

OVERCOMING FEDERAL PREEMPTION:

How to Spur Innovation at the State
and Local Level

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INTRODUCTION

While the National Labor Relations Act (NLRA, or “the Act”) is generally silent on preemption, decades of court decisions have created multiple federal preemption doctrines.¹ Together, these doctrines have effectively hampered states and localities from passing innovative laws that expand the ability of workers to engage in collective action to improve their wages, benefits, and working conditions.² Giving states and localities the freedom to innovate in certain areas would improve the ability of workers to engage in concerted action. Similar to other areas of labor and employment law, federal law should be a floor—not a ceiling—for the protection of labor rights.³

COVID-19 has exposed the existing fissures in our economy and made it clear that income inequality, the lack of a safety net, and insecurity in our labor market have left far too many workers behind. The lack of unionization amongst U.S. workers and an archaic federal labor law hamper workers’ ability to organize while at the same time prohibit state and local action. The result is that innovation has happened in spite of, rather than because of, labor law.⁴

Over the last several years, and accelerating during the Trump administration, worker rights advocates have moved toward a period of experimentation in workers’ rights at the state and local level. Numerous states and local governments have increased their minimum wages,⁵ passed collective bargaining laws for domestic and agricultural workers outside of the NLRA’s purview, and passed paid sick and paid caregiving laws.⁶ But unlike other areas of worker life, innovation on the labor front remains hampered by strict NLRA preemption, solidified over—and in fact created by—decades of Supreme Court law. While new rules permitting state and local innovation are critical, they must be carefully crafted to enhance, not diminish, collective action and collective bargaining rights.

¹ The one exception is right-to-work laws, which are explicitly authorized under Section 14(b) of the NLRA. See 29 U.S.C. § 164(b) (2014).

² See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31, 1569–79 (2002); see also Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 163–88 (2009).

³ See Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, HARV. L. & POL’Y REV., 2017, at 12.

⁴ See generally Estlund, *supra* note 2.

⁵ See *Minimum Wage Tracker*, ECON. POL’Y INST., <https://www.epi.org/minimum-wage-tracker/> (last visited Mar. 6, 2021).

⁶ See *State and Local Paid Sick Leave Laws*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/paid-sick-leave> (last visited Mar. 6, 2021).

THE PRO ACT: MODERNIZING LABOR LAW BUT NOT SUBSTITUTING FOR STATE AND LOCAL INNOVATION

The Protecting the Right to Organize (PRO) Act,⁷ major labor law reform passed in the House in February 2020, would modernize labor law in ways that affect how we think about preemption; however, this does not obviate the need for allowing for more state and local innovation. The legislation would modernize labor law in several major ways:⁸

Imposes increased, faster remedies. The PRO Act would, for the first time, provide for penalties on employers that unlawfully fire or retaliate against employees for engaging in union activity. Remedies would include compensatory damages, backpay, and liability on officers and directors, and they would cover workers regardless of immigration status. The PRO Act also requires the National Labor Relations Board (NLRB) to seek an injunction to reinstate workers immediately if the NLRB believes that the employer has illegally retaliated against workers for union activity, and it creates a private right of action. The legislation also prohibits employers from forcing workers to waive their right to class or collective action.

Streamlines the NLRA process to minimize employer interference. The PRO Act streamlines the election process, so that a vote on unionization can occur faster; prohibits employer “captive audience” anti-union meetings; requires bargaining if an employer interferes with a fair election, so long as the union had majority support from workers; and reinstates the Obama “persuader” rule, requiring an employer to disclose the name(s) and payment(s) they make to any outside consultants they hire to help them run an anti-union campaign.

⁷ PRO Act, S.1306, 116th Cong. (2019).

⁸ See *Protecting the Right to Organize Act Fact Sheet*, U.S. HOUSE COMM. ON EDUC. AND LAB., 116TH CONG. (Feb. 4, 2021), <https://edlabor.house.gov/imo/media/doc/PRO%20ACT%20-%20Fact%20Sheet.pdf>.

