absence of a successful national effort to abate the union belligerence that threatens workers’ Section 7 rights,<sup>56</sup> a solid foundation exists that supports state efforts to protect

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<sup>51</sup> *Id.*

<sup>52</sup> Fisk, *supra* note\_\_ at 603.

<sup>53</sup> *Id.* at 601.

<sup>54</sup> Sachs, *supra* note\_\_ at 1155 (defending state and local efforts that act in areas of law that are entirely unrelated to labor organizing and bargaining but are of acute interest to employers, such as medical malpractice reform, wherein government actions are sold to employers in exchange for private contractual agreements through which unions and employers bind themselves to new rules for organizing and bargaining). Tripartite lawmaking does not involve states and cities acting through the remaining exceptions to the NLRA’s broad preemption doctrine. *Id.* at 1157. Evidently, tripartite bargaining expands union rights, consistent with Gray’s claim that government power is sought because it controls so much already. JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 12 (1996).

<sup>55</sup> Somin, *supra* note\_\_ at 619.

<sup>56</sup> The capacity of labor unions to engage in coercive behavior when workers exercise their Section 7 rights can also be seen in instances where workers resign from labor unions and then face threats against their lives and families, and are required to run a gauntlet of intimidation and insults. See Joe Knollenberg, *The*

workers’ opinions from unwarranted interference.<sup>57</sup> Coincident with such efforts and operating on a parallel track that is animated by distinctively different values, labor union advocates and progressive reformers are tempted by the premise that more state or federal intrusions into the market will solve private sector labor’s current woes.

One progressive scholar expands her explanation of the growing move toward local statutory innovation: “In the face of massive changes in the American and global economy and labor markets, state and local governments are experimenting with a variety of strategies to promote the good jobs on which strong communities depend.”<sup>58</sup> Although such claims are deeply paradoxical,<sup>59</sup> progressive reformers look longingly at the putative benefits of shared state-federal authority over wage and hours issues made explicit by the Fair Labor Standards Act (FLSA) or in other areas of employment,<sup>60</sup> and they argue that labor law cries out for a similar expression of congressional intent.<sup>61</sup> Reformers have supported a major devolution of labor relations policymaking that gives authority to the states; accordingly, they have called upon Congress to examine and reform labor preemption doctrine.<sup>62</sup> Nevertheless, whether state labor relations creativity will benefit workers or, whether it will succeed in escaping from preemption, depends on more than the specific legislation under review. It is possible that some state regulatory proposals are primarily designed to achieve a larger goal: the reversal of private sector labor union decline as part of a broad effort to federalize (i.e., centralize) the workplace under the

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*Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 366 (1998).

<sup>57</sup> MAYER, *supra* note \_\_\_ at 18 (quoting James Madison).

<sup>58</sup> Fisk, *supra* note \_\_\_ at 628.

<sup>59</sup> Such claims are paradoxical because employers intending to provide good jobs and good wages have every incentive to react negatively to the costs and bureaucracy associated with local government labor law experimentation and, hence, have every reason to flee to other states or countries. South African government policy illustrates this point. The current government has continued minimum wage regimes imposed and maintained during the apartheid era for the purposes of excluding Blacks from employment. In response to this policy of oppressive wage regulation, South African firms are relocating to Poland. THOMAS SOWELL, *BASIC ECONOMICS*, 216-217 (2007).

<sup>60</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 158.

<sup>61</sup> *Id.*

<sup>62</sup> Drummonds, *Beyond the Employee Free Choice Act*, *supra* note \_\_\_ at 86-87.

direction of and pursuant to directives issued by the labor bureaucrats charged with presumptive expertise. This development may expand the level of economic rents that union leaders<sup>63</sup> and employers can capture through collusive arrangements with state and local governments as part of a tripartite lawmaking process. Partially consistent with the tenor of these efforts, Drummonds offers ten areas for potential state lawmaking that fit within a rebalanced preemption scheme. Most would favor labor organizing, which he candidly admits is precisely the point.<sup>64</sup> It is possible that highly-disputed state ballot initiatives that protect workers’ access to secret ballot elections, in combination with Drummonds’ proposals and additional effort by other progressives, challenge the wisdom and appropriateness of the current broad labor law preemption doctrines.

Various proposals that represent either progressive or classical liberal values are competing for attention and acceptance within the political arena. If these competing proposals can be implemented successfully, then it is possible that substantive state-to-state variation in labor law may emerge to benefit all participants in America’s labor relations conflict. Although an expansion in state labor lawmaking jurisdiction may plausibly protect employee’s liberty interests in the near term, such an expansion, may undermine stronger federal enforcement in the future.<sup>65</sup> Hence, a near term trend favoring state lawmaking may provide an opportunity for capture by groups and individuals committed to uniformity in the long term because the risk associated with wresting jurisdictional authority from the federal courts runs both

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<sup>63</sup> Traditionally, labor unions have supplied economic rents for their members by creating labor monopolies protected by the NLRA. This encourages cartelization of labor markets. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 341-347 (7<sup>th</sup> ed., 2007). Although, increased foreign competition has eroded the capability of rank and file members to earn extra-ordinary income at consumers’ expense, labor leaders receive pecuniary benefits as well as non-pecuniary rents in the form of political influence that fuels their political and social ambitions, and this influence is purchased by coercing labor union dues revenues from represented workers. See generally, Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues dispute with First Amendment Values*, 14 WILLIAM & MARY, BILL OF RIGHTS J. 1309, 1313-1319 & 1365-1401 (2006) [hereinafter, Hutchison, *A Clearing in the Forest*].

<sup>64</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 189-191.

<sup>65</sup> See e.g., Jeffrey M. Hirsch, *Nonemployee Access to Employer Property: A State or Federal Solution?*, 12 TRANSACTIONS: TENN. J. OF BUS. 175, 186 (2010) [hereinafter, Hirsch, *Nonemployee Access to Employer Property*].

ways. And this risk does not necessary favor proponents of workers’ liberty. This is so because advocates of states rights must deal with a larger and still ascending trend: the drift toward uniformity being frequently captured through increased centralization.

Since the past is merely prologue, this trend is furthered not simply by today’s progressive reformers, but also by Big Business and Big Labor, which evokes memories of the New Deal, which reached its apogee in an exclusionary process whereby it was not only inevitable but intended for big business to grow in size and power<sup>66</sup> while labor unions profited by locking out marginalized workers.<sup>67</sup> America’s contemporary thirst for economic rents represents an alarming and subordinating concentration of power reminiscent of the joint participation of big corporations and large labor unions in the cartelization of markets during the 1930s.<sup>68</sup> This inclination meant that individuals, groups, and economic entities, with limited access to rent-seeking lobbyists, were either driven out of work or out of business during the New Deal. This corporatist process favored the extraction of economic rents during the 1930s. This process is consistent with the observation that the New Deal had little connection with the goal of alleviating the Great Depression or the interests of the electoral majority and much more to do with the pursuit of transformative policies by political elites and organized interest groups.<sup>69</sup> Big Business and Big Labor, today’s beneficiaries of yesterday’s approaches are naturally quite reluctant to cede more authority to state-level lawmaking, lobbying, and political action that respond to state business and labor groups or to citizens of state and local governments,<sup>70</sup> particularly if this reduces the self-interested rents available for capture. The ever-present prospect of capturing rents explains why government intervention rarely

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<sup>66</sup> Drummonds, *Beyond the Employee Free Choice Act*, *supra* note \_\_\_ at 142-43.

<sup>67</sup> JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 155-156 (2007).

<sup>68</sup> *See e.g., id* at 153-156 and 290—295 (detailing the cartelization of America, which benefited Big Labor and Big Business through a process of approved codes under the National Recovery Administration that covered almost all industrial workers, and showing that industrialists and big labor profited at the expense of small firms and African American workers, who were locked out of the labor force).

<sup>69</sup> Somin, *supra* note \_\_\_ at 619.

<sup>70</sup> Drummonds, *Beyond the Employee Free Choice Act*, *supra* note \_\_\_ at 142-43.

favors individuals and groups that lack political and economic influence.<sup>71</sup> Although decentralization in labor relations policy implicates more than the narrow interests of national labor federations, such as the AFL-CIO and business groups like the U. S. Chamber of Commerce,<sup>72</sup> the presence of such entrenched interest groups threatens workers’ long-term liberty interests, regardless of whether state secret ballot referenda can somehow escape preemption in the short term.

## II. ACHIEVING THE PROMISE OF FEDERALISM?

### A. Preemption in the Mirror of Skepticism

On one account, the world has now entered the Age of Federalism marking the end of an experiment with nationalism that began with the French Revolution’s rejection of provincial power, and its endorsement of hyper-centralization.<sup>73</sup> Although such claims appears far too optimistic, it is true that federalism is the cornerstone of the United States Constitution, and the constitutional system of federalism assigns powers to state and federal government officials, not for their own benefit, but for that of the people.<sup>74</sup> These benefits are many, including the diverse preferences and competitions between the states themselves and between the states and the federal government.<sup>75</sup> At times, of course, federalism can be defended only by restricting the power of state government rather than by expanding it.<sup>76</sup> Whether the world has actually relinquished its fascination with nationalism and hyper-centralization or not, preemption issues figure prominently into labor law consistent with certain conceptions of federalism, despite the general claim that preemption cases are not

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<sup>71</sup> For example, highly-lubricated access to power explains why the UAW and other stakeholders were treated more favorably in Chrysler Corporation’s recent bankruptcy than the police officers and teachers who were the beneficiaries of the State of Indiana’s pension fund. Hutchison, *Racial Exclusion*, *supra* note \_\_\_ at 13.

<sup>72</sup> Drummonds, *Beyond the Employee Free Choice Act*, *supra* note \_\_\_ at 143.

<sup>73</sup> Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law, Two Different Possibilities?* APSA 2011 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=1902971>.

<sup>74</sup> John O. McGinnis and Ilya Somin, *The Rehnquist Court: Federalism vs. States Rights: a Defense of Judicial Review in A Federal System*, 99 NW. U. L. REV. 89, 89 (2004).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

about federalism at all.<sup>77</sup> Indeed, “[s]cholars who attempt to view preemption doctrine as somehow providing an important account of the difficulties of the dual-sovereign premises of American constitutionalism tend to be dismissed either with cynicism or derision.”<sup>78</sup>

Whether cynicism or derision is warranted, labor law is at the center of the concern regarding the tension between state-based regulation and the commands of a national market,<sup>79</sup> particularly given the momentum toward federalization over the long term.<sup>80</sup> It is possible, of course, to conceive of two federalist constraints on centralized political power. The first approach is captured by Justice Brandeis’s invocation of states as the laboratories of democracy in which<sup>81</sup> “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>82</sup> “The second ties the smaller, decentralized scale of subnational units to a more robust democratic accountability by which ‘government is brought closer to the people, and democratic ideals are more fully realized.’”<sup>83</sup> According to this view, contemporary federalism vindicates state authority relative to the federal government and serves as antidote to the central planner by concentrating on economic heterogeneity and democratic accountability.<sup>84</sup> Against the possible benefits of states acting to place constraints on centralized political power, Issacharoff and Sharkey note that some claims of state sovereignty pose risks to the rest of the country.<sup>85</sup> Such risks, whether real or imagined, constitute a plinth for the advancement of uniformity that diminishes an equal concern for federal encroachment on state autonomy, while simultaneously strengthening the hand of large economic and political entities.

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<sup>77</sup> Issacharoff & Sharkey, *supra* note \_\_\_\_ at 1366 (citing Michael S. Greve for this proposition).

<sup>78</sup> *Id.* at 1367.

<sup>79</sup> *Id.* at 1368.

<sup>80</sup> *Id.* at 1369.

<sup>81</sup> *Id.* at 1354.

<sup>82</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>83</sup> Issacharoff & Sharkey, *supra* note \_\_\_\_ at 1355.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Issacharoff and Sharkey’s argument proceeds as follows: experiments of democracy within one’s state’s borders have spillover effects that adversely affect citizens of other states, but these other states are deprived of the political means of compelling democratic accountability from economic actors shielded by other states’ claim of sovereignty.<sup>86</sup> Propelled by a concern for protecting an increasingly unified national (and international) commercial market from the imposition of negative externalities by unfriendly state legislation,<sup>87</sup> and thinking about sovereignty in two dimensions, they emphasize two questions: first, the more familiar question of whether state or federal law controls the circumstances; and second, the battle over which forum, state or federal, should govern a particular circumstance, and which is to be the catalyst for new legal norms.<sup>88</sup> The implicit necessity of uniformity, bolstered by the thirst for new legal norms in their conceptualization of federalism, issues forth in their concern for the need for horizontal federalism (policing relations between the states) versus vertical federalism (namely the balance of power and division of labor between federal and state sources of authority).<sup>89</sup>

Completely solving this riddle is beyond the scope of this Article. I am principally concerned with both the question of vertical federalism within the domain bounded by the intersection of the NLRA and state regulatory efforts, as well as the risks to human freedom and liberty implicit in the goal of horizontal federalism, which sets the stage for coordinated solutions to matters that cross state lines.<sup>90</sup> An overly-expansive conception of the latter agenda, in combination with a cramped conception of vertical federalism, may preclude state-to-state variation on a substantive level, clear the field of labor of state regulation, or, alternatively, shoehorn state regulation in a direction that complements federal regulation of minimum standards. Taken as a whole, this process would minimize authentic state-to-state diversity and maximize centralization as part of an insistent nationalist agenda. This is an appropriate

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1356.

<sup>88</sup> *Id.* at 1355-56.

<sup>89</sup> *Id.* at 1356.

<sup>90</sup> *Id.* at 1380.

moment for me to put my cards on the table. This Article is animated by a concern for the dangers and inherent authoritarianism associated with centralized power, which is frequently reinforced by a weak conception of vertical federalism and bolstered by a strong conception of horizontal preemption that has the potential to impose too great a cost on economic freedom and liberty. As alluded to earlier,<sup>91</sup> this perspective is driven by rich skepticism about government power, whether exercised federally or by states. In particular, my intuition suggests that centralizing powers<sup>92</sup> (state or federal) have often been an enemy of small economic entities, low-wage workers and members of marginalized communities; this coheres with the observation that progressives, Big Business, Big Labor and New Deal labor law have combined to create a remarkably repugnant record<sup>93</sup> that is regularly defended by contemporary progressives.<sup>94</sup> Although a complete explication of my skepticism is beyond the scope of this Essay, a sliver of explanatory force can be evoked by balancing Justice Brandeis’s views extolling the benefits and risks of state experimentation with the observation that he spent much of his career as a progressive lawyer, arguing that government, particularly that of the state has a duty to “protect” women through minimum wage laws and other regulations.<sup>95</sup> Premised upon women’s innate

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<sup>91</sup> See *supra* Part I.

<sup>92</sup> In fairness, even some staunch defenders of the market believe law must be provided centrally. See Edward Stringham, & Todd J. Zywicki, *Hayekian Anarchism*, George Mason University Law and Economics Research Paper Series (2011), available at [http://ssrn.com/abstract\\_id=1744364](http://ssrn.com/abstract_id=1744364), at page 2 (describing F. A. Hayek).

<sup>93</sup> See e.g., Hutchison, *Employee “Free” Choice in the Mirror of Liberty*, *supra* note\_\_\_ at 595-613 (examining the Progressive Era, the New Deal and contemporary unionism).

<sup>94</sup> See e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 146 (1993) (portraying federal intervention during the New Deal as part of an encouraging pursuit of social equality that set the stage for later civil rights measures).