Overrides right-to-work laws. The PRO Act overrides “right-to-work” laws by establishing that employers and unions in all 50 states may agree upon a “fair share” clause requiring all workers who are covered by a collective bargaining agreement to pay a fair share fee.

Establishes a process for winning a first contract. The PRO Act establishes a process for reaching a first contract, requiring mediation and, if necessary, binding arbitration.

Protects strikes and other protest activity. The PRO Act would bar employers from permanently replacing strikers and repeals the NLRA’s prohibition on secondary boycotts, allowing workers to pressure companies that hold sway over the employer.

Covers more workers. The PRO Act tightens the definitions of supervisors and independent contractors to prevent misclassification and to cover more workers. The PRO Act also clarifies that an employee can have more than one employer, which is particularly important for our modern, fissured workplaces.

BACKGROUND: FEDERAL NLRA PREEMPTION

Federal preemption of labor law rests on 50 years of judicially created doctrine, not on any statutory language in the NLRA or subsequent federal labor legislation nor on any discernible congressional intent.⁹ Despite the lack of statutory language on preemption, the judicially created jurisprudence is extensive. Indeed, “it would be difficult to find a regime of federal preemption broader than the one grounded in the NLRA.”¹⁰

The judiciary has created multiple federal preemption doctrines. Under the *Garmon*¹¹ preemption, states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.¹² In *Garmon*, an employer obtained a state injunction against a union for picketing.¹³ Instead of simply holding that the injunction was invalid because it interfered with federally protected labor rights, the Court created a broad preemption doctrine that covers even arguably protected or prohibited conduct—necessarily more than conduct regulated by the NLRA.¹⁴ Since the 1947 Supreme Court decision, *Garmon* has been riddled with inconsistencies and exceptions.¹⁵

The Supreme Court broadened preemption further in *Machinists*,¹⁶ where the Court held that the NLRA preempts areas intended to be left to “the free play of economic forces.”¹⁷ There, an employer brought an unfair labor practice charge against unionized workers for refusing overtime work during contract negotiations.¹⁸ The Supreme Court ruled in favor of the union but expanded the *Garmon* doctrine to hold that Congress intended for certain conduct “to be controlled by the free play of economic forces,”¹⁹ and thus not to be regulable by states any more

⁹ See, e.g., *Chamber of Com. v. Brown*, 554 U.S. 60, 65 (2008) (noting that the NLRA contains no express preemption provisions).

¹⁰ See Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154 (2011).

¹¹ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

¹² See *id.* at 245–46.

¹³ See *id.* at 237.

¹⁴ See *id.* at 244–46.

¹⁵ See Drummonds, *supra* note 2, at 167–70.

¹⁶ *Machinists v. Wis. Emp. Rel. Comm’n*, 427 U.S. 132 (1976).

¹⁷ *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); see also *id.* at 147.

¹⁸ See *id.* at 135.

¹⁹ *Id.* at 140 (quoting *Nash-Finch Co.*, 404 U.S. at 144).

than by the NLRB.”²⁰ Though the union in *Machinists*, like the union in *Garmon*, benefitted from the Court’s expansion of federal preemption, the decision has effectively been read to prohibit states and cities from promoting unionization and collective bargaining.²¹

Following these seminal cases, courts have developed a theory of jurisprudence in preemption cases that distinguishes between states and localities utilizing their purchasing or spending power related to labor relations (which is generally permissible) versus attempting to regulate labor relations (which is generally considered preempted). When a state or local government takes action affecting labor relations that serves its proprietary—as opposed to regulatory—interest, the action is not subject to NLRA preemption. In *Boston Harbor*,²² the Supreme Court upheld the City’s action because the project labor agreement (PLA) at issue was tailored to one particular job, the Boston Harbor cleanup project.²³ While courts have generally upheld laws promoting a localities’ promotion of PLAs,²⁴ other laws have not fared as well. *Machinists* has been used to strike down the following: an action by the Los Angeles City Council to deny the renewal of a taxicab franchise unless the cab company settled a labor dispute with its drivers;²⁵ an Illinois statute governing rest breaks and meal periods for hotel attendants in Cook County (enacted during a strike by hotel attendants against a hotel owner);²⁶ and a statute prohibiting “employers that receive state funds from using those funds to ‘assist, promote, or deter union organizing.’”²⁷

²⁰ *Id.* at 149.

²¹ See Moshe Z. Marvit, *The Way Forward for Labor is Through the States*, AM. PROSPECT (Sept. 1, 2017), <http://prospect.org/article/way-forward-labor-through-states>.

²² Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218 (1993).

²³ See *id.* at 232.

²⁴ See, e.g., Ohio St. Bldg. & Constr. Trades Council v. Cuyahoga Cnty. Bd. of Comm’rs, 781 N.E.2d 951 (Ohio 2002) (holding that state statute could not under NLRA prohibit “project labor agreements” in public works contracts), Associated Builders & Contractors, Inc. v. S.F. Airports Comm’n, 981 P.2d 499 (Cal. 1999) (upholding a “project stabilization agreement” that specified procedures for resolving labor disputes), and George Harms Constr. Co. v. N.J. Tpk. Auth., 633 A.3d 76 (N.J. 1994) (upholding agreement).

²⁵ See *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 618–19 (1986).

²⁶ See *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1131–36 (7th Cir. 2008).

²⁷ *Chamber of Com. v. Brown*, 554 U.S. 60, 62 (2008) (quoting CAL. GOV’T. CODE § 16645.2(a) (West Supp. 2008)).

OPTIONS FOR REFORM: LIMITING THE PREEMPTION DOCTRINE TO RECALIBRATE LABOR LAW

Reforming labor law to allow for state and local action is necessary to ensure that innovation continues and to prevent future labor reform from becoming “ossified” at one point in time. But the labor movement has suffered decades of unrelenting attacks from corporate interests and, oftentimes, the courts. A new preemption scheme must recalibrate labor law so that it cannot be used to undermine existing collective bargaining rights that employees presently enjoy, particularly in regions of the country less conducive to organizing or to enacting more protective legislation.

In *Clean Slate for Worker Power: Building a Just Economy and Democracy*,²⁸ the authors noted that the problem of ossification is a danger, even with a reimagined labor law. To solve for this, rather than occupy the entire field, federal labor law should serve as a floor—much like in other contexts of worker protection laws—allowing state and local governments to expand or better protect the right to engage in collective bargaining and concerted activity. The Clean Slate report noted the challenge of setting a standard that ensured that state or local laws did not in fact diminish collective rights under a new standard. Unlike, for instance, in the context of the Fair Labor Standards Act (FLSA), where one can easily determine if a state or local law sets a minimum wage higher than the federal floor, determining a metric for measuring the quality of a collective right is more challenging.

This paper delves deeper into this challenge, proposing potential options for allowing state and local innovation while ensuring that federal law acts as a floor and protects collective rights. Given the judicially developed federal law on preemption, and given that the Supreme Court is unlikely to loosen preemption rules in the near term, all of these options require federal legislation.

²⁸ See Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 1-125 (2020), https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf.

A LABOR FLOOR: NO PREEMPTION IF STATE OR LOCAL LAW ARE BOTH MORE PROTECTIVE OF CORE NLRA PROTECTIONS AND SUFFICIENTLY PROTECTIVE OF EXISTING COLLECTIVE BARGAINING RELATIONSHIPS OR RIGHTS

To determine an NLRA “floor,” we must first examine the core rights that the NLRA protects. As stated in Section 1, the NLRA’s policy is to eliminate obstructions to the free flow of commerce by encouraging collective bargaining, the freedom of association, self-organization, and the ability to designate the representative of one’s choosing for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection.²⁹ That policy is embodied in Section 7 of the NLRA,³⁰ which protects three main rights:

1. the right to self-organize or form, join, or assist a labor organization;
2. the right to bargain collectively through the representative of one’s choosing; and

²⁹ Section 1 of the Act provides, in part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C § 151 (2018). Section 1 also recognizes the connection between inequality of bargaining power between employees and employers and its negative effects on wage rates, purchasing power, and the stabilization of wage rates and working conditions. *See id.*

³⁰ 29 U.S.C. § 157 (2018).