<sup>95</sup> See e.g., RICHARD EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, 90 (2006) (Showing how Justice Brandeis, acting as a stalwart progressive before joining the U.S. Supreme Court, served as the architect of detailed sociological studies used to support differential treatment of women against a Fourteenth Amendment challenge, and how he successfully defended a state statute limiting hours of work for women on grounds of innate female inferiority in a Supreme Court case decided in 1908); and TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 8 (2010) (showing that Brandeis believed that women, were unfit for work).

inferiority,<sup>96</sup> this centralizing and dominating perspective gleams with sheer masculine self-appreciation and betrays its origins within progressive ideals.<sup>97</sup>

A fuller explanation of my skepticism is evinced by evidence that government throughout the nation, at both the state and federal levels, now acts as an instrument of oppression rather than as an umpire who enforces the rules of civil association.<sup>98</sup> Government “power is sought, in part because of the vast assets it already owns or controls, but also because no private or corporate asset is safe from invasion or confiscation by the state. From being a device whereby the peaceful coexistence of civil association is assured, the state becomes itself an instrument of predation, the arena within which a legal war of all against all is fought out.”<sup>99</sup> Far from favoring a Madisonian conception of equality as the basis of every law,<sup>100</sup> legal creativity has now become an object of capture by interest group exploitation, as shown by the evolution of tripartite lawmaking, which enables those who are organized to hijack the political process for their own benefit.<sup>101</sup> “Corporate interests and pressure groups [labor unions] are continuously active, by lobbying, colonization or cooption of regulatory authorities, or just plain corruption, to mold these rules to suit their own interests.”<sup>102</sup> Consequently, civil life has come to resemble the Hobbesian state of nature from which the state was meant to deliver us.<sup>103</sup>

This process explains the passage of the NLRA in spite of the fact that its main purpose—strengthening labor unions and guaranteeing the right to strike—was opposed by the majority of the public at the time.<sup>104</sup> This authoritarian process is reinforced by Big Business, Big Labor and Big Lobbyists, who are prowling everywhere for economic and ideological rents. This form of self-interested behavior,

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<sup>96</sup> See EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note \_\_\_ at 90.

<sup>97</sup> See e.g., Hutchison, *Waging War on the “Unfit?”*, *supra* note \_\_\_ at 1-46 (explaining progressive ideals tied to biology).

<sup>98</sup> GRAY, *supra* note \_\_\_ at 12.

<sup>99</sup> *Id.*

<sup>100</sup> MAYER, *supra* note \_\_\_ at 28.

<sup>101</sup> GRAY, *supra* note \_\_\_ at 12.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Somin, *supra* note \_\_\_ at 666.

as public choice theory illustrates, is often sheltered by the rhetoric of social justice, progress and the public interest. Although states potentially feature more democratic accountability, they are still susceptible to capture. This is particularly true when national groups as part of a national program, endeavor to hide their objective from voters and then proceed to seize state government as instruments of uniformity that will layer regulations on their smaller economic competitors in order to attain hegemonic objectives.

### **B. An Overview of Preemption Issues**

Against this backdrop, it is noticeable that no area of labor law seems quite as confusing as the scope of federal preemption, and there are a number of reasons for this state of affairs.<sup>105</sup> First, the translation of statutory implications into concreteness regarding what has been taken from the States and what has been left to them is of such a Delphic nature that it materializes through a process of litigating elucidation.<sup>106</sup> Elucidation provides a platform for elastic adjudication and statutory construction<sup>107</sup> that, under certain circumstances, favors state and local statutory creativity. Evidently, this move can serve to minimize the reach of preemption and the Supremacy Clause, so long as labor unions and local governments are included in an often surreptitious process that originates in the desire to escape preemption in the first place.<sup>108</sup> Since history repeats itself, it is noticeable that tripartite state and local

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<sup>105</sup> ROBERT A. GORMAN AND MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1078 (2004) (reasons for this development include: (1) at the time that the NLRA was passed there was only a modest body of state law to protect individual employees; (2) the courts are confronted far more often today with state claims that are protective of individual employees than prohibitive of concerted activity; (3) unlike other federal laws that expressly confront their relationships to overlapping or potentially-conflicting state law, Congress did not express its intent in the text of the Act, and according, the law of preemption is entirely judge-made is therefore subject to shifts in judicial application over time). *See also*, Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV., 779, 789-799 (2009) [hereinafter, Hutchison, *Liberty, Liberalism, and Neutrality*].

<sup>106</sup> *International Assn' of Machinists v. Gonzales* 356 U.S. 617, 619 (1958).

<sup>107</sup> Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note \_\_\_ at 783.

<sup>108</sup> *See* Sachs, *supra* note \_\_\_ at 1155-56 (explaining how state and local innovation escapes the preemptive force of the NLRA through a form of tripartite lawmaking under which the NLRA affirmatively protects such contractual reordering even when such lawmaking offers organizing and bargaining rules that are markedly different from federal law yet fully enforceable as a matter of federal law). An example of such tripartite creativity can found in the City of New Haven where the Yale-New Haven hospital, the New Haven hospital workers, and the City of New Haven engaged in three-way negotiations over the

regulation (a collusive corporatist policy calculated to set up workers as bystanders to union organizing) offers striking parallels to FDR’s corporatist policies as part of a deceptive strategy for eliciting public support for the National Industrial Recovery Act (NIRA).<sup>109</sup> Although it obviously requires more effort to deceive a well-informed audience than a comparatively ignorant one,<sup>110</sup> the shifting fight over card-check, secret ballot initiatives and other labor relations proposals shimmers with the suspicion that “Nietzsche was mostly right: that while the will to power has always been present, American democracy increasingly operates within a political culture—that is a framework of meaning—that sanctions a will to domination.”<sup>111</sup> Whether through tripartism or by other regulatory efforts, state and local governments can partner with national schemes intended to expand this dominating process through opaque regulations and contractual arrangement designed to achieve what otherwise seems unachievable within the domain of labor law preemption.<sup>112</sup> This observation coheres with the claim that under prevailing conceptions of federalism, the will to dominate normally favors federal power,<sup>113</sup> especially when it is transmuted into the demand for uniformity.<sup>114</sup> Centralized federal power has become an expandable and

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construction of a cancer facility. The City issued permits in exchange for the hospital’s agreement to contractually reorder the rules of organizing. *See id* at 1156. This process resembles a political shakedown wherein government power is sold in exchange for benefits to labor allies prompting such allies to contribute financial funds to powerful politicians who anticipate the next sale or exchange transaction, a process lucidly explained by John Gray. *See* GRAY, *supra* note \_\_\_ 12 (“Corporate interest and pressure groups are continuously active, by lobbying, colonization or cooption of regulatory authorities, or just plain corruption, to mold these rules to suit their own interest.”).

<sup>109</sup> Somin, *supra* note \_\_\_ at 652 (virtually all scholars agree that the NIRA was intended to be a permanent restructuring of the American economy along corporatist lines and supporters of the NIRA among business interest groups and many American liberals hoped that the NIRA would rebuild America on the model of Mussolini’s fascist Italy, which was then regarded as a successful alternative to laissez-faire capitalism by both corporate and liberal leaders).

<sup>110</sup> Somin, *supra* note \_\_\_ at 662-63 (discussing New Deal deception and the NIRA).

<sup>111</sup> HUNTER, *supra* note \_\_\_ at 109.

<sup>112</sup> Sachs, *supra* note \_\_\_ at 1156.

<sup>113</sup> *See e.g.*, Issacharoff & Sharkey, *supra* note \_\_\_ at 1358 & 1359 (implying that federal oversight to states grounded in the notion that the lives of a state’s citizens are increasingly accountable to broader market commands because state rules may be orthogonal to the need to coordinate an increasingly national market for good and services justifies the need to police outlier states and propels the introduction and enforcement of more and more federal minimum standards).

<sup>114</sup> Issacharoff & Sharkey, *supra* note \_\_\_ at 1360 (asserting that over the last century, the powers of Congress have been greatly expanded because of a recognition that we live in a world with an increasingly interconnected national commercial market that gives rise to a cry for uniformity of regulation).

paradoxical feature of late modernity, postmodernism, Progressivism,<sup>115</sup> and majoritarian authoritarianism.<sup>116</sup> In the context of labor law, postmodernism issues forth with the contention that the ostensible promise of the Wagner Act—the flourishing of labor union representation as a vehicle for class-based justice—has been diminished or distorted by the Board or the courts,<sup>117</sup> albeit without noting that the Wagner Act was enacted by political elites over strong objections by the public,<sup>118</sup> which strongly suggests that this law was designed to fulfill the political ambitions and impulses of hierarchs rather than a majority of Americans. Further evidence of postmodernist nostalgia materializes by noting that the NLRA, in its original form, does not entirely exist because the Taft-Hartley Amendment rebalanced the scales to strengthen workers’ ability to decline to join a labor union,<sup>119</sup> clarified employers’ free speech rights during organizing campaigns,<sup>120</sup> and sought to hold labor unions responsible for unfair labor practices.<sup>121</sup> Steadfast with the tenets of postmodern hermeneutics, labor advocates look fondly to foreign jurisdictions for inspiration to reverse labor’s decline<sup>122</sup> however, they rarely concede that private sector labor union

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<sup>115</sup> Paradox surfaces in the face of indisputable evidence showing that both federal enforcement and state “protection,” propelled by progressive values, are often equal opportunity actors in the subordination of workers. See generally, Harry G. Hutchison, *Waging War on the “Unfit”?: From Plessy v. Ferguson to New Deal Labor*, 7 STAN. J. OF CIVIL RIGHTS & CIVIL LIB. 20-34 (2011) [hereinafter, Hutchison, *Waging War on the “Unfit”?*] and Harry G. Hutchison, *Waging War on “Unemployables”?: Race, Low-Wage Work, and Minimum Wages: The New Evidence*, 29 HOFSTRA LAB. AND EMPL. J. (forthcoming 2011) available at <http://ssrn.com/abstract=1866365> [hereinafter, Hutchison, *Waging War on “Unemployables”?*] (showing how federal law and progressive presumption further the subordination of minorities and women).

<sup>116</sup> See e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIANISM, 125, 125(Andras Sajo ed. 2002) (showing that authoritarianism is an inherent structural tendency of democratic regimes).

<sup>117</sup> George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LABOR., L. 187, 193 (1994) (citing cases reflecting the liberal doctrine that labor law only protects unions insofar as they limit their role to that of representatives of the employees of an individual employer and not of all workers in the fight for national class-based justice).

<sup>118</sup> Somin, *supra* note \_\_\_ at 619.

<sup>119</sup> 29 U. S. C. § 157 (1947) (protecting workers right to refrain from forming, joining or assisting labor organizations or engaging in any activities for mutual aid and protection).

<sup>120</sup> 29 U. S. C. § 158© (1947).

<sup>121</sup> 29 U. S. C. § 158(b) (1)-(4) (1947).

<sup>122</sup> RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (updated edition) 184 (2006).

penetration rates are declining more quickly in foreign countries than in the United States.<sup>123</sup>

Further compounding this complex picture, the facts on the ground demonstrate that neither a reliance on federal enforcement nor a dependence on progressive presuppositions, advanced (at either the state or federal level) on the basis of the public’s or workers’ interests, actually favors the public<sup>124</sup> or workers. Labor advocates continue to emphasize an escalating role for regulation at both the state and federal levels of government, premised on the claim that the current labor system is broken.<sup>125</sup> This contention is bolstered by the lachrymose assertion that workers are dissatisfied with their current jobs<sup>126</sup> despite transparent evidence to the contrary.<sup>127</sup> Although these assertions likely constitute a self-preoccupied falsifying veil that conceals reality,<sup>128</sup> such claims, when used to provide intellectual ammunition for state regulatory enthusiasm, may or may not be useful in providing a defensible basis for renewed state efforts that strengthen and protect workers’ ability to refrain from participating in collective action.

Within the space bounded by workplace federalism and preemption doctrine, if states have legitimacy to expand worker rights based on either the improbable promise of workplace democracy,<sup>129</sup> or the equally problematic claim that the decline in private sector union penetration rates is accounted for by the employer-hostility

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<sup>123</sup> See e.g., John T. Addison, Claus Schnabel & Joachim Wagner, *The (Parlous) State of German Unions*, 28 J. LAB. RES. 1 (2007) (authors abstract) (showing that German unionism has declined sharply over the last three decades despite the existence of Works Councils). See also, RICHARD A. EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note \_\_\_ at 14 tbl. 1 (showing substantial declines in unionization in Australia, the European Union, France, Germany, Ireland, Japan, New Zealand, the United Kingdom and the United States, and a more modest decline in Canada, Italy, and South Korea).

<sup>124</sup> Hutchison, *Employee “Free” Choice or Employee Forged Choice*, *supra* note \_\_\_ at 396-414 (demonstrating the subordinating power of the deployment of federal enforcement, and also showing that such enforcement cannot be in the public interest).

<sup>125</sup> See e.g., FREEMAN & ROGER, *supra* note \_\_\_ at 209-210.

<sup>126</sup> Hutchison, *What Workers Want*, *supra* note \_\_\_ at 807-808 (critiquing Freeman & Rogers’ claims that workers are on the whole dissatisfied).

<sup>127</sup> FREEMAN AND ROGERS, *supra* note \_\_\_ at 5 (admitting that the Gallup Poll for the period between 1997 and 2005 shows that eighty-six percent of workers reported being satisfied with their jobs).

<sup>128</sup> Iris Murdoch, *The Sovereignty of Good Over Other Concepts*, in *EXISTENTIALISTS AND MYSTICS* 363, 368 (Peter Conradi, ed., 1998).

<sup>129</sup> See e.g., Karl L. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV., 1 (1988).

thesis,<sup>130</sup> it seems clear that states ought to be able to expand workers’ liberty interests and provide for the economic interests of their workers in obtaining employment at good wages, in harmony with the overwhelming weight of public opinion that workers ought to be able to select their representatives without intimidation. The latter contention is entirely consistent with freeing workers from the often subordinating effect of increased unionization.<sup>131</sup> Freedom, after all, is part of the promise of federalism. While proponents of state sovereignty must tackle the forces of uniformity and regulatory homogeneity, as well as the claim that there is one national policy for labor relations,<sup>132</sup> they can also take heart in the observation that for various reasons and, at any given time prior to resolution by the Supreme Court, the NLRB may apply one “national policy,” the Second Circuit another, and the Seventh circuit yet another, which means that on particular issues there is no such thing as a national policy.<sup>133</sup> Drummonds bolsters this observation by noting that one of the three major preemption doctrines<sup>134</sup> is filled with several exceptions and doctrinal caveats, which imply that this doctrine lacks consistency.<sup>135</sup> The second major doctrine loses coherence when considered in light of other rulings,<sup>136</sup> and the third could plausibly be vindicated by deferring rather than preempting the claims of

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<sup>130</sup> EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note \_\_\_ at 54-57 (puncturing the employer-hostility thesis by showing that private-sector unionization has declined for reasons that are independent of employer intimidation). *But see*, CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION, 165-66 (2010) (defending the employer hostility thesis).

<sup>131</sup> Hutchison, *Employee “Free” Choice, in the Mirror of Liberty*, *supra* note \_\_\_ at 595-613 (explaining the subordinating premise, promise, and effect of progressive labor law legislation).

<sup>132</sup> As Drummonds, notes, this claim may not be true. *See* Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 174-175 (disputing the claim that there is necessarily one national labor policy).

<sup>133</sup> *Id.* at 174-75.

<sup>134</sup> There are three major preemption doctrines in the labor relations arena: *Garmon*, *Machinist* and Section 301. *See infra* Part III A.

<sup>135</sup> *Id.* at 176-178 (showing, for instance, that the Supreme Court has indicated that the “arguably prohibited” prong of *Garmon* may be limited to cases in which NLRB and state proceedings address the identical controversy, and alternatively demonstrating that the Court allows states to proceed to enforce tort actions against labor unions, which taken together, suggests that *Garmon* has not been consistently applied).

<sup>136</sup> *Id.* at 185-186 (explaining that the *Machinists* doctrine allows states to adopt labor standards legislation that directly establishes the terms of employment, including a statute permitting only unionized miners to work over eight hours per day).

union members, who assert individual rights claims under state law.<sup>137</sup> Taken together, Drummonds’ analysis may provide a basis for statutory innovation, arising in the future from judicial reconsideration or, more likely from Congress.

On the other hand, proponents of state secret ballot amendments, who advance under the broad banner of state sovereignty, may have reason to worry over attempts to weaken preemption doctrine. Such efforts may prove troubling in the long run as states, once unleashed from NLRA and NLRB control by a more limited conception of preemption, or under the doctrine of tripartism, may become even more attractive objects of capture by progressives and labor unions. Arguments that advance state and local regulatory creativity may ultimately place workers’ liberty interests at risk since a program or policy that expands the scope for state and local innovation can be transmuted into the goal of uniformity and centralization, a goal that is reinforced by the pursuit of self-interested benefits and new legal norms that shelter this unfolding process.