3. the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection.³¹

While the Taft-Hartley Act added “right to refrain” language into Section 7 of the Act,³² Section 7 was not intended to change the Act’s overall policy. Notably, Congress reenacted its declaration of policy in Title I of Taft-Hartley without the “right to refrain” language,³³ indicating its reconfirmation of the original policy.³⁴ Moreover, the 1959 Labor-Management Reporting and Disclosure Act (LMRDA),³⁵ in restating the policy of the NLRA, also omitted the “right to refrain” language, thereby confirming that the negative right stated in Taft-Hartley was not meant to dilute the rights to organize and engage in collective bargaining but was limited to regulating union conduct, tying to the newly enacted Section 8(b) provision.³⁶ Thus, this Taft-Hartley language did not alter the Wagner Act’s original policy.

A new law establishing that federal law is a floor, not a ceiling, should protect the three, core NLRA rights, but it must also explicitly recognize that state and local law cannot be used to undermine existing collective bargaining relationships. Otherwise, any new preemption law could have the effect of worsening, rather than improving, collective bargaining power. Since the Wagner Act was passed, the unionization rate drastically spiked and then plummeted, from 10.8 percent in 1935³⁷ to a high of 33.4 percent in 1945, with a steady decline after 1959, the year the LMRDA was passed, to 10.8 percent in 2020.³⁸ A new preemption framework should not be subject to manipulation to pass laws to reduce unionization using the specious argument that such laws promote employee free choice.

³¹ Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (2018).

³² Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 157 (2018) (amending the National Labor Relations Act of 1935).

³³ 29 U.S.C § 151 (2018).

³⁴ See Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft Hartley Revisionism and the National Labor Relations Board’s Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 29–36 (2012).

³⁵ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

³⁶ The “refrain” language of Section 7 is text needed to trigger Section 8(b)(1)(A) violations. 29 U.S.C. § 158(b)(1) (2018).

³⁷ Josh Bivens et al., *How Today’s Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, ECON. POL’Y INST. (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>.

³⁸ See Bureau of Labor Statistics, *Union Members Summary*, U.S. DEP’T LAB. (2020), <https://www.bls.gov/news.release/union2.nr0.htm>. As the Economic Policy Institute has noted, the decline in unionization has correlated closely with the rise in income inequality. See Bivens et al., *supra* note 34.

Thus, in addition to being “more protective” of rights protected under the NLRA, the law must also be “sufficiently protective” of existing collective bargaining relationships and agreements. While this standard may seem subject to manipulation at first blush, the standard can have a strong definition tied to it that would provide meaning and clarity. This additional language will serve the Act’s purpose of maintaining industrial peace; will help ensure that this recalibration of labor law serves to promote, not decrease, unionization rates; and will help prevent anti-union lawmakers from attempting to pass laws that are purportedly in the name of employee free choice but that actually seek to undermine collective bargaining.

For example, a law requiring unionized employees to affirmatively vote every year on whether they wish to remain represented by their union would arguably promote the right to be represented by the representative of one’s choosing, but it would clearly not be “sufficiently protective” of existing collective bargaining relationships. Similarly, a state may try to pass a law eliminating or shrinking the voluntary recognition bar, which places certain limitations on how soon a petition can be filed after voluntary recognition; while a state may attempt to argue that such a law promotes employees choosing their own bargaining representative, such laws would clearly not be sufficiently protective of existing collective bargaining relationships.

This two-part standard has several benefits:

- By grounding the NLRA floor in the core rights protected by the NLRA, federal courts are clearly guided on how to interpret the new law.
- The proposal ensures that there is a mechanism to protect existing collective bargaining relationships and agreements. By separating the “more protective” standard for rights grounded in the NLRA from the “sufficiently protective” standard for existing collective bargaining relationships and agreements, the law can properly recalibrate the NLRA to recognize the unequal bargaining power that exists today between labor and management. Any recalibration of labor law must recognize the attempts that will be made to undermine collective bargaining and existing relationships.

Using this general two-part standard, more detailed options are explored below.

OPTION 1: Establish a Department of Labor precertification process to determine whether the law is “sufficiently protective” before it can be effective, unless it falls within a category of “presumptively compliant” laws.

In order to provide an additional safeguard for ensuring that the new preemption scheme was not used to subvert existing collective bargaining relationships, the Department of Labor (DOL) could be required to pre-certify a law as “sufficiently protective” of existing collective bargaining relationships. The DOL plays this role in other contexts, including Section 13(c) of the Federal Transit Act,³⁹ which requires the Secretary of Labor to certify “fair and equitable” transit labor protections in connection with Federal Transit Administration (FTA) grants awarded to public transit agencies.⁴⁰

To prevent state and local governments from having to pre-certify legislation with the DOL on laws that are obviously more protective than the NLRA and sufficiently protective of existing collective bargaining agreements and relationships, the law could delineate presumptively lawful areas for state innovation that do not need to undergo the DOL precertification process. Potential areas for precertification are discussed in greater detail below.

Unions and other aggrieved parties can still challenge a law as preempted in court—even if the DOL certifies it—on two grounds: first, that the law is not “more protective” than federal law; and second, that the law is not “sufficiently protective” of existing collective bargaining relationships.

Clean Slate, as it is so named, proposed several other reforms to a labor regime, including a new sectoral bargaining regime that would be administered by a new agency within the DOL. If preemption becomes a floor, rather than an absolute, without a full Clean Slate agenda,

³⁹ 49 U.S.C. § 5333(b) (2012).

⁴⁰ Section 13(c) requires the DOL to certify protective arrangements that include:

(a) the preservation of rights, privileges and benefits ... under existing collective bargaining agreements or otherwise; (b) the continuation of collective bargaining rights; (c) the protection of individual employees against a worsening of their positions related to employment; (d) assurance of employment to employees of acquired public transportation systems; (e) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and (f) paid training or retraining programs.

49 U.S.C. § 5333(b)(2) (2012).

lawmakers should consider creating a new agency within the DOL to administer the “sufficiently protective” test. The Office of Labor-Management Standards (OLMS)⁴¹ is a part of the LMRDA of 1959, which created election, oversight, and fiscal responsibility processes over labor organizations. Since the focus of the agency is on the enforcement of laws regulating unions, the mission of the agency is not amenable to regulating the “sufficiently protective” standard.⁴²

Rooted in these principles, a new statute could provide:

- (a)** Nothing in the Act shall prohibit a state or local government from passing laws concerning areas regulated by the National Labor Relations Act so long as such laws are:
 - (1)** more protective of: the right to self-organize or form, join, or assist a labor organization; the right to bargain collectively through the representative of one’s choosing; and/or the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection, such as striking or picketing; and
 - (2)** sufficiently protective of existing collective bargaining relationships and agreements.

- (b)** In order to ensure that laws are sufficiently protective of existing collective bargaining relationships or agreements, any state or local government which, at any time, seeks to enact a labor law other than those presumptively compliant laws set forth in (c) shall submit a state or local plan to the Secretary of Labor for a determination on whether a law is sufficiently protective of existing collective bargaining relationships and agreements. The Secretary shall approve the plan submitted by a state or locality under subsection (b), or any modification thereof, if such plan in their judgement, does not:
 - (1)** interfere with or potentially interfere with employees’ existing relationship with their chosen bargaining representative; and

⁴¹ *Office of Labor-Management Standards Fact Sheet*, U.S. DEP’T LAB. (Feb. 25, 2010), <https://www.dol.gov/agencies/olms/compliance-assistance/fact-sheets/office-of-labor-management-standards>.