Self-interested rents come into view for several reasons<sup>138</sup> and include the conversion of organizing activity into increased labor union dues revenues<sup>139</sup>

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<sup>137</sup> *Id.* At 186-188 (discussing Section 301 preemption doctrine, which is not part of the primary focus of this Article).

<sup>138</sup> The production of economic rents arises because labor unions cartelize markets and exclude some workers from the workforce, a phenomena best illustrated by the New Deal, which massively increased the unemployment of African Americans during the 1930s and 1940s. Economic rents also arise because of the following reasons: (1) the fact that the law has failed “to require, let alone enforce, democratic bargaining [and] has left union members subject to the manipulation of union leaders and negotiators with interests sharply different from theirs;” Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L. J. 793, 843 (1984); (2) given this foregoing failure labor unions have been transformed from vehicles designed to further self-government by workers who are oriented toward their own common economic interest into robust engines of collective insurgency against class-based injustice that is, among other things, concerned with marijuana decriminalization and, abortion rights, as unions have become supporters of ideological goals that are separate and distinct from the workplace, *See*, Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 UNIV. OF MICH. J. OF L. REFORM, 447, 448 & 490-492 (2000) [hereinafter, Hutchison, *Reclaiming the Labor Movement Through Union Dues*]; and accordingly, (3) the efforts of political progressives and labor advocates to support and sustain state labor relations innovation is largely aimed at expanding opportunities to organize workers as part of the quest for increased union dues revenues thought necessary to fund societal transformation, and which provide self-interested benefits (rents) to individuals outside of the labor union itself that are purchased by claiming to provide economic benefits to workers. *See* Hutchison, *A Clearing in the Forest*, *supra* \_\_\_ at 1309 (discussing these issues in the context of labor union dues objectors’ claims and contentions).

controlled by labor hierarchs and their political allies as they jointly seek to achieve political goals at workers’ expense. Intertwined with any discussion of workplace federalism, preemption doctrine and economic rents are the acts of organizing and innovative attempts to expand organizing since labor union expenditures for political and related purposes continue to rise, while labor unions (consistent with their quest for ideological rents) spend a fraction—perhaps less than twenty percent—of their dues revenues on collective bargaining and related activities.<sup>140</sup> Labor unions representing a small fraction of the workforce (public and private) occupy a majority of the slots atop the list of political donors, while Big Business and Big Lobbyists follow in hot pursuit.<sup>141</sup>

Taking full advantage of efforts to moderate labor’s preemption doctrine, it is entirely possible for some states, captured by progressive ideology, to enact labor laws that recall the subordinating force and exclusionary effects that are inescapably connected to the presuppositions and ideology of Louis Brandeis, Oliver Wendell Holmes and Woodrow Wilson, among others.<sup>142</sup> Alternatively, a majoritarian commitment to federal minimum standards, coupled with the claim that state statutory innovations that are protective of workers’ liberty create adverse effects on other states, may justify an authoritarian attempt to police so-called outlier states<sup>143</sup> and leave state secret ballot initiatives in shambles, surrounded by an even more imposing federal edifice that patrols and limits workers’ freedom.

### **III. PREEMPTING STATE REGULATORY EFFORTS**

#### **A. The State of the Law: Specific Preemption Rules Surface in the Labor Relations Arena**

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<sup>139</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1318 (union organizing activities can be fashioned as a form of politics funded by compulsory union dues payments).

<sup>140</sup> *Id.* at 1315-16.

<sup>141</sup> *Top Overall Donors*, CENTER FOR RESPONSIVE POLITICS, OpenSecrets.org, *available at* <http://www.opensecrets.org/overview/topcontribs.php>. Big Business and Big Lobbyists occupy most of the other slots. *See id.*

<sup>142</sup> For a general discussions of these and other actors and their transparent commitment to social exclusion, *see*, Hutchison, *Waging War on the “Unfit”?* *supra* note \_\_\_ at 17-34.

<sup>143</sup> *See e.g.*, Issacharoff and Sharkey, *supra* note \_\_\_ at 1359-60 (conceptualizing an intellectual framework designed to police so-called outlier states).

Prior to the adoption of the NLRA in 1935, preemption was rarely an issue since the regulation of labor relations and union activities entailed a mélange of state conspiracy doctrines, common law torts, and state statutes of general application applies to union activities.<sup>144</sup> The adoption of the Wagner Act immediately raised questions concerning the relationship of existing state laws as enforced in the courts, as well as the new federal law and the administrative agency created to administer it.<sup>145</sup> “More specifically, how much of the previous patchwork of state laws and new federal legislation was to coexists, and how much had been preempted?”<sup>146</sup> Preemption issues are particularly nettlesome because, unlike the other issues raising federal-state concern, labor relations were mostly a matter of state concern up to the enactment of New Deal legislation.<sup>147</sup> Indeed, even after the passage of the NLRA, states continued to regulate within the field of labor relations in areas where the Act was silent.<sup>148</sup> This development was exemplified by “the continued state regulation of union activity before the 1947 Taft-Hartley amendments added union unfair labor practices to the federal labor law.”<sup>149</sup> Although the issue of preemption with regard to the NLRA and its subsequent amendments was in many ways no different from the issues that are raised whenever Congress legislates in a domain previously unregulated or left to the states, the question remains as to how much of the field Congress intended to preempt.<sup>150</sup>

“Between 1959 and 1985, the United States Supreme Court created three distinct strands of labor law preemption doctrine,”<sup>151</sup> which sprang from acorns of sensible decision making into mighty oaks that have grown beyond all usefulness.<sup>152</sup> Labor law preemption thwarts meaningful reform legislation by states that either

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<sup>144</sup> JULIUS G. GETMAN, BERTRAND B. POGREBIN & DAVID L. GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW 370 (2<sup>nd</sup> ed., 1999).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 371.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 370.

<sup>151</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 99 n. 9.

<sup>152</sup> *Golden State Transit Corp. V. City of Los Angeles*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting).

protect workers’ freedom to refrain from supporting a labor organization or, alternatively, state statutory innovation that legitimately expands workers’ representation rights beyond the parameters specified by the NLRA. Although preemption, in theory, rests upon congressional intent, it is clear that Congress remains silent after fifty years of judicially-created preemption doctrine.<sup>153</sup> Today, labor preemption rules and their application are often neither consistently nor intelligibly applied, which corresponds with the suspicion that the conceptual approach developed by the courts is governed by principles that are easier to articulate than to apply.<sup>154</sup>

Among the clearest principles available, the Supremacy Clause of the Constitution mandates that where Congress has intended to legislate in a field, state law is preempted.<sup>155</sup> The move toward federal preemption has found judicial sympathy outside the domain of labor law in arenas similarly attached to the Commerce Clause. For instance, the Supreme Court is content to conclude that states’ rights must yield on such disparate issues as the home cultivation of marijuana that was not intended to be sold or the production of wheat grown for private consumption with no intent to sell in any market, on the thin premise that federal regulation is sufficiently tied to Congress’ conception of interconnected national markets justifying

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<sup>153</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 164.

<sup>154</sup> GETMAN, POGREBIN AND GREGORY, *supra* note \_\_ at 371. Congress, since the founding of the nation has “been accorded the power by Article I, Section 8 of the Constitution, ‘To regulate Commerce . . . among the several States’ and ‘To Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.’” ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN, & MATTHEW W. FINKIN, *LABOR LAW: CASES AND MATERIALS*, 1001(2006). Nonetheless, the “entire residue of regulatory power, as far as it may affect labor relations, was left to the states.” *Id.*

<sup>155</sup> COX, BOK, GORMAN, & FINKIN, *supra* note \_\_ at 1001. Nonetheless, the “entire residue of regulatory power, as far as it may affect labor relations, was left to the states.” *Id.* It is clear that until the first third of the twentieth century, “the principal body of legal rules regulating the relationship among employers, workers and unions was formulated through common law decisionmaking by state-court judges.” *Id.* This follows from the assumption that relations between labor and management were essentially beyond the power of Congress to regulate. *Id.* at 1002. *See also*, *Adair v. United States*, 208 U.S. 161 (1908) (holding that the federal government could not constitutionally protect organization activities on interstate railroads because there was no legal or logical connection between an employee’s membership in a labor organization and the carrying on of interstate commerce). Even today, in situations entailing a compelling state interest such as the maintenance of domestic peace, state jurisdiction is not overridden by federal labor law in the absence of clearly-expressed congressional direction. *San Diego Building Trades Council v. Garmon* 359 U.S. 236, 244, 247 (1959).

preclusive uniform regulation.<sup>156</sup> A similar dependence upon the needs of uniformity arose under the Labor-Management Relations Act,<sup>157</sup> wherein Congress has sought to occupy the field.<sup>158</sup> Returning to labor law preemption, the ultimate question “is to determine what aspects of the conduct being regulated by the states Congress intended to preempt. Outside of a few explicit exceptions, Congress has not set down any clear guidelines”<sup>159</sup> Congress’ silence regarding the extent to which it intends to occupy the field has led to the understandable conclusion that it did not intend to fully occupy the field.<sup>160</sup>

Corresponding with this analysis, and elevating the observation that labor law leaves much to the states, although Congress has refrained from telling us how much,<sup>161</sup> current Ninth Circuit’s labor law preemption analysis “begins with the basic assumption that Congress did not intend to displace state law.”<sup>162</sup> If the Ninth Circuit is correct, then its approach provides space for additional state labor regulation, despite the existence of early cases decided by courts sensitive to any state regulation. This indicates that any state interference with section 7’s virtually unlimited grant to employees of the right to engage in concerted activities was preempted.<sup>163</sup> The subsequent passage of the Taft-Hartley amendments to the NLRA, bolstered by strong public support,<sup>164</sup> produced additional debate over the reach of federal preemption.<sup>165</sup>

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<sup>156</sup> Issacharoff & Sharkey, *supra* note\_\_\_ at 1361-63 (discussing *Wickard v. Filburn*, 317 U.S. 11 (1942) and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005)).

<sup>157</sup> *Id.* at 1378 (citing the need for uniformity in this arena).

<sup>158</sup> *Id.* at 1389.

<sup>159</sup> GETMAN, POGREBIN AND GREGORY, *supra* note\_\_\_ at 371.

<sup>160</sup> *Id.*

<sup>161</sup> *San Diego v. Garmon*, 359 U.S. at 240.

<sup>162</sup> *Chamber of Commerce of the U.S. v. Lockyer* 463 F. 3rd 1076, 1085 (9<sup>th</sup> cir. 2006), *rev’d sub nom.* (quoting *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981)).

<sup>163</sup> GETMAN, POGREBIN AND GREGORY, *supra* note\_\_\_ at 372. (courts disallowed early attempts by states to modify or condition rights guaranteed by Section 7 of the Act and they found impermissible a Florida statute that required the licensing of union representatives, which limited the issuance of a license to persons free of criminal convictions and of good moral character).

<sup>164</sup> On this point, see Somin and the DEVELOPING LABOR LAW. Somin shows that the NLRA was passed despite strong public skepticism about the virtues of unions and strikes. Somin, *supra* note\_\_\_ at 655-658. THE DEVELOPING LABOR LAW explains that the labor movement in the United States was seen as the most aggressive and powerful the world had ever seen and the resulting public indignation toward union strike

In line with the observation that the penumbral area of labor preemption can be rendered progressively clear only by the course of litigation, two specific doctrines have drawn the most attention within the arena patrolled by the NLRA.<sup>166</sup>

Responding to the proposition that the ultimate touchstone of preemption analysis, is the question of congressional intent and the purpose of Congress,<sup>167</sup> the first doctrine emerged in the *Garmon* case<sup>168</sup> and the second was produced in the *Machinists* case.<sup>169</sup>

Taking the opportunity to synthesize previous case law,<sup>170</sup> ostensibly carrying out the purposes of Congress with fidelity,<sup>171</sup> and giving application to “congressional incompleteness,”<sup>172</sup> the *Garmon* Court suggested that “[t]he determination of what was to be left to state regulation and what was to be preempted had to be determined on the basis of potential areas of conflict—inconsistent standards of substantive law and differing remedial schemes.”<sup>173</sup> Exuding an appealing simplicity,<sup>174</sup> the *Garmon* Court majority stated that “[w]hen 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

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activity led to changes in the NLRA despite President Truman’s initial veto of the bill. THE DEVELOPING LABOR LAW, *supra* note\_\_\_ at 26-47.

<sup>165</sup> See GETMAN, POGREBIN AND GREGORY, *supra* note\_\_\_ at 372-73 (showing that the Supreme Court took the view that preserving the primary jurisdiction of the NLRB was the basis for preemption in cases where both state and federal law regarded the union’s conduct as prohibited, and confirming the danger to the establishment of a uniform national labor policy if states as well as the NLRB applied different sanctions or remedies even if both state and federal law prohibited the same conduct).

<sup>166</sup> In reality, in addition to *Garmon* and *Machinists*, a third doctrine arose in connection with Section 301 preemption under which state law individual rights claims, available to non-unionized employees, suffer preemption in the union sector if those claims in some way require the interpretation of a collective bargaining agreement. See Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_\_ at 99 n.9 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 2020 (1985)).

<sup>167</sup> *Chamber of Commerce of the U.S. v. Lockyer* 463 F. 3rd 1076, 1085 (9<sup>th</sup> cir. 2006), *rev’d sub nom.* (quoting *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981)).

<sup>168</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>169</sup> *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n* 427 132 (1976).

<sup>170</sup> GETMAN, POGREBIN AND GREGORY, *supra* note\_\_\_ at 375.

<sup>171</sup> *Garmon*, 359 U.S. at 240.

<sup>172</sup> *Id.*

<sup>173</sup> GETMAN, POGREBIN & GREGORY, *supra* note\_\_\_ at 376. Thus appreciated, “[r]emedies that differed were no less disruptive of a uniform labor policy than were substantive conflicts.” *Id.*

<sup>174</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_\_ at 166.

must yield.”<sup>175</sup> This is due to the fact that leaving the “States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.”<sup>176</sup> Preemption thus averts the danger of state interference with national policy.<sup>177</sup> Preclusion of direct state regulation “sprang from the New Dealers’ faith in federal administrative agencies”<sup>178</sup> and depends neither on the mode or objective of state regulation,<sup>179</sup> nor on whether the state has acted through laws of general application or through laws specifically directed towards the governance of industrial relations<sup>180</sup> because such regulation could frustrate national purposes.<sup>181</sup> Although *Garmon*’s preemption is arguably far too broad,<sup>182</sup> two apparent impulses drive its breadth: (1) the avoidance of conflicting rulings on substantive rights (i.e., the states either enjoining or restricting conduct that the NLRB would find legal and protected as embodied by Sections 7 and 8 of the NLRA), or, conversely, the states’ enforcing or permitting conduct that the NLRB would hold was prohibited; and (2) the concern that Congress sought to impose a national labor law policy that was uniformly

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<sup>175</sup> *Garmon* 359 U.S. at 244.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 245.

<sup>178</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_ at 165.

<sup>179</sup> *Garmon*, 359 U. S. at 244. *See also*, GORMAN AND FINKIN, *supra* note\_\_ at 1081. With respect to matters of peripheral concern to the operation of the NLRA, or where the regulated conduct touches interests so deeply rooted in local feelings and responsibilities, the Supreme Court has carved an exception to the general rule of preemption. GETMAN, POGREBIN AND GREGORY, *supra* note\_\_ at 377. Rather than distinguishing between laws that are specifically geared to regulate labor relations and laws that are of general application, such as the common law of tort, federal labor preemption analysis largely concentrates on the conduct that is regulated. GORMAN AND FINKIN, *supra* note\_\_ at 1081. The failure of the NLRB to adjudicate the status of the disputed conduct does not leave the states free to regulate the conduct particularly when the conduct is arguably within the compass of Sections 7 or 8 of the NLRA. Even when states are required to yield, this does not ensure Board adjudication. *Garmon*, 359 U. S. at 245-46. In other cases the Board may decide that an activity is neither protected nor prohibited, which thereby raises the question of whether such activity may be regulated by the States. *Id.* at 246.

<sup>180</sup> *Garmon*, 359 U. S. at 244.

<sup>181</sup> *Id.* at 246. This approach is often referred to as the “substantive rights” element of *Garmon* preemption and prevents states from prohibiting conduct that the federal law protects pursuant to the doctrine of federal supremacy. GORMAN AND FINKIN, *supra* note\_\_ at 1081. Perhaps less obviously, a state cannot prohibit (or add remedies for) conduct that the federal law prohibits. *Id.* The primary jurisdiction component of *Garmon* arises when it is not clear in a particular case whether or not the regulated conduct is actually protected by Section 7 or prohibited by Section 8 of the NLRA. *Id.* at 1084.

<sup>182</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_ at 166.

administered by investing primary jurisdiction in the NLRB with respect to Sections 7 and 8.<sup>183</sup> “Generations of labor lawyers, professors, and students have worshipped at this doctrinal shrine.”<sup>184</sup>

Although *Garmon* provides a readily-cited framework, the decision does not fully clarify its domain. Instead, leaving lawyers confounded and confused, the *Garmon* Court concedes that some activities when regulated by the states will not be clearly governed by Sections 7 or 8 of the NLRA.<sup>185</sup> Deciding which state regulations fall prey to the preemptive force of the NLRA, is apparently the task for the NLRB.<sup>186</sup> In order to avert the danger of state interference with national policy, deference by courts and states to the Board’s exclusive competence can be required under circumstances<sup>187</sup> where it is not clear whether or not the conduct regulated is actually protected by Section 7 or prohibited by Section 8.

Scholars Gorman and Finkin argue that in the vast majority of cases triggering federal labor preemption, the state is deprived of any power to act at all, which poses a problem for direct state labor regulation. Still, the threshold question for *Garmon* preemption purposes is “whether the conduct was or might be federally-protected because states clearly could not regulate federally protected conduct.”<sup>188</sup> *Garmon* and its progeny teach that, based on considerations of federal supremacy, there appears to be a much stronger constitutional objection to state interference with the federal scheme when and if the conduct in question is protected rather than simply prohibited.<sup>189</sup> Hence, legal innovation that is protective of the employees’ right to refrain from participating in self-organization, such as current state initiatives, faces

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<sup>183</sup> GETMAN, POGREBIN & GREGORY, *supra* note \_\_\_ at 378.

<sup>184</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 167.

<sup>185</sup> *Garmon*, 359 U.S. at 244-45. Courts following *Garmon* analysis suggest a difference in results depending on whether the interest, at issue, is protection of the conduct or protection of the primary jurisdiction of the Board. In cases where preemption is primarily concerned with state regulation of conduct that is *actually* protected, the rule is that there can be no exceptions for local state interest no matter how deeply-rooted. GETMAN, POGREBIN & GREGORY, *supra* note \_\_\_ at 378.

<sup>186</sup> *Garmon*, 359 U.S. at 244-45.

<sup>187</sup> *Id.* at 245.

<sup>188</sup> DOUGLAS E. RAY, CALVIN WILLIAM SHARPE AND ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW 305 (3<sup>rd</sup> ed., 2011).

<sup>189</sup> THE DEVELOPING LABOR LAW, 2359 (John E. Higgins, Jr., ed.-in-chief 2006).

understandable difficulty. This is so because state referenda likely and directly interfere with workers’ rights to achieve representation through card-check and voluntary recognition within the meaning of Sections 7 and 9 of the NLRA. This is true regardless of whether or not state proposals can be seen as a form of generally-applicable state regulation designed to prevent the intimidation of workers.

Strong policy arguments support state efforts to limit the harmful effects of card-check representation arising from the potential enactment of the EFCA. Consistent with this intuition, former Democratic senator and presidential nominee George McGovern slammed the EFCA because of its failure to take into account the obvious: “There are many documented cases where workers have been pressured, harassed, tricked, and intimidated into signing cards that have led to mandatory payment of dues.”<sup>190</sup> Since case precedent clearly shows that states can escape preemption when and if they have a strong interest in affording redress for socially-harmful conduct,<sup>191</sup> and since harassment and trickery likely fall within this category, a state ought to be able to avoid preemption under *Garmon* if it can enforce its policy preference in a way that averts the danger of interfering with national policy.<sup>192</sup>

Although state secret ballot proposals, as drafted, are unlikely to escape the preclusive force of *Garmon*, particularly if workers access to card-check is seen as a protected activity within the meaning of Section 7 of the NLRA, it is worthwhile to examine the second basis for preemption. In addition to the fact that courts are often confused about which form of preemption applies within the organizing arena,<sup>193</sup>

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<sup>190</sup> George M. McGovern, *My Party Should Respect Secret Union Ballots*, WALL ST. J., (August. 8, 2008) available at <http://online.wsj.com/article/SB121815502467222555.html>.

<sup>191</sup> GORMAN & FINKIN, *supra* note \_\_\_ at 1083 (allowing a state tort action to restrain socially harmful union behavior).

<sup>192</sup> *See id* (suggesting that state action that realistically threatens interference with the NLRA may be preempted, even if a state has a strong interest in preventing social harm).

<sup>193</sup> One illustration of the difficulty that courts have in distinguishing *Garmon* from *Machinist* preemption can be found in Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408 (2008). The district court found that organizing was part of a zone meant to be free of regulation whereas Judge Beezer found that the California statute, at issue, was precluded under both *Garmon* and *Machinists*. *Garmon* is implicated because the California statute stifles employer speech, which he found to be a protected activity granted by federal law; this impedes the ability of the NLRB to uphold its election speech rules and to administer free and fair elections. *Machinists* was implicated, on Judge Beezer’s account, because the California statute intrudes on a zone that Congress intended to be left free to the parties’ devices. Ultimately, the Supreme

*Machinists* remains important because the academic response to this rule may have positive implications for proponents of secret ballot proposals. Advocates of secret ballot referenda may be able to exploit the level of confusion triggered by *Machinists*, as well the regulatory innovation proffered by progressives. The *Machinists* doctrine results from the perception that the NLRA creates an insulated zone for collective action and precludes regulation that would upset an arena that Congress intended to be left unregulated (other than by the parties’ economic weapons). *Machinists* preemption is arguably consistent with the teaching of *Garmon*, which signifies that Congress formulated a code whereby it outlawed some aspects of labor activities and protected others, leaving some activities to the operation of economic forces.<sup>194</sup> Evidently, *Machinists* preemption means that “[a]n economic weapon that is neither arguably protected nor arguably prohibited nonetheless may be immune from state regulations.”<sup>195</sup> More specifically, activity that is neither protected nor prohibited<sup>196</sup> is sheltered by *Machinists* preemption from regulation that deprives the NLRB and states of power to control or otherwise protect conduct within this arena.<sup>197</sup> Taken as a whole, *Machinists* divests states of the power to take sides and to seek to implement their own view of the permissible use of economic weapons by the parties.<sup>198</sup>

State secret ballot proposals, properly viewed as a form of anti-paternalism, raise the question of whether union representation based on a card-check majority is a federally-protected activity (*Garmon*), regardless of whether or not the federal EFCA proposal is enacted, or, alternatively, whether or not state-based secret ballot proposals take sides and intrude on a zone (*Machinists*) that Congress intended to be left free from regulation by states. Although it is unlikely that state secret ballot

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Court found the challenged provision preempted under *Machinists* because the provision regulates within a protected zone reserved for market participants. See Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note \_\_ at 814-15 (describing the various holdings and opinions of the courts).

<sup>194</sup> *Garmon*, 359 U. S. 236, at 240.

<sup>195</sup> See DOUGLAS L. LESLIE LABOR LAW 320 (5<sup>th</sup> ed., 2008).

<sup>196</sup> ESTLUND, *supra* note \_\_ at 42 (citing *Machinists*).

<sup>197</sup> LESLIE, *supra* note \_\_ at 322.

<sup>198</sup> Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note \_\_ at 799. (“In general, where state law sets a floor providing employment rights for all, it is not preempted. However, where the state adopts legislation directed toward collective bargaining or creates a distinction between *unionized* and non-unionized employees in enforcing the state law, it is preempted.”).

initiatives fall within the parameters of the *Machinists* doctrine, it is equally improbable that state initiatives can pass muster within the domain bounded by *Garmon*. The broad and firmly-entrenched preemption doctrine, comprised of both *Garmon* and *Machinists*, indicates little room for state-to-state variations in labor relations regimes<sup>199</sup> (particularly those involving direct labor regulations) because NLRA preemption is part of a nationalist agenda.

This latter point of view is buttressed if one looks outside of the NLRA framework,<sup>200</sup> to other areas that affect interstate commerce. There one finds the contemporary embodiment of a broad and sweeping nationalism that indicates that the power of the states is displaced, no matter how legitimate their own needs and policies may be, particularly in areas deemed important enough to legislate by Congress itself.<sup>201</sup> Although the powers of the federal government have expanded through an increasingly muscular reading of the Commerce Clause,<sup>202</sup> labor scholars and advocates have engaged in a pro-union campaign that is evident in a number of state-based proposals that insistently challenge this paradigm. Among the contentions offered within the domain of *Machinists* are claims that states can provide for minimum conditions in the workplace under its police powers,<sup>203</sup> an argument that has often been used by progressive reformers as a slender but sturdy reed to expand the powers of states in a preferred directions. Labor advocates routinely claim that state rules prohibiting employers from terminating employees for failure to attend mandatory yet non-work-related meetings (often related to union organizing attempts) coheres with the inherent powers of states, and that such promulgations are consistent with both the reach and the purposes of the NLRA and

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<sup>199</sup> ESTLUND, *supra* note\_\_ at 44.

<sup>200</sup> In *Raich*, for example, the Supreme Court recently reaffirmed its commitment to broad federal power and a nationalist agenda. Issacharoff & Sharkey, *supra* note\_\_ at 1364.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1365.

<sup>203</sup> See e.g., Paul M. Secunda, Brief of Law Professors as *Amicus Curiae* in Support of Defendants’ Opposition to Motion for Summary Judgment, *Associated Oregon Industries and Chamber of Commerce of the United States of America, v. Brad Avakian, Individually, and as Commissioner of the Oregon Bureau of Labor Industries and Laborers Int’l Union of North America, Local No. 296*, United States District Court, District of Oregon, Case No. 09-CV-1494-MO, Part II, Lines 11-13 (2010).

the principles of federalism.<sup>204</sup> Whether these challenges reflect a conversion towards states rights and sovereignty, they may provide hope for proponents of state secret ballot initiatives.

### **B. Does NLRA Preemption Doctrine Preclude Arizona’s Initiative?**

Whether or not states rights are on the ascendancy, it is clear that the actions undertaken by the NLRB to vindicate both employee and employer rights secured by the NLRA against state court decisions, laws and local ordinances have given birth to a long and varied history. This history has produced case precedent that threatens the viability of Arizona’s Secret Ballot amendment.<sup>205</sup> Consider a few cases. In *Garner v. Teamsters Local 776*,<sup>206</sup> the Supreme Court held as impermissible a state court action that enjoined peaceful picketing aimed at coercing employers into influencing their workers to join a union even though this activity was prohibited under the NLRA. In *NLRB v. Nash-Finch*,<sup>207</sup> the Supreme Court held that the NLRB’s authority to seek federal court injunctions against state actions that conflict with federal rights is robust.<sup>208</sup> More recently, in *Livadas v. Bradshaw*, the Court precluded a state from enforcing its decision to interpret a statute so as to impair employees’ right to collective bargaining representation.<sup>209</sup> Similarly, in *Chamber of Commerce v. Brown*, the Court disallowed the enforcement of a California statute that diminished the

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<sup>204</sup> *Id.* at Part II, page 2, lines 14-20.

<sup>205</sup> Many examples exist of case law thwarting state regulation. For example, in two cases, the Minnesota Supreme Court and the Eighth Circuit, respectively, declared unconstitutional, as preempted, the Minnesota Striker Replacement Law, which made it unlawful for employers to hire or threaten to hire permanent replacement employees during strikes or lockouts. THE DEVELOPING LABOR LAW, *supra* note \_\_\_ at 1581 (referencing *Midwest Motor Express v. Teamsters Local 120*, 512 N. W. 2d 881, (Minn, 1994) and *Employer’s Ass’n v. Steelworkers*, F. 3d. 1297, (8<sup>th</sup> cir. 1994).).

<sup>206</sup> 346 U.S. 485 (1953) (finding impermissible a state court action that enjoined peaceful picketing aimed at coercing employers to influence their workers to join a union, which is an activity prohibited under the NLRA).

<sup>207</sup> 404 U.S. 138 (1971) (upholding the NLRB’s authority to seek federal court injunctions against state actions that conflict with federal rights).

<sup>208</sup> LESLIE, *supra* note \_\_\_ at 311 (the NLRB can sue in federal court to block state court action, even though no unfair labor practice charge is pending).

<sup>209</sup> 412 U.S. 107 (1994).

employer’s right to campaign against unionization<sup>210</sup> despite impassioned support from labor activists and proponents of state action.<sup>211</sup>

If the various state secret ballot referenda, represented by Arizona’s regulatory thrust, conflict with the employees’ right to choose their own representative through a process *other than* a secret ballot, it is unlikely that such regulatory creativity can withstand judicial scrutiny. This remains so, even if such an outcome vindicates an unnecessarily broad doctrine created by Justice Frankfurter in *Garmon* rather than Congress.<sup>212</sup> As we have already seen, NLRA Sections 7 and 8 effectively operate as a shield against state innovation and experimentation via both the protected and the prohibited prongs of *Garmon*.<sup>213</sup> The reach of this doctrine is triggered even when the conduct is *only* “arguably” protected or prohibited by the federal law and, thus, rests, not on a clear substantive conflict between federal and state law but rather upon the primary agency jurisdiction rationale.<sup>214</sup>

Clear evidence supports the contention that Congress intended for the NLRA and the NLRB to control the election and the labor union selection process. This conclusion gels with the view that labor law preemption doctrines not originating in Congress force exclusive reliance (if no exemption can be found) on the wisdom of federal administrators.<sup>215</sup> The NLRB’s complaint against Arizona’s constitutional amendment rests upon an implicit (if not expressed) congressional intent to allow workers to organize without the necessity of a secret ballot election, consistent with freedoms granted by Section 7. Bear in mind, however, that Section 7 freedoms granting workers the right to choose or to refrain from choosing representatives are not absolute. Rather, the NLRA requires the NLRB to balance conflicting doctrines

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<sup>210</sup> 554 U.S. 60 (2008).

<sup>211</sup> Secunda & Hirsch, *supra* note \_\_\_ at 30-31.

<sup>212</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 169.

<sup>213</sup> *Id.* at 170.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 154.

that vitiate employees’ fullest freedom to choose their representative.<sup>216</sup> As an initial matter, if express protection exists for a process enabling employees to select their labor representative through *either* a secret ballot election or through employee card-check, then this implicates the *actually* protected as well as the “*arguably* protected prong” of *Garmon* preemption. This implication likely conduces to a successful suit for injunctive relief by the NLRB. Preliminarily, then, it is likely that state secret ballot proposals ought to be preempted under existing doctrine and under a straightforward conflicts analysis within the meaning of the Supremacy Clause,<sup>217</sup> without necessarily examining the NLRB’s complaint against the state of Arizona.

In any case, the NLRB’s complaint sets forth the following argument:

The NLRA permits but does not require secret ballot elections for the designation, selection, or authorization of a collective bargaining representative where, for example, employees successfully petition their employer to voluntarily recognize their designated representatives on the basis of reliable evidence of majority support, in accordance with Sections 7 and 9 of the NLRA, 29 U.S.C. §§ 157 and 159, or where a construction union seeks recognition from a construction employer in accordance with Section 8 (f) of the NLRA, 29 U.S.C. § 158(f).<sup>218</sup>

By contrast, Article 2 § 37 of Arizona’s constitution guarantees a secret ballot election wherever federal law “permits or requires election.” Sophisticated analysis is unnecessary to show that Arizona (Article 2 § 37) requires elections where federal law

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<sup>216</sup> See *e.g.*, *id* at 119-120 (showing that the recognition bar doctrine and its sister doctrines, the election certification and contract bar doctrines, balance two labor relations policies that conflict: the need for stability in bargaining relationships and the right of employees to freely choose their representatives as guaranteed in Section 7).