⁴² A new office could also take over responsibilities under 13(c) of the Urban Mass Transportation Act, which requires that where federal funds are used to acquire, improve, or operate a mass transit system (public transportation), federal law must be “protective arrangements” to protect the interests of mass transit employees. 49 U.S.C. § 5333(b) (2012).

(2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements.

(c) A law is presumed not to be preempted, and need not undergo the Department of Labor certification process, if it regulates one of the following areas: [A list of potential areas that are presumptively compliant is discussed below in the “Alternative Under Any Option” section.]

The pros of adding the DOL into this process for areas that are not presumptively compliant include:

- The DOL is only adjudicating on the issue of whether a law interferes with existing collective bargaining agreements, over which it both has some expertise and has a mission aligned with developing additional expertise. The DOL is not making the overall NLRA preemption decision focused on Sections 7, 8, and 10 of the Act, over which it has more limited expertise. Thus, this proposal does not put the DOL in the position of certifying that a law complies or does not comply with the NLRA, which it does not enforce.
- This helps ensure that lawmakers hostile to unions cannot quickly enact laws that undercut collective bargaining. The DOL process, in essence, serves as an extra safeguard before enactment.

The negatives of this proposal include:

- The process of requiring DOL certification in areas other than those presumptively compliant will still be burdensome for state and local governments and may hinder the passage of laws.
- The DOL certification process is a bit unusual in this context; other situations requiring DOL precertification generally have grant funding attached to them. For instance, when federal funds are used to acquire, improve, or operate a mass transit system (public transportation),⁴³ federal law requires “protective arrangements” to protect the interests of

⁴³ See Office of Labor-Management Standards, *Mass Transit Employee Protections* 49 U.S.C. § 5333(b), U.S. DEP’T LAB. (Dec. 17, 2014), https://www.dol.gov/olms/regs/compliance/transit/transit_glossary.htm#masstransit.

mass transit employees,⁴⁴ with OLMS responsible for the certification process. While the Occupational Safety and Health (OSH) Act does provide a good model for precertification without grant funding, state OSH laws are taking over from a federal scheme, which makes the precertification process more compelling. This preemption scheme is not geared toward mini state NLRAs, although it would not preclude them.

- A DOL hostile to unions could use the certification process (and any accompanying regulatory scheme) to undermine unions and state innovation or to stall these efforts. Even worse, a state seeking to undermine existing collective bargaining relationships could send their proposal to a hostile DOL, which then certifies them as sufficiently protective. Even if later challenged in court, it could lead to the negative development of case law.

OPTION 2: Federal courts enforce the entire standard, without DOL precertification.

As noted above, the DOL precertification process could have drawbacks, particularly during an administration hostile to labor rights, where the DOL could use the process to delay state and local innovation and rubber stamp laws hostile to collective bargaining. In lieu of the DOL, federal courts could apply the “presumptively compliant” test. If applied by a federal court, a state or local government would not need to pre-certify a law before applicability, enabling the law to become effective more quickly. And parties could still challenge problematic laws by seeking a temporary restraining order or other immediate relief.

The language of the statute would provide that federal courts enforce the “sufficiently protective” standard, leaving the DOL out of the process:

- (a)** Nothing in the Act shall prohibit a state or local government from passing laws concerning areas regulated by the National Labor Relations Act so long as such laws are:
 - (1)** more protective of the right to organize or join a labor union, the right to bargain collectively through the representative of one’s choosing, and/or the right to engage in concerted activity, such as striking or picketing; and

⁴⁴ See 49 U.S.C. § 5333(b) (2012).

- (2) sufficiently protective of existing collective bargaining relationships and agreements.
- (b) A law is deemed sufficiently protective of existing collective bargaining relationship and agreements so long as it does not:
- (1) interfere with or potentially interfere with employees' relationship with their chosen bargaining representative; and
- (2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements.
- (c) A law is presumed not to be preempted if it regulates one of the following areas: [A list of potential areas for presumptively compliant is discussed below in the "Alternative Under Any Option" section.]