<sup>217</sup> Beyond the observation that state interference with “activities clearly within the ambit of either section 7 or 8 are preempted,” it should be noted that even “those activities over which the Act’s coverage is not clear cannot be left to the states or federal courts to decide.” GETMAN, POGREBIN, GREGORY, *supra* note \_\_\_\_ at 376. In addition, the preemptive barrier precluding state interference with the selection of employees’ representatives cannot simply be confined to *Garmon*. For instance, if a court finds *Garmon* preemption, to be inapplicable, but later places the choice of representative in a zone that ought to be left free of regulation, then it is possible that *Machinists* preemption may be implicated.

<sup>218</sup> National Labor Relations Board v. State of Arizona, Complaint for Declaratory Judgment, (Para. XII) (U.S. District Court for the District of Arizona) (May 6, 2011).

does not and thereby deprives private sector employees of their right to pursue another option, as permitted by federal law for the purposes of designating, selecting, or authorizing representatives of their own choosing, and to secure their employer’s voluntary recognition of such labor representatives.<sup>219</sup> Arizona creates an actual conflict with the Section 7 right of employees to choose their own representative,<sup>220</sup> a right further protected by Section 9 (a) of the NLRA.<sup>221</sup> Furthermore, even though it is not a given that Congress meant to ban state remedies for conduct *prohibited* by federal law, it is clear that Congress did mean to supplant state law condemnation of federally-protected conduct.<sup>222</sup> Here, Arizona directly challenges the existence of a protected right, which appears to require preclusion<sup>223</sup> since there is little question that federal labor relations law need not be broadly construed to find a conflict.

Further strengthening the case against Arizona is the deduction that American labor law assumes that the majority of employees in an appropriate bargaining unit have the freedom to voluntarily choose to be represented by a labor organization.<sup>224</sup> Coherent with this viewpoint, case law<sup>225</sup> demonstrates judicial acceptance of a selection process that enables workers to authorize union representation without the necessity of submitting their choice to a secret ballot election. The NLRB issued

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<sup>219</sup> National Labor Relations Board v. State of Arizona, Complaint for Declaratory Judgment, (Para. XIII) (U.S. District Court for the District of Arizona) (May 6, 2011).

<sup>220</sup> National Labor Relations Board v. State of Arizona, Complaint for Declaratory Judgment, (Para. XIV) (U.S. District Court for the District of Arizona) (May 6, 2011).

<sup>221</sup> 29 U. S. C., § 159.

<sup>222</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 169.

<sup>223</sup> *See e.g., id.* at 168-169 (asking how a state remedy for a violation of the NLRA could plausibly interfere with federal rights any more than state remedies for acts of racial, national origin, and sex discrimination interfere with Title VII rights and explaining that it is doubtful that the 1947 Amendments to the NLRA were designed to displace state law in such a situation)

<sup>224</sup> *Id.* at 136.

<sup>225</sup> *See e.g.,* Linden Lumber Div, Summer & Co. v. NLRB, 419 U.S. 301 (1974) (holding that an employer in the ordinary case need not bargain with the union on the basis of a card-based majority, even if cards provide evidence of a majority); NLRB v. Broadmoor Lumber Co., 578 F. 2d 238 (9<sup>th</sup> Cir 1978) (voluntary recognition furthers the objectives of national labor policy); and Gissel Packing Co. v. NLRB 395 U.S. 575 (1969) (where the Supreme Court considered and approved an order requiring an employer to bargain with a union on the basis of signed authorization cards and where the employer engaged in pre-election unfair labor practices and rejected the ideal that single-purpose authorization cards designating the union as the representative of the signing employee were inherently unreliable). *See also*, RAY, SHARPE AND STRASSFELD, *supra* note \_\_\_ at 112-115.

bargaining orders in such cases prompted by evidence of signed authorization cards coupled with substantial evidence showing that employer pre-election misconduct. Although this remedy appears to be ineffective,<sup>226</sup> the existence of cases such as *Linden Lumber*, *Broadmoor*, and *Gissel* constitutes judicial approval of the contention that Congress did not intend to condition the Section 7 rights of employees to manifest their choice in a secret ballot election controlled by the NLRB. Case law sustains the proposition that employers may voluntarily recognize a labor union without an election if sufficient evidence of majority support exists<sup>227</sup> or, alternatively, force the union to file for an election.<sup>228</sup> Arizona’s labor relations gambit must deal with the supremacy of federal law, which dictates the preemption of conflicting state law.<sup>229</sup> State-based secret ballot protection measures appear to be doomed to preemption under *Garmon*.

Before completely sealing the case, however, consider for a moment two additional possibilities for reviving Arizona’s secret ballot scheme that hint at the prospect of a convergence between approaches taken by progressives and by proponents of liberty. First, there is the possibility that a court may be prepared to adopt Professor Gottesman’s analysis aimed at expanding the range of non-precludable state regulation promulgated to promote collective action in the workplace.<sup>230</sup> Gottesman argues that *Garmon* should not be deployed—leaving space for state regulation—when Congress has chosen to regulate categories of conduct in a narrow way.<sup>231</sup> This approach is plainly embedded in the intuition that overbroad preemption rulemaking persuades federal courts to preclude state regulatory efforts

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<sup>226</sup> RAY, SHARPE AND STRASSFELD, *supra* note \_\_\_ at 114-115 (showing that the bargaining order remedy typically fails to establish a lasting bargaining relationship).

<sup>227</sup> *Id.* at 198-99 n. 7 (Voluntary recognition is considered by the Board and the courts to further the objectives of the nation labor policy and is generally encouraged).

<sup>228</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine supra* note \_\_\_ at 118.

<sup>229</sup> ESTLUND, *supra* note \_\_\_ at 41.

<sup>230</sup> Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitate Unionization*, 7 YALE J. ON REG., 355, 386 (1990) [hereinafter, Gottesman, *Rethinking Labor Law Preemption*] See also, Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKLEY J. EMP. & LABOR. L. 223 (2005).

<sup>231</sup> Gottesman, *Rethinking Labor Law Preemption, supra* note \_\_\_ at 386.

that are consistent with the political impulses that gave rise to the NLRA.<sup>232</sup> This claim, however forceful, appears to be an instance of postmodern argumentation unless one is prepared to completely discount the opinion of American voters who opposed both the passage and the goals of the NIRA and the NLRA.<sup>233</sup> However, assuming that the political instincts and impulses of New Deal elites count, there seems little reason to believe that courts should preempt state regulatory efforts that are consistent with the actual political impulses (representing both the opinion of political elites and the public) that gave rise to an NLRA amendment 1947. Moreover, this widely-supported impulse which responded to labor union overreach during the 1940s<sup>234</sup> was surely part of the political calculus that led Congress to pass the Taft-Hartley Act over President Truman’s veto. And this observation lends support to current state labor referenda strongly backed by contemporary public opinion that protects workers’ liberty interest in refraining from unionization, since this move operates consistently with the purposes expressly contained within the statutory reformulation of workers’ Section 7 rights promulgated during the 1940s.

The second possibility for resurrecting Arizona’s secret ballot initiative from preclusion rests on the prospect that proponents of workers’ liberty could take advantage of the confused state of affairs regarding preemption doctrine. Confusion could provide a basis for deciding the fate of the Arizona initiative under *Machinists*, which would track the apparent perplexity that was elevated by federal courts leading up to and including the Supreme Court’s decision in *Chamber of Commerce v. Brown*.<sup>235</sup> The concept of neutrality is essential to understanding *Machinists* preemption and its protection of the zone left free to the parties’ economic weapons. If readers concentrate on the question of whether or not Arizona’s secret ballot amendment is a neutral enactment, then an affirmative answer implies that the

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<sup>232</sup> *Id.* at 356.

<sup>233</sup> See Somin, *supra* note\_\_\_\_ 617-663 (describing strong public opposition to the goals of the NIRA, the NLRA, and the Supreme Court packing schemes favored by New Deal elites).

<sup>234</sup> Hutchison, *Reclaiming the Labor Movement Though Union Dues?*, *supra* note\_\_\_\_ at 451 (explaining labor union overreach during and after World War II).

<sup>235</sup> See *supra* Part III A.

amendment could be classified as a defensible enactment that is not designed to favor any of the parties in a potential labor dispute or organizing campaign. If this analysis were accepted, perhaps Arizona’s referendum could withstand scrutiny. Still, if one adopts the analysis proffered by the two justices necessary to make up a majority in *Machinists*, it is worth observing their conclusion that “[s]tate laws should not be regarded as neutral if they reflect an accommodation of the special interest of employers, unions or the public, in areas such as employee self-organization, labor disputes, or collective bargaining.”<sup>236</sup> Surely the NLRB and political progressives will be prepared to make such an argument. As a result, Arizona’s proposal and similar initiative are highly doubtful. Nonetheless, the next two sections consider whether Arizona and other states that are propelled to protect their workers’ liberty interests ought to join with political progressives and labor advocates in a coextensive effort to weaken labor law preemption doctrine or, alternatively, whether they should be alarmed that this possibility may simply expand opportunities for subordination, rent seeking and centralization sheltered by the rhetoric of state sovereignty.

#### IV. ANALYSIS: PURSUING BALANCE, HUMAN FLOURISHING AND JUSTICE WITHIN THE STATE AND FEDERAL POWER PARADIGM

##### A. The Quest for Balance?

On one account, “[u]nderlying the balance between federal and state power is the critical recognition that “[t]he extent to which a federal statute displaces (or preempts) state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government.”<sup>237</sup> *Machinists* remains intriguing because proponents of employer neutrality (labor union advocates) have encouraged states to weaken the preclusive effect of this case<sup>238</sup>

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<sup>236</sup> Int’l Ass’n of Machinists & Aero. Workers v. Wis Employment Relations Comm’n, 427 U.S. 132, 156 n\* (Powell, J. and Burger, J., concurring).

<sup>237</sup> Issacharoff & Sharkey, *supra* note \_\_\_ at 1365 (citing Caleb Nelson).

<sup>238</sup> See e.g., Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience meetings in the United States*, 29 COMP. LAB. L. & POL’Y J. 209, 210-16 (2008) [hereinafter, Secunda, *Toward the Viability of State-Based Legislation*] (supporting state efforts to limit employers’ ability to speak to workers in their facilities, and advocating ways to weaken the preclusive effect of *Machinists*); and Paul M. Secunda & Jeffrey M. Hirsch, Debate, *Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 28, 28-34 (2008), <http://www.pennumbra.com/debates/pdfs/>

despite continuing momentum toward federalization over the long term. Other progressives remain wary of such efforts.<sup>239</sup> Still, both sides of the progressive divide agree on one thing regarding the question of whether state or federal efforts are necessary to advance labor’s agenda: an expansive role for government.<sup>240</sup> Although this perspective typically favors federal power<sup>241</sup> as part of the insistent quest for uniformity, the embryonic tension between and among progressives fails to expose a huge disagreement about federal and state power allocation. Depending upon the scheme adopted, moderating preemption doctrine may ultimately threaten state ballot initiatives or any other proposal that expands workers’ freedom, even if proponents of secret ballot initiatives are energized by the possible success of progressive reformers. To more completely understand this likelihood, brief assessments of the intertwining of labor history and federal court power and the budding movement to enlarge state labor regulation are necessary.

### **B. The Federal Courts in the Mirror of Suspicion**

Labor law preemption, sprang not from Congress but entirely from the Supreme Court’s own policymaking.<sup>242</sup> From a progressive perspective this lays the groundwork for suspicion.<sup>243</sup> This perspective sees the Supreme Court as an enemy of progressive regulatory ambition, while justifying skepticism of federal court power as a general matter. Skepticism is not a new development. Federal power and, in particular, the powers of federal courts have been chronicled as the linchpins of federal intervention to stop regulations of the progressives, the most notorious being

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WorkplaceFederalism.pdf (same).

<sup>239</sup> See e.g., Hirsch, *Nonemployee Access to Employer Property*, *supra* note \_\_\_ at 185.

<sup>240</sup> See e.g., *id.* (explaining his exclusive federal power argument, in contrast with Jesse Dill’s state-power argument regarding nonemployee union access rights that essentially agrees on the desirability of uniformity). See also Jesse Dill, *Restoring Unions in America by Reforming Nonemployee Union representative Access Right to Employer Property*, 12 TRANSACTIONS: TENN. J. OF BUS. L. 127 (2010) (favoring state solutions to the nonemployee access problem).

<sup>241</sup> See e.g., Hirsch, *Nonemployee Access*, *supra* note \_\_\_ at 176-179 (arguing that exclusive regulation of the workplace would be superior to state jurisdiction or shared state and federal jurisdiction, and urging the NLRB to incorporate a reinterpretation of Section 8(a) (1) into nonemployee access cases by skirting state law property rights and, instead, focusing on the effects excluding nonemployee union organizers on employees’ labor rights).

<sup>242</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 189.

<sup>243</sup> *Id.*

the use of the labor injunction.<sup>244</sup> Constitutional oversight during the *Lochner* era made the federal courts a particular enemy of progressive reformers throughout the early part of the twentieth century.<sup>245</sup> The progressive conception of the federal courts as an opponent of social progress operates in stark contrast to *Lochnerian* liberty-of-contract jurisprudence, which was invoked to expand constitutional protection of African Americans and women.<sup>246</sup>

The general common law power of federal courts came under additional scrutiny by progressives after the Supreme Court, on occasion, struck down expansive labor legislation. One early example is the 1908 decision in *Adair v. United States*, wherein the Court struck down the 1898 Erdman Act (designed to peacefully resolve labor disputes in the railroad industry) on the grounds that the statute was an unconstitutional infringement of freedom of individual contract and was protected by substantive due process.<sup>247</sup> A later case that drew fire from progressives was the Court’s decision to strike down the National Industrial Recovery Act (NIRA),<sup>248</sup> which granted monopoly power to labor unions and was used to displace marginalized workers and reify social stratification.<sup>249</sup> Provoked by the demise of such legislation at the hands of the federal judiciary, progressives sought to rein in the federal courts.<sup>250</sup> Fueled by this record of federal courts having blocked the expansion of labor law, labor advocates and their allies have become frustrated with current adjudication that limits union power. The contemporary reaction by progressives to federal courts has sparked a surge in state-based labor relations regulation. It has also prompted support for additional Congressional intervention in the labor market and stirred

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<sup>244</sup> Issacharoff & Sharkey, *supra* note\_\_ at 1406.

<sup>245</sup> *Id.*

<sup>246</sup> *Lochner: A Notorious Case Reconsidered*, 23 CATO POLICY REPORT, 17 (May/June 2011) (describing David Bernstein’s book, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, (2011)). See also, Thomas Woods, *Forgotten Facts of American Labor History*, MISES INSTITUTE, available at <http://www.mises.org/fullstory.aspx?Id=1685> (defending the freedom of contract and association as essential principles of the labor market).

<sup>247</sup> GORMAN & FINKIN, *supra* note\_\_ at 5.

<sup>248</sup> Issacharoff & Sharkey, *supra* note\_\_ at 1406.

<sup>249</sup> See e.g., BERNSTEIN, *supra* note\_\_ at 89-94 (describing the subordinating policies, which were reified by the National Industrial Recovery Act).

<sup>250</sup> *Id.*

legislative action to defang labor’s preemption doctrine, thereby facilitating state regulatory discretion in harmony with the goal of uniformity.<sup>251</sup>

Monitored by members of the administrative class who share their values, political progressives see state statutory innovation as a way of expanding the homogeneity of labor relations law premised on the common sense claim that the world and the nation have become more interconnected and interdependent.<sup>252</sup> Labor advocates have thus sought to impose their own view of the permissible use of economic weapons by expanding the substantive rights of labor unions, either by constricting federal displacement of pro-union state regulatory efforts or through the EFCA, which is aimed at ensuring workers’ rights to organize through card-check. The success of some of these schemes may depend upon a renewed commitment by federal courts to centralized power. This commitment may require courts to find the application of state power permissible only when it complements the goals of centralization. This progression would weaken judicial independence but would enable federal courts to assume an instrumental role in society’s long march toward enforced homogeneity. When taken as a whole, it is hoped that these maneuvers may restore balance in national labor markets, even if they do not necessarily lead to the expansion of unionization.<sup>253</sup> The contemporary embrace of state regulatory lawmaking by progressive scholars signals that advocates of workers’ liberty ought to view preemption doctrine as both a possible ally and a potential enemy consistent with “Professor Scalia’s observation that federalism is a stick that can beat either dog.”<sup>254</sup>

### **C. Searching for Balance? Traversing America’s Ideological Partition**

State secret ballot initiatives must negotiate a contested terrain bounded by federalism. After all, our system of government distributes and diffuses power

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<sup>251</sup> See generally, Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 97-191.

<sup>252</sup> Issacharoff & Sharkey, *supra* note \_\_ at 1360.

<sup>253</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 101 (expressing some doubts about the efficacy of some of these moves).

<sup>254</sup> *Id.*

producing the potential to spark legal change through subordinate sovereigns as part of federalism.<sup>255</sup> Proponents of state initiatives designed to protect workers’ liberties may choose to conceive of states as laboratories, and successful local experiments may spread to other localities and provide credible models for national reform.<sup>256</sup>

This raises a question: Can state proposals guaranteeing workers’ liberty interests via secret ballot elections be seen as part of a balanced approach to state and federal power? Classical liberals may potentially take inspiration from innovative schemes tendered by political progressives that conduce to state-to-state variation in labor regulation lawmaking as part of an effort to establish a truly-balanced framework for diminishing the reach of both *Garmon* and *Machinists*. Alternatively considered, are attempts to attain balance that incorporate and build upon politically progressive scholarship a chimera?

A conflicted response to such questions surfaces since ideological barriers exist, threatening state efforts that stray from labor law orthodoxy. Orthodoxy signifies that the NLRA ought to be seen as a statement of federal minimum standards that protects unions as well as workers’ rights to organize and engage in collective bargaining. In harmony with this notion, employers possess few (if any) minimum rights. Under this view of the cathedral, organized labor has more to gain and employers have more to lose from a more limited preemption doctrine<sup>257</sup> that produces a shared (state and federal) labor relations regime. This perspective also provokes the question of whether secret ballot initiatives ought to be viewed as protective of employees’ liberty interests or of employers’ well-being. Clearly, current state ballot initiatives would prevent card-check unionization in the absence of preemption. This alone makes them suspect from the perspective of labor’s natural allies, who are unlikely to support a more limited conception of preemption if they are confident that such a maneuver would produce gains for workers’ freedom and liberty, particularly if such gains are purchased by shrinking the role of organized

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<sup>255</sup> ESTLUND, *supra* note \_\_\_ at 40.

<sup>256</sup> *Id.* at 41.

<sup>257</sup> *Id.* at 43.

labor in the long run. Efforts that advance the presumption of liberty must navigate rocky shoals in dreadful weather. The regulatory thrust of such initiatives faces the contention that such efforts are outliers and threaten to inflict nefarious spillover effects upon the rest of the country.<sup>258</sup> This claim can be made tangible by noting that labor union advocates were rarely inspired by state regulation of labor union activity during the period before the NLRA was amended in 1947, a period of significant state labor relations lawmaking.

In reality, contemporary state constitutional amendments that ban the selection of union representatives through non-secret ballots recall the initiation of the right-to-work movement as twelve states between 1944 and 1947 forbade the conditioning of employment on union membership.<sup>259</sup> State efforts bore fruit at the federal level in the form of an amendment to the NLRA in 1947 that explicitly permits states to enact a “right-to-work” provision.<sup>260</sup> This provision accords workers with the option of employment without having to either join or contribute financial support to any union, including one that has been selected as the employees’ lawful collective bargaining representative.<sup>261</sup> Expanding economic liberty and reducing the power of rent-seekers, the right-to-work provisions of the Taft-Hartley Act amending the NLRA “constitutes an express congressional exemption from the general principle that the NLRA preempts the field it covers”<sup>262</sup> and therefore undermines the contention that “national labor policy” requires either uniformity or exclusive federal

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<sup>258</sup> Issacharoff & Sharkey, *supra* note \_\_\_ at 1370-71 (spillover effects in their view arise when and if a state enacts a law that shifts costs and favors its own citizens while disproportionately affecting out-of-state interests).

<sup>259</sup> GORMAN AND FINKIN, *supra* note \_\_ at 898. *See e.g.*, Nebraska Rev. St. Const. Art. XV, s 13 (1946) (“No Person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any in or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.”) and, Arizona Revised Statutes, (A.R.S. Const. Art. 25) (1946) (“No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association . . . enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.”).

<sup>260</sup> National Labor Relations Act, 29 U.S.C. §164 (b).

<sup>261</sup> THE DEVELOPING LABOR LAW, *supra* note \_\_ at 2150.

<sup>262</sup> *Id.*

law making in the labor relations area.<sup>263</sup> Indeed, NLRA Section 14-B authorizes a state option on the fundamental issue of union security.<sup>264</sup> State-led endeavors to establish right-to-work laws established a model that federal power followed. It is surely possible that contemporary efforts to establish state secret ballot principles premised on widespread public support will provide a similar pathway for the development and application of federal power in the future. In the short run, such efforts must deal with preemption and with the appetite for self-interested rents by unions and their political brethren. If such barriers can be overcome, then the right balance between federal and state power may be restored, thus producing an environment where economic and ideological liberty creates adequate conditions for human flourishing.

Although contemporary federal proposals exist to protect employees’ right to a secret ballot, such legislative efforts fail at this stage of the drafting process to provide express congressional exemption from the general principle that the NLRA and Board adjudication, preempt the field that they cover. Even if such proposals were to be approved by Congress, they would likely be vetoed by President Obama. Hence, two questions arise over whether states’ “right-to-a-secret-ballot” bills can succeed outside of the shelter provided by express amendments to the NLRA. First, can a doctrinal, constitutional, or policy argument be found to successfully defend state-based secret ballot protection initiatives against the preclusive effects of labor law preemption? Put another way, can states exploit existing gaps within our federalist scheme that appear to permit more state-to-state variation in labor relations lawmaking? Given the convergence of opinions among progressives scholars directed toward restricting employer speech, favoring tripartite lawmaking, or otherwise constraining employer power as part of a transparent effort to expand labor union power,<sup>265</sup> the second and

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<sup>263</sup> Drumonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine* *supra* note\_\_\_\_ at 164.

<sup>264</sup> *Id.* at 164-165.

<sup>265</sup> Many of these efforts are designed to neutralize employer opposition to social transformation made concrete through increased employee participation in workplace decision making and increased dues revenue collection, which enables labor organizations to pursue social transformation through politics. These objectives are facilitated by state proposals to vitiate employer’s property interest. Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note\_\_\_\_ at 800-801.

more important question becomes whether proponents of state efforts aimed at protecting employees’ liberty interests should join with political progressives to enlarge state sovereignty and diminish labor preemption doctrine?

#### **D. Dismissing Economic Freedom and Workers Liberty Interest? Horizontal Preemption and Vertical Federalism**

Representing a contemporary turn in labor scholarship that favors states rights, a lively debate is currently underway concerning the efficacy of state and local labor law innovation,<sup>266</sup> sparked by the view that preemption doctrine is an aging relic.<sup>267</sup> Hence, if successful state efforts of various descriptions and viewpoints are not preempted, they may gain traction at the federal level for years to come<sup>268</sup> and thus revitalize the reliquary content of federalism by diminishing preemption doctrine’s vertical dimension. Successful state and local lawmaking may also soften opposition to an expansion in the reach and scope of labor regulations, irrespective of the ideological underpinnings of such efforts. Still, the focus on expanding state regulatory lawmaking appears to contradict the instincts of “progressive” scholars who contend that a paramount concern for workers’ best interests provides a sturdy platform for the elimination of the states’ role in regulating the workplace.<sup>269</sup> From the perspective of state ballot initiative proponents and others who favor workers liberty interests, this brewing conflict may possibly lead to a substantial and hopeful breach in the progressive imagination, which instinctively favors a centralized bureaucracy. Such a conclusion is far too optimistic since an accurate understanding of the domain of state regulatory lawmaking indicates that the commitment of political progressives to authentic state-to-state variation is only imagined in most of the circulating proposals.<sup>270</sup>

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<sup>266</sup> Secunda & Hirsch *supra* note \_\_ at 21 (Secunda supporting state statutory innovation for the purposes of expanding workers’ rights).

<sup>267</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_ at 167.

<sup>268</sup> Secunda & Hirsch, *supra* note \_\_ at 21.

<sup>269</sup> See e.g., Jeffrey Hirsch, *Taking States out of the Workplace*, 117 YALE L.J. POCKET PART 225 (2008), available at [http://the\\_pocketpart.org/2008/04/01hirsch.html](http://the_pocketpart.org/2008/04/01hirsch.html).

<sup>270</sup> Proposals include the need for federal minimum standards to preclude innovation that undermines progressive presumptions, the necessity of reinvigorating horizontal federalism and its progeny, horizontal

Complementing this move, the record shows that the Supreme Court has, at times, become a willing partner of Congress in providing federal oversight to state interference with national markets. This is confirmed by the Court’s recent jurisprudence on the scope of the Eleventh Amendment.<sup>271</sup> Given the benefits that flow from coordinated uniformity, progressive scholarship, in combination with contemporary judicial efforts are infused with the possibilities that are likely to diminish state discretion in the longer run. This process proceeds as follows: states and the federal government are first enlisted and indoctrinated in the benefits that flow from the understanding that labor markets are really essential parts of a national market and require oversight to protect a broadly-defined federal interest or, alternatively, to ensure a coordinated solution to matters crossing state lines that are tied to the possibility of either positive or negative spillovers resulting from state action. Both levels of government, armed with minimum standards and a commitment to coordination, are then unleashed to patrol a tightly-defended archipelago in pursuit of negative spillovers, premised on protecting the rational operation of the national market from harmful actions by individual actors. Coordination of state regulation requires a coordinator.<sup>272</sup> State and federal consolidation would legitimate restrictions on authentic state-to-state variation, premised on a particularized conception of the national interest and tethered to the contention that states, as overseers of the quotidian affairs of their citizens, must yield to the reality that the lives of citizens are increasingly accountable to broader market commands.<sup>273</sup> This move inevitably justifies and requires federal monitoring of states as part of the national market. This predatory process creates the conditions for selective preemption that snuffs out real state-to-state variation.

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preemption as bulwarks against certain kinds of state innovation or, alternatively, tripartism, which consists of local government actors occupying the field, purportedly abandoned by federal power and propelled by an asserted substitutionary role thought necessary to vindicate national objectives.

<sup>271</sup> Issacharoff & Sharkey, *supra* note \_\_\_ at 1357.

<sup>272</sup> My debt to Issacharoff & Sharkey for these claims should be obvious. *See id* at 1357-1358.

<sup>273</sup> *Id.* at 1358.

Consideration of how this process might unfold is advanced by considering a specific example of progressive scholarship. Professor Secunda, a productive exemplar of progressive regulatory creativity, has argued, for example, that states have a role in constraining employers’ freedom of speech rights through state rules restricting employers’ property rights.<sup>274</sup> Although his argument has not carried the day,<sup>275</sup> he is not alone, and he forcefully avers that state law should be permitted to play a complementary role in areas of workplace regulation where federal law is silent or absent.<sup>276</sup> His approach illustrates why substantive state-to-state variation, as opposed to complementary variation is likely to encounter difficulties. These difficulties are apparent since progressives are prepared to embrace the capacious possibilities available for censoring state regulation that fail to comply with their aspirations. Issacharoff and Sharkey’s concept of backdoor federalization supplies an apt rationale for such censorship. Either premised on the need to develop a coordinated solution to matters that cross state lines, which may be tied to the risk of putative interstate externalities,<sup>277</sup> or, premised on the necessity for uniformity within interconnected national markets that require the occlusion of state experimentation<sup>278</sup> authentic state-to-state regulatory diversity appears to be foreclosed.

Thus examined, progressive argumentation that favors state innovation, fails to provide a sturdy basis for states rights, state sovereignty or vertical federalism wherein states operating as laboratories of experimentation contest uniformity and advance ideological diversity. Instead, Secunda’s argument, as an exemplar of other efforts, is a nationalist attempt to expand centralized power with states occupying an instrumental role in the implementation of a cohesive (progressive) vision of what that power ought to look like. This Article’s inspection of state secret ballot referenda indicates that supporters of workers’ liberty may have entered a rigged prisoners’

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<sup>274</sup> See generally, Secunda, *supra* note \_\_\_ at 212 (supporting state statutory innovation designed to place property restrictions on the bundle of rights that the state grants to its property owners).

<sup>275</sup> See Kye. D. Pawlenko, *The Non-Viability of State Regulation of Workplace Captive Audience Meetings: A Response to Professor Secunda* 32 HAMLIN L. REV. 191 (2009) (disputing Secunda’s analysis).

<sup>276</sup> Secunda & Hirsch, *supra* note \_\_ at 28.

<sup>277</sup> Issacharoff & Sharkey, *supra* note\_\_ at 1380.

<sup>278</sup> *Id.* at 1358.

dilemma, an arena where the deck of cards is stacked against economic and ideological liberty. This is so because individual liberty in the form of worker freedom is an antidote to compelled forms of collective action that political progressives as well as large economic entities and actors crave.

Despite such claims, the pursuit of workers liberty is enhanced by reconsidering the surprisingly successful role played by states in establishing the federal right- to-work option during the 1940s and comparing it to similar state efforts that culminated in the regulation of union unfair labor practices. What is fascinating about this comparison is that two similar state efforts led to quite different federal solutions, which hints at different possibilities for state regulation, preemption doctrine and federalism than those offered by *Secunda*. Examining the different federal solutions, also allows me to sketch out a very different approach to the federalism/preemption debate as a prelude to responding to Professor Drummonds’ thoughtful alternative to existing preemption doctrine: the passage of a Labor Preemption Clarification Act.

#### **E. Two Different Possibilities?**

As we have seen, prior to the passage of Taft-Hartley Act, a number of states exercised a catalyzing (though not necessarily provably so) role that succeeded in gaining traction at the federal level. The states’ role in furthering the debate regarding union unfair labor practices led to a federalized uniform solution as Congress outlawed union unfair labor practices throughout the United States. On the other hand, the states’ role in advancing the debate over worker’s right-to-work protection led to the passage of a federal right-to-work law statute that expressly granted states the freedom to decide this issue. Although the passage of both state and federal laws governing union unfair labor practices, as well as state and federal laws permitting workers to exercise a right-work-option, are beneficial because they expand workers’ liberty and freedom from either coercive financial transactions or, alternatively, intimidation, it is still possible to have very different opinions about the trajectory and wisdom of both efforts.

State autonomy within the right-work domain remained vibrant after the passage of Section 14-B. State experimentation was advanced as states were granted an option within the framework of the federal scheme without threatening private ordering or causing substantial problems due to a lack of uniformity. This approach vindicates state’s sovereignty because the federal enactment did not create a perimeter to either protect or prohibit state regulatory discretion, nor did the federal amendment require the coordination of state affairs. A somewhat different, federal response ensued after states moved to outlaw certain kinds of union misconduct. Prior to the institution of federal union unfair labor practices, it was clear that union misconduct was unregulated at the federal level. Meanwhile, states that operated consistently with the notion of subordinate but still independent sovereigns responded to statutory silence in the NLRA by enacting statutes precluding union misbehavior. This example of substantive state regulatory variation was precluded by a uniform (federal) approach in 1947 since Section 8 expressly prohibits certain kinds of union conduct. State regulatory innovation in this arena, now triggers *Garmon* preemption.

Although neither example of state labor regulation was welcomed by Big Labor, a comparison of the differences in state outcome that became allowable after the respective federal provisions were enacted may offer a pathway forward. State-to-state labor regulation of one type (union unfair labor practices) led to a preclusive amendment to the NLRA, whereas the implementation of state right-to-work laws led to the passage of a federal right-to-work option expressly permitting state discretion, thus advancing vertical federalism while diminishing horizontal federalism and the possibility of horizontal preemption. All told, state regulation within the right-to-work domain was not coordinated with the federal government or with adjoining jurisdictions. By contrast, the federalization of union unfair labor practices, while a welcome step for workers yearning to be free from restrictions against exercising their

Section 7 rights,<sup>279</sup> advanced standardization and uniformity in contradistinction to state regulatory diversity.