This proposal has several benefits:

- The statute includes a "sufficiently protective" standard, but a labor-hostile DOL could not use the process to delay pro-labor laws from going into effect.
- If a state passed an anti-labor law, such as a law requiring employees to vote on union representation annually, unions or advocates could go straight to federal court and seek an injunction against such a law going into effect without having to wait for a DOL decision.

Potential drawbacks include:

- The DOL process provides a safeguard against anti-labor state and local laws quickly going into effect. A proposed law that the DOL fails to certify could still be challenged in court, but a judge may provide deference to a DOL decision, leading to the negative development of case law.
- This process leaves much discretion to federal courts. With the present makeup of the judicial bench, this proposal could lead to the negative development of the law in this area.

Under this option, the law could provide that the DOL or the NLRB will issue regulations providing further explanation of the standard within a prescribed time period after passage.

This proposal has the benefits of allowing a federal agency to provide more expertise and clarity in a tricky area of preemption while not creating a precertification process that could serve to delay innovative laws from becoming effective.

OPTION 3: Rather than leading with the new federal floor, a law could prescribe specific areas where states and localities would be permitted to regulate and include a “catch-all” for laws that otherwise meet the federal floor standard.

Attempting to define a “floor” in labor law is more challenging than in the FLSA context because the NLRA is an integrated and complicated statutory scheme. Because of this, there will always be some unknowns as to how courts interpret a law providing for state and local innovation even with language that attempts to establish only a “floor,” particularly given the present makeup of the judiciary.

Rather than attempting to define a “floor” at the outset, a law establishing a labor law floor could prescribe a defined set of areas where state and local laws would not be preempted and include a defined “catch-all” at the end. This list of issues where the NLRA could no longer preempt state or local law is further discussed below, but how the “catch-all” is written effectively becomes the floor.

Statutory language could read:

- (a)** Nothing in the Act or any other law shall limit a state or local entity from enacting or enforcing laws that:
 - (1)** [list explicit areas no longer preempted]; or
 - (2)** are otherwise more protective of the right to self-organize or form, join, or assist a labor organization; to bargain collectively through the representative of one’s choosing; and/or to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection, such as striking or picketing; and

(3) are sufficiently protective of existing collective bargaining relationships and agreements.

(b) A law is deemed sufficiently protective so long as it does not:

(1) interfere with or potentially interfere with employees' relationship with their chosen bargaining representative; or

(2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements;

This proposal might substantively be the same as Option 2, but the emphasis on delineating areas that are no longer preempted may provide more clarity in the area most likely subject to state and local innovation while still permitting state and local innovation through the enumeration of the floor as a catch-all.

THE ALTERNATIVE UNDER ANY OPTION: DEFINING ISSUES THAT ARE PRESUMPTIVELY NO LONGER PREEMPTED

Under any scenario, providing a list of issues that are presumptively compliant with the two-part test will facilitate the application of the law and appropriately encourage states and local governments to innovate in appropriate areas. There are numerous issues that could potentially be enumerated as presumptively permissible for state and local action. To promote continued innovation, other issues would be subject to the test set forth above. Those issues could include the following:

1

Impose a supplemental sanction on or prohibit the state or locality from doing business with an employer that has been determined to violate the NLRA

Explicitly authorizing state or local governments to provide for penalties or damages would fill a major gap in NLRA law. Even if the PRO Act passes, state and local action in this area could still provide innovative solutions to deter unlawful discrimination and unlawful refusals to bargain. In *Wisconsin Department of Industry v. Gould Inc.*,⁴⁵ the Supreme Court struck down a Wisconsin law that prohibited the state from purchasing goods and services from employers that were three-time NLRA violators because it imposed a “supplemental sanction” that conflicted with the NLRA’s “integrated scheme or regulation.”⁴⁶ This addition would directly address *Gould*.

In addition to a scheme like in *Gould*, this language would also permit states to impose other sanctions for employers that are determined to violate the NLRA. States could, for instance, impose an additional penalty on an employer that violates the NLRA before it will do business with that employer.

⁴⁵ 475 U.S. 282 (1986).

⁴⁶ See *id.* at 288.

2 Expand collective bargaining coverage and protections to those not covered under the NLRA

By expanding coverage to the broad swaths of individuals not covered by the NLRA (e.g., certain individuals defined as supervisors under the NLRA, students, farmworkers, independent contractors, and domestic workers) a state or local law could fill major gaps in NLRA coverage. While the PRO Act addresses joint employment and misclassification, it does not address other major gaps in NLRA coverage and still leaves some of the most vulnerable workers unprotected. A new scheme on preemption should make it clear that states and localities are free to innovate on separate schemes of coverage.

Indeed, states already have authority in many instances to pass legislation for workers not covered under the NLRA. Courts have held that states can pass labor laws governing exempt workers—namely agricultural and domestic workers, independent contractors, and public sector employees—without confronting the preemption doctrine.⁴⁷ And several states have laws protecting farmworkers.⁴⁸

Expanding coverage would also provide needed clarity for independent contractors, where states and localities have been innovating in establishing wage boards.⁴⁹

3 Allow for the use of alternative procedures for demonstrating majority support, including electronic means

While an employer can presently agree with a union that majority status is established through means other than an NLRA election, an employer can presently still demand an NLRB election. Current election law process allows for employers to significantly delay elections by, for instance, filing objections to the proposed bargaining unit.⁵⁰ Studies have shown that employers

⁴⁷ See Andrias, *supra* note 3, at 14–15; see also, e.g., *UFW v. Ariz. Agric. Emp’t Rel. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (agricultural laborers); *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 790 (9th Cir. 2018) (independent contractors); *Greene v. Dayton*, 81 F.Supp.3d 747, 750–52 (D. Minn. 2015) (domestic workers); and *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007) (citing 29 U.S.C. § 152(2)) (“The National Labor Relations Act leaves States free to regulate their labor relationships with their public employees.”).

⁴⁸ See Laura Jordan, *OLR Research Report: States Granting Collective Bargaining Rights to Agricultural Workers*, OFF. OF LEGIS. RSCH., CONN. GEN. ASSEMBLY 2000-R-0894 (Sept. 13, 2000), <https://www.cga.ct.gov/2000/rpt/2000-R-0894.htm>.

⁴⁹ See Andrias, *supra* note 3, at 13 (noting that “a preemption finding under either *Garmon* or *Machinists* would represent a significant departure from existing doctrine”).

⁵⁰ See John Logan et al., Research Brief, *New Data: NLRB Process Fails to Ensure a Fair Vote*, U. CAL., BERKELEY CTR. FOR LAB. RSCH. & EDUC. 1, 2 (June 2011), https://laborcenter.berkeley.edu/pdf/2011/NLRB_Process_June2011.pdf.

commit more unfair labor practices the longer the delay between the filing of a petition and an election.⁵¹ Delaying elections is in fact a strategy for anti-union employers so that they can run an anti-union campaign, during which many commit unfair labor practices. By allowing states and localities to legislate in this area (e.g., permitting unions to show majority status by, for instance, obtaining signed authorization cards or electronic means of showing support), state and local governments can rectify perhaps the most significant barrier to organizing today.

This reform could be limited to allowing for such alternative means of showing support only when there is no existing union representing a bargaining unit, which would ensure that this reform is not utilized to undermine existing collective bargaining relationships.

Significantly, the PRO Act does not address this major gap in NLRA law.

4 Provide for the expansion of workers on corporate boards

Under U.S. law, workers have no voice in corporate decisions, and shareholders are generally considered the only stakeholder, all of which contributes to expanding economic inequality.⁵