Given the dichotomy between the federalization of right-to-work and union unfair practice law, as well as the states’ role in the passage of both provisions, it is possible to speculate for a moment on the prospect that states may have a similar role to play in the current debates regarding secret ballot elections, a role that may be inhibited by the passage of a Labor Preemption Clarification Act. The efficacy of states’ rights and state secret ballot initiatives may depend on whether policy makers are willing to adopt the distinction between substantive state-to-state variations as opposed to complementary variations that are essentially part of a nationalist agenda preferred by progressive scholars. The latter approach appears to offer a sophisticated version of capture favored by labor union advocates, whereas the former advances the notion that authentic differences between states and between individuals do indeed exist (and ought to exist) within a nation that is deeply and perhaps irreversibly divided on ideological grounds but still clings feebly to the notion of autonomy.

## V. Should State Rights Innovators Embrace the Labor? Preemption Clarification Act of 2011?

### A. *Lochner* in the Mirror of Elite-Led Majoritarianism?

Influenced by a yearning “to accelerate ‘social progress’ created by building a transformative ‘social movement,’ but refusing to rely solely on workers’ ability to freely choose or reject voluntary forms of human solidarity that may or may not include unions, some labor experts appear to be drawn to government power as a vehicle to ensure organizing”<sup>280</sup> and restore private sector labor unions to their former prominence. This restorative impulse appears to rest on the supposition that the opinions of political progressives and their labor allies represent the actual desires of workers.<sup>281</sup> This perspective issues forth with the deduction that federal government power, authorized by a pliable conception of the commerce power and subordinated to

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<sup>279</sup> National Labor Relations Act, 29 U. S. C. §158 (b) (1) (prohibiting unions from restraining or coercing employees in the exercise of the rights guaranteed in Section 7).

<sup>280</sup> Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note\_\_ at 793.

<sup>281</sup> *Id.*

the dominant will of the majority as interpreted by progressive intellectuals, should not be thwarted.<sup>282</sup> Provoked by the contention that the federal government has proven unwilling and unable to protect the basic rights of workers through exclusive federal regimes like the NLRA, progressive commentators argue that now is the time to deploy state and local government power to solve the ills that afflict American workers in areas where federal labor law remains mute.<sup>283</sup> This claim resonates within progressive circles despite evidence showing that workers everywhere, both within the United States and in most foreign countries, are shying away from labor organizations and reasserting their individual rights. Still, the embrace of state power by progressives for assistance in attaining their aspirations constitutes a palpable irony since federal labor laws, such as the NLRA, and the Railway Labor Act of 1926, were ostensibly instituted to take power away from management-friendly state courts and to give power to workers and labor organizations.<sup>284</sup> In point of fact, courts rarely intervened to block social progress legislation.<sup>285</sup> Instead, acting on the basis of questionable presumptions,<sup>286</sup> labor jurisprudence typically advanced the preferences of elites, if not their prejudices.<sup>287</sup> Hence, the instantiation of a federal bureaucracy

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<sup>282</sup> Hutchison, *Waging War on the “Unfit”?*, *supra* note \_\_\_ at 33-34.

<sup>283</sup> Secunda & Hirsch, *supra* note \_\_\_ at 29.

<sup>284</sup> *Id.* This questionable contention represents the insistent power of the myth of judicial laissez-faire constitutionalism that purportedly thwarted social justice legislation at both the state and federal levels of government during and after the Progressive Era. MAYER, *supra* note \_\_\_ at 1-10 (explaining the persistence of this myth, which originated in legal scholarship written during the Progressive Era in the early twentieth century). In any case, this myth has been damaged by antique scholarship. *See e.g.*, Charles Warren, *The Progressiveness of the United States Supreme Court* 13 COLUM. L. REV. 294, 294-313 (describing the courts’ response to the growth in social justice legislation). In addition this myth has been further destabilized by additions to the literature this century. *See generally*, BERNSTEIN, *supra* note \_\_\_ at 1-113.

<sup>285</sup> *See* Warren, *supra* note \_\_\_ at 294-313 and BERNSTEIN, *supra* note \_\_\_ at 7.

<sup>286</sup> This process, as Epstein explains, was sparked by a number of progressive presumptions tethered to the Progressive Era. First, it was presumed that exploitation was rampant within unregulated markets, bolstered by the contention that competition was understood only as a force that led to the bidding down of wages, never to their bidding up. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note \_\_\_ at 92-93 (exposing the errors and presumptions of progressives through the prism of Chief Justice Hughes’ opinion in *West Coast Hotel v. Parrish* 300 U.S. 379 (1937), which sustained a minimum wage regime for women). Second, it was asserted that the absence of a living wage cast a direct burden upon the community. *Id.* at 93. Third, it was argued that collective bargaining was only the starting point to solving the nation’s woes through creation of a collectivity that diminished the discretion of individual actors. *Id.* at 94.

<sup>287</sup> *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATION IN LAW* 83 (2009) (describing this move in *West Coast Hotel v. Parrish*).

was only partially inhibited by federal courts, because the courts, like the other members of the progressive vanguard were convinced of the need for a national coordinator legitimated through an expansive conception of the Commerce Clause<sup>288</sup> in order to transmute individuals into a collectivized society led by political elites.<sup>289</sup> Notwithstanding the courts’ complicity in the establishment of progressive labor norms,<sup>290</sup> the reification of the New Deal paradigm failed to guarantee the conditions necessary to ensure progressive policy preferences today: the transformation of the labor movement and the workplace, as well as the economic, social, and political systems of the country.<sup>291</sup> Hence, though the centralizing goals and objectives ostensibly embedded in New Deal lawmaking still represent the apex of the promise of federal labor legislation their potential now lies in tatters.

Given the collapse of this vision, progressive reformers, are despondent and prepared to start over. They seek to expand innovations across state and local arenas in an effort to complement and strengthen federal law. This invasive process suggests that the resurrection of government control and the abortive arrogation of power previously thought secured by the promise of the New Deal, are the objects of a renaissance in state and local labor relations lawmaking. Progressive reformers rightly understand that labor preemption doctrine, if rigorously defended by the courts, has the potential to block desirable state lawmaking and the rebirth of their dream, a panegyric tied ultimately to the chilling views of Woodrow Wilson<sup>292</sup> and his

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<sup>288</sup> See Somin, *supra* note\_\_\_ at 660 (describing the effect on Supreme Court decision making and independence resulting from President Roosevelt’s court packing scheme, which led to new constitutional principles, including a broadened conception of the Commerce Clause that enabled the Court to endorse wide-ranging federal government power over the economy). See *e.g.*, *NLRB v. Jones & Laughlin Steel Corp.* 301 U. S. 1 (1937) (upholding the enactment of the NLRA on grounds that Congress’ power to regulate interstate commerce in order to prevent industrial strife).

<sup>289</sup> EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note\_\_ at 94.

<sup>290</sup> See *e.g.*, *West Coast Hotel v. Parrish*, 300 U. S. 397 (1937) (upholding legislation setting minimum wages and maximum hours as reasonable exercises of the police power). See *also*, *NLRB v. Jones & Laughlin Steel Corp.* 301 U. S. 1 (1937) (upholding the enactment of the NLRA on the basis of Congress’ power to regulate interstate commerce in order to prevent industrial strife).

<sup>291</sup> Hutchison, *Reclaiming the Union Movement Through Union Dues?*, *supra* note\_\_\_ 449.

<sup>292</sup> Hutchison, *Employee Free Choice or Employee Forged Choice*, *supra* note\_\_\_ at 381 (explaining Wilson’s crusade to create a “progressive” country wherein the power of the state would remain unlimited).

intellectual heirs who could see no reason to limit the power of government so long as it was committed to elite-led majoritarianism.<sup>293</sup>

This analysis implies that preemption doctrine is not the genuine target of reformers, nor is it necessarily the real foe of workers’ liberty. Progressive reformers’ real object is the manifestation of the conditions necessary to achieve their ideological ambition, which leads to a form of bureaucratic and centralized governance within the domain of work. The attempt to achieve this nationalist, even hyper-centralized regime places the interests of individual workers at risk. This risk was made tangible by a rise in the dislocation of marginalized workers ever since the 1930s<sup>294</sup> via the implementation of policies opposed by most of the public. The seeds of this centralizing process were sown more than a century ago. *Lochner* makes these seedlings explicit by demonstrating how larger, well-organized entities pursue profit through regulatory innovation at the expense of smaller groups and the public interest. *Lochner* simultaneously illustrates the explanatory power of public choice analysis and explains the contemporary currents that underscore the labor preemption debate.

Although powerful interest groups—Big Business, Big Labor, Big Lobbyist, and progressives—have assumed the moral high ground in debates regarding the benefits and evils of centralization, Bernard Siegan shows that this high ground is a mirage in his explication of the interest group dynamics underlying the labor regulations statute in *Lochner*.<sup>295</sup> Offering a similar analysis, Professor David Bernstein demonstrates that the larger New York bakeries were staffed by unionized workers who were upset by upstart competition from smaller, non-union bakeries populated by lower-wage

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<sup>293</sup> *Id.*

<sup>294</sup> *See id* at 371-72 (explaining how President Franklin Roosevelt’s insistence on raising the price of labor increased unemployment and widened the unemployment gap between Blacks and Whites, and showing that this gap persists).

<sup>295</sup> The state of New York regulated the hours of bakers premised on the claim that such regulation was necessary to reduce potential health risks. This claim did not the result of a benign motivation to protect bakers from harm. Rather, such regulation was designed to protect those bakers who worked at the larger industrial bakeries that already complied with the various safety and hours regulations reflected in the New York law, at the expense of small, often immigrant-owned bakeries that did not. *See* STEARNS & ZYWICKI, *supra* note\_\_ at 80 (discussing Siegan’s view).

immigrants.<sup>296</sup> Evidently, immigrants were prepared to work long hours in basements of tenement buildings in order to survive.<sup>297</sup> Believing that competition from members of “unfit,” racially-inferior groups drove down wages of union members, labor union leaders and their ideological allies, as well as larger bakeries dreading competition, sought the consolidating power of government, sheltered by the language of social justice, in order to safeguard their pursuit of economic and ideological rents achievable through the subordination of their competitors.

The complementary analysis of Siegan and Bernstein expose the indisputable problem with *Lochnerism* and the state-based liberty of contract jurisprudence on which it was based: from the perspective of marginalized members of society *Lochnerian* adjudication was much too timid and ineffectual a weapon against centralized power as the courts, unpersuaded by the anti-subordination principle, gave far too much leeway to regulatory initiatives of governments.<sup>298</sup> This pattern was continuously repeated during the 1930s as New Deal hierarchs, rarely supervised by the courts, created a corporatist process that benefited large economic entities by destroying their smaller and less politically-influential competitors.<sup>299</sup> Courts and hierarchs also ignored the fact that free market norms contained their own set of antidiscrimination principles, which correspondingly undermined the moral case for legislation that benefits large entities and groups.<sup>300</sup> At both the state and federal levels, judicial fecklessness enabled powerful interest groups to profit from labor regulations at the expense of marginalized workers.<sup>301</sup> On the other hand, labor preemption doctrine as a component of vertical federalism, richly augmented by a commitment to state autonomy (see e.g., federal right to work law) and bolstered by the claim that subordinate sovereigns offer robust democratic accountability as

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<sup>296</sup> See *id.*, at 81-82 (discussing Bernstein’s analysis).

<sup>297</sup> See *id.*, at 82 (discussing Bernstein’s analysis).

<sup>298</sup> BERNSTEIN, *supra* note \_\_\_ 7.

<sup>299</sup> Somin, *supra* note \_\_\_ at 650.

<sup>300</sup> BERNSTEIN, *supra* note \_\_\_ at 109.

<sup>301</sup> *Id.* at 1-117 (describing the thirst for subordinating labor regulations and the inability of courts to prevent this move).

government is brought closer to the people<sup>302</sup> (see e.g., state referenda representing authentic public opinion), can on occasion thwart powerful groups (and the centralized political power, as well as, the nationalist agenda that they represent) at the state level, even if it cannot prevent such corporatist forces from achieving their ends at the federal level.

*Lochner*, as an exception to the pervasive failure by judges and legislators to withstand the influence of powerful groups, sheds light on the conflicting forces at work in any discussion regarding whether labor preemption rules should be relaxed. *Lochner* suggests that proponents of protective of workers’ liberty interests ought to remain vigilant regarding the possibility that the relaxation of preemption becomes a form of backdoor subordination led by interest groups that are committed to uniformity and centralization.

### **B. Whither the Labor Preemption Clarification Act?**

Professor Drummonds offers one vision for reforming preemption doctrine through such a statute. His proposal is part of an intensifying debate regarding the efforts of political progressives to reform labor law that are percolating within the academy. Three principles guide his proposal. First, he posits that change must allow the states to play a role in creating innovation that rebalances labor relations by offering more protection for employee free choice, premised on the claim of employer abuse.<sup>303</sup> Second, he asserts that NLRA Section 7 rights belong to the employees and not to the other parties involved in organizing or collective bargaining activities, and that the states, accordingly, should be allowed to play a greater role in fostering such rights.<sup>304</sup> Third, Drummonds avers that any effort to reform preemption doctrine must involve a shared state and federal responsibility for innovation and change. This move anticipates that federal labor law should function to set minimum standards but not to displace state law-making that is consistent with those minimums.<sup>305</sup>

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<sup>302</sup> Issacharoff & Sharkey, *supra* note\_\_\_ at 1355.

<sup>303</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption*, *supra* note\_\_ at 189-190.

<sup>304</sup> *Id.* at 190.

<sup>305</sup> *Id.*

This paradigm produces pressing questions in an era that has seen a profusion of academic and state proposals to reform labor law in order to expand unionization.<sup>306</sup> Questions include: (1) should contemporary efforts to rebalance the scales favor employees’ Section 7 freedom to refrain from participating in concerted activities, or should it be the other way around, as most progressives prefer?; (2) if Section 7 rights truly belong to workers rather than to employers and unions, should states be allowed greater freedom to protect workers from trickery, harassment, and intimidation, consistent with Senator McGovern’s profound concern for workers’ freedom that resonates with the weight of public opinion?; and (3) should reform efforts mandate the capitulation of state sovereignty to federal minimum standards, signifying the likely evisceration of authentic as opposed to complementary state-to-state variation in the domain of labor regulation? Although the prospects of loosening the federal government’s power are remote in an era featuring a cascade of federal bailouts that favored rich corporate and labor interests while middle-class pensioners suffered,<sup>307</sup> it is possible to infer that proposals advancing state secret ballot initiatives have something in common with the incipient call by reformers to relax preemption rules surrounding the NLRA.

Although current secret ballot referenda are unlikely to be classified as lawmaking in a domain where the NLRA is silent, such efforts may benefit from a relaxed preemption doctrine that allows for some kind of direct state regulation. State referenda and similar efforts may well flourish within a shared state-federal labor relations regime and they may even temporarily secure workers’ liberty interest against card-check programs and policies. Good arguments exist for relaxing preemption doctrine, particularly when such a move advances workers’ liberties. Nonetheless, champions of liberty should be wary of inherent threats in any attempt to weaken preemption doctrine unless such efforts are accompanied by a combination of successful efforts to vitiate national market coordination in the form of horizontal federalism, horizontal preemption, and entrenched power. Thus examined, it is

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<sup>306</sup> See *e.g.*, *Chamber of Commerce v. Brown* 128 S. Ct. 2408 (2008).

<sup>307</sup> See *supra* Part I (discussing the Chrysler bailout).

doubtful that Professors Drummonds’ proposal can be seen as a positive step forward in advancing workers’ liberty interests for a variety of reasons, which this Article has already outlined.

A fuller response to Professor Drummonds’ proposal hinges on one final example that captures the rich possibilities and risks associated with a relaxed preemption doctrine. Consistent with the notion that state action can create both positive and negative externalities through regulatory competition, successful efforts to advance individual liberty, at the margin, may establish the necessary conditions for expanding human flourishing in State A, for instance, that attracts underemployed resources, including human capital from State B, a state that is less committed to human liberty and therefore more willing to respond to a relaxed preemption regime with more pro-union regulation. This process of regulatory competition externalizes the benefits of liberty. Coherent with the political impulses<sup>308</sup> that gave rise to the Taft-Hartley amendments to the NLRA, State A’s lawmaking may plausibly produce benefits for the nation as a whole because it lessens the level of economic dislocation in State B by attracting underutilized resources, including human and financial capital,<sup>309</sup> despite the fact that it reduces State B’s potential for economic growth in the future. This possibility corresponds with the conclusion that “territorial thinking about law is becoming increasing outmoded because rapid transportation, instantaneous communication and free trade have shrunk the world and people no longer stay put.”<sup>310</sup> Although State A’s lawmaking and the likely responses of its economic actors may not necessarily be seen for what it is—a positive externality affecting competing states—the relaxation of preemption doctrine may trigger a pro-union regulatory response in other states that is in harmony with the tenets of public choice and rent-seeking theories. Taken as a whole, a relaxed

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<sup>308</sup> THE DEVELOPING LABOR LAW, *supra* note \_\_\_ at 36-42.

<sup>309</sup> See DENNIS C. MUELLER, PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE 25 (1989) (“An externality occurs when the consumption or production activity of one individual or firm [or state] has an unintended impact on the utility or production function of another individual or firm, [or state].”).

<sup>310</sup> Andrew Morriss, *The Role of Offshore Financial Centers in Regulatory Competition*, ILLINOIS LAW AND ECONOMICS RESEARCH PAPERS SERIES, RESEARCH PAPER No. LE07-032, 1, 18 (2008) available at [http://papers.ssrn.com/pape.tar?abstract\\_id=1275390](http://papers.ssrn.com/pape.tar?abstract_id=1275390).

preemption doctrine would likely benefit states that have a high regard for workers’ interests (at least initially), since employees and employers will have an incentive to leave heavily-regulated jurisdictions, a positive spillover that favors jurisdictions characterized by economic freedom and less regulation. This general trend appears to already be underway.<sup>311</sup>

Regulatory competition<sup>312</sup> thus places pressure on State B to lessen the adverse impact of its existing lawmaking or face the loss of capital. Problems remain because this paradigm likely discounts the economic, psychological, and ideological benefits that political progressives and their allies obtain from regulation. Thus, however attractive this paradigm may be in theory, the success of state action of the kind offered by State A may trigger two responses. First, other states captured by the progressive agenda, such as State C charging that State A has engaged in a race to the bottom, may take advantage of relaxed preemption rules and intensify their commitment to statutory innovation that disfavors workers’ liberty, defends uniformity, and advances union power. While the adverse impact of State C’s response to State A’s regulatory innovation may constrain the liberty interest of State C’s workers and reduce economic activity, this move can be moderated by individual workers’ mobility and individual capital outflows.<sup>313</sup>

Nevertheless, the success of individual responses to State C’s efforts coupled with the economic success of competing states committed to economic liberty, may well lead progressives, as members of a rather cohesive group to further respond. Regulatory progressives who worry about the benefits accruing to other states from their own misguided regulation, and who are cognizant of their inability to compel so-called “democratic accountability” on economic actors shielded by State A’s claim of

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<sup>311</sup> Matt Mitchell, *Economically Free States see 30 percent faster Job Growth*, MERCATUS CENTER, available at <http://neighborhoodeffects.mercatus.org/2011/01/12/economically-free-states-see-30-percent> . . . (accessed on July 20, 2011). See also, Jed Kolko, David Neumark, and Marisol Cuellar Mejia, *Public Policy, State Business Climates, and Economic Growth*, NBER Working Paper Series, Working Paper 16968, NATIONAL BUREAU OF ECONOMIC RESEARCH, available at <http://www.nber.org/papers/w16968>.

<sup>312</sup> Morriss, *supra* note \_\_\_ at 4 & 11.

<sup>313</sup> See e.g., Harry G. Hutchison, *Bad for Employers and Employees*, Room for Debate, *New York Times*, NEWTIMES.COM, available at <http://www.nytimes.com/foomfordebate/2011/07/26/the-hiring-bias-against-the-unemployed> . . . (July 28, 2011) (discussing regulatory competition).

sovereignty,<sup>314</sup> may undertake the following second order response. Reacting to the outflow of capital, including human capital from heavily-regulated states (e.g., States B & C) as part of the competition for law in the market for government action, and propelled by the notion that the lives of State A’s citizens ought to become increasingly accountable to broader market commands because State A’s rules are orthogonal to the need to coordinate an increasingly national market for goods and services, political progressives, labor unions and other corporatists may spur renewed momentum toward federalization over the long term. Furthermore, this maneuver is likely to be sheltered by an increasingly muscular reading of the Commerce Clause in line with the claim that the whole point of the federal scheme is to suppress state creativity which may consist only in creatively gaining benefits for their own citizens at the expense of non-residents.<sup>315</sup> This move is entirely consistent with the pursuit of the novel legal norms that transformed the legislative, executive, and finally, the judicial branches of government during the New Deal; it also illuminates contemporary reformers’ urgent pursuit of new legal norms that are congruent with contemporary progressive iconography.

The insistent commitment of reformers to progressive values comes into view in their puzzlingly persistent defense of progressive programs that inexorably etiolate human liberty. This defense proceeds, despite substantial scholarship exposing the adverse consequences (negative externalities) of such policies on the nation and on marginalized Americans.<sup>316</sup> These consequences are particularly apparent with respect to the economic and social liberties of women, blacks, and immigrants, who have

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<sup>314</sup> Issacharoff & Sharkey, *supra* note\_\_ at 1353.

<sup>315</sup> *Id.* at 1370.

<sup>316</sup> See e.g., AMITY SHLAES, THE FORGOTTEN MAN (2007) (exposing the shortcomings of the New Deal); PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY 134-219 (2006)(detailing the subordination of African American through the institution of progressive values); EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE (2003) (exposing progressives commitments to raceology); GOLDBERG, *supra* note\_\_1-390 (exposing the subordinating values and policies of progressives from Woodrow Wilson to FDR); and David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform* 72 LAW AND CONTEMPORARY PROBLEMS, 176, (2009) (showing that early progressives were interested in constraining opportunities for African Americans, immigrants, women and others who were classified as “unfit” and that this pernicious ideology provided a platform for New Deal reforms that fulfilled the promise of the imperatives embedded in progressive values).

often been seen as unworthy of uplift.<sup>317</sup> Whether in the context of the Progressive Era’s quest for social perfection, which required the imposition of involuntary salpingectomies on “unfit” females,<sup>318</sup> or in the context of New Deal efforts to transform the economy through cartelization and other corporatist schemes,<sup>319</sup> the evidence plainly suggests that progressives wished to increase the choices (internalized benefits) available to dominant interest groups, such as Caucasian American male workers, large labor unions, and capital owners, while reducing the opportunities of members of less powerful groups, such as minorities thought to be within the moral compass of contemporary progressives. Backed by the influential efforts of Big Business and Big Labor, and striving to protect the living standards of racially superior groups as well as the wealth of economically-powerful entities, legal innovation and creative judicial interpretations,<sup>320</sup> fashioned labor law as an effective means of expunging suspect competition (“racially-inferior” people) from the workforce.<sup>321</sup> Despite the fact that there is no issue on which modern progressives consider themselves more enlightened than that of race,<sup>322</sup> the relevant repercussions of Progressive Era and New Deal policies continue to disfavor the economic liberties of members of racial and ethnic minorities today.<sup>323</sup> Nevertheless, contemporary progressives persistently and robustly defend New Deal assumptions as part of the pursuit of social equality.<sup>324</sup> Unavoidably, this vatic apology predicts persistent economic inequality for minorities in the future.

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<sup>317</sup> Bernstein & Leonard, *supra* note\_\_ at 177-180.

<sup>318</sup> See e.g., Hutchison, *Waging War on the “Unfit”?* *supra* note\_\_\_\_8-29 (linking this move to labor law).

<sup>319</sup> BERNSTEIN, *supra* note\_\_ at 83-117 (describing the adverse effects of New Deal cartelization schemes on African American workers).

<sup>320</sup> Hutchison, *Employee “Free” Choice in the Mirror of Liberty*, *supra* note\_\_ at 601 (explaining that, originally, the Commerce Clause limited Congress’s authority to impose cartel-like arrangements but as Congress expanded its power within a number of arenas during the Depression, courts increasingly caved to legislative and executive pressure to act, which led to the passage and judicial approval of a large number of labor statutes).

<sup>321</sup> *Id.* at 600.

<sup>322</sup> GOLDBERG, *supra* note\_\_ at 243.

<sup>323</sup> *Id.* at 268-69.

<sup>324</sup> See e., g., BERNSTEIN, *supra* note\_\_ at 106 (disputing Bruce Ackerman, who portrays federal interventionism during the New Deal as part of an encouraging pursuit of social equality that set the stage for later civil rights measures).

Regrettably, such an outcome ought to be expected in a world where ideology appears to trump the conditions necessary for justice and human flourishing, which roughly constitutes political liberalism of the progressive variety, implying that this viewpoint may be nothing more than an unprincipled *modus Vivendi*,<sup>325</sup> as contemporary policy makers and their allies, steadfastly committed to such values, remain devoid of the courage to face discomfiting facts. Thus, within the context of American liberalism, a world where centralization, uniformity, and standardization are offered as a compelling faith and posited as a ontology of necessity, it is hard to say, on balance, whether labor unions, management, or workers will gain from a narrower preemption doctrine when it is hard to say how state and local government would exercise their broadened authority in the domain of labor relations.<sup>326</sup> The baroquely exclusionary potential of such a move is likely to be realized in the probability that many states, captured and colonized by labor unions and their allies, would exercise their broadened authority to disfavor marginalized workers, just like New York State exercised its authority more than a century ago under the police power to reduce competition for unionized bakery workers by discriminating against their “less-skilled” immigrant competitors.<sup>327</sup> Consistent with this observation, an examination of *Lochner* shows that state labor reform advancing under the broad banner of Progressivism supplied economic rents to large entities by disfavoring the economic liberties of workers at smaller firms, thereby exposing the disjunction between progressive values and actual progress.

Paralleling this analysis, it is hard to say how Congress might amend the NLRA to allow for greater state regulatory innovation. It is possible that any loosening of the preemption doctrine would be subverted by a requirement for greater enforcement of federal labor law under the rubric of establishing democratic ideals,<sup>328</sup> minimum

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<sup>325</sup> Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. OF CONTEMP. LEG. ISSUES, 625, 625 (2002).

<sup>326</sup> ESTLUND, *supra* note \_\_\_ at 43.

<sup>327</sup> See *supra* Part V. A (discussing Siegan and Bernstein’s analysis of *Lochner*).

<sup>328</sup> Issacharoff & Sharkey, *supra* note \_\_\_ at 1355.

standards<sup>329</sup> and tripartite lawmaking.<sup>330</sup> Although it seems true that the reform of labor law preemption doctrine must likely come from Congress,<sup>331</sup> and that NLRA Section 7 rights belong to employees and not to labor unions or employers,<sup>332</sup> tempering preemption doctrine, ironically enough, may well risk furthering the promise of corporatist authoritarianism inherent in democratic societies. The odds that this risk will be realized are compounded by the ongoing rise in the size and scope of government,<sup>333</sup> which reflects the fact that the “State has permeated civil society to such an extent that the two are mostly indistinguishable.”<sup>334</sup> Hence, centralization and uniformity are more than possible, and this outcome is made ever more likely, when progressive reformers are more organized than the individuals committed to the presumption of liberty and because Big Labor and Big Business, ably reinforced by Big Lobbyists are indissolubly linked as members of highly-organized groups. Such groups reflexively favor centralized power, and their policy preferences are tethered together by the economic rents, which are extractable through this process. A relaxed preemption doctrine would further enable contemporary courts to become an enemy of workers’ liberty, just like the courts in the 1930s were captured by New Deal enthusiasm. As a consequence, New Deal courts became willing partners in an adjudicatory process that enabled judges to impose their policy preferences by actively ignoring constitutional precedent and public opinion.<sup>335</sup> This process granted FDR virtually unlimited power over the economy,<sup>336</sup> despite objections from the majority of the public.

Of course, history often repeats itself. Consistent with judicial complicity during the 1930s, the Ninth Circuit more recently found that a California State provision

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<sup>329</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at

<sup>330</sup> *See generally*, Sachs, *supra* note \_\_\_ at 1154-1220.

<sup>331</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note \_\_\_ at 188.

<sup>332</sup> *Id.* at 190.

<sup>333</sup> Brian M. Riedl, *Federal Spending by the Numbers: 2010*, HERITAGE SPECIAL REPORT, (SR-78) 1-16 (June 1, 2010) *available at* The Heritage Foundation, 214 Massachusetts Avenue, NE, Washington, DC 2002 (providing some perspective on the rise in government spending during the period from 1990-2010).

<sup>334</sup> HUNTER, *supra* note \_\_\_ at 154.

<sup>335</sup> Somin, *supra* note \_\_\_ at 656-657

<sup>336</sup> *Id.* at 659.

designed to advance private sector unionization did not conflict with either *Garmon* or *Machinists*, despite rich evidence to the contrary. Instead, the court accepted the postmodern assertion that the statute in question was a neutral enactment.<sup>337</sup> If either Congress or the Supreme Court moderates preemption doctrine, then courts may become evermore captive to the policy preferences of labor unionists and their political allies. Thus appreciated, state regulation that advances workers’ liberties may be cramped as courts further tighten their grip on state sovereignty when state regulatory lawmaking fails to advance progressive teleology. This move would leave workers and entrepreneurial capital owners with only one good option: to follow the nation’s ongoing and entirely justifiable outflow of capital toward jurisdictions that thoroughly understand the concept of regulatory competition,<sup>338</sup> and to emigrate.

## VI. CONCLUSION

Responding to federal card-check proposals, a number of states have sought to preserve the secret ballot elections for workers via state constitutional amendments. Commendably, state referenda advance the presumption of liberty while protecting a state’s workforce from trickery, harassment, and intimidation. Such efforts face many challenges despite the plausible argument that state initiatives should be seen as an attractive component of a shared state-federal governance regime that curbs the power of political elites.<sup>339</sup> Within the domain of federalism, preemption marches under the New Deal-era banner of a uniform federal labor law policy,<sup>340</sup> which coheres with the objectives of progressives-turned-New Dealers who created a host of federal administrative agencies to regulate the economy.<sup>341</sup> Preemption has been bolstered by the contention that Americans live in an interconnected world that requires central coordination in order to limit negative externalities generated by individual actors in the economy. Contrary to the impulses that drive such claims, state secret ballot

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<sup>337</sup> See Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note\_\_\_ at 815-825.

<sup>338</sup> See generally, Morriss, *supra* note\_\_\_ at 1-74.

<sup>339</sup> Somin, *supra* note\_\_\_ at 598.

<sup>340</sup> Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine*, *supra* note\_\_\_ at 97, n.1.

<sup>341</sup> *Id.* at 171.

proposals expand the reach of federalism, and rightly contest the ongoing demand for centralization and uniformity. This challenge, if effective, would further secure workers’ liberty interest and expand human flourishing. This development would revitalize state sovereignty, strengthen state autonomy, and further state-to-state diversity within the realm of labor relations.

However appealing this challenge may be, optimism on this front ought to be tempered because weakening existing preemption doctrine may, paradoxically, further constrain workers’ freedom and liberty since there is also a contemporary move afoot that favors federalization, centralization, and uniformity. This corporatist trend can be explained by the pursuit of self-interested rents by Big Labor, Big Business, and Big Lobbyists, and it is reinforced by progressive scholarship espousing a more relaxed preemption doctrine. This kinetic maneuver favors the enforcement of minimum standards, with the expansion of centralized authority (either state or federal) in the workplace being the ultimate goal. Although state referenda can serve as a canary in a coal mine, proving that progressive paradigms are not effective for most American workers, attempts to break free from NLRA preemption may expose workers to the risk that the pursuit of liberty will fall prey to self-interested labor leaders and their political allies. Hence, champions of employees’ liberty interests ought to be wary of the long term implications of efforts that advance the promise of state sovereignty and the presumption of liberty, particularly if their attempts to weaken preemption doctrine provide an opening for increasing levels of federalization, uniformity, and centralization that will lead toward more rent-seeking and subordination in the future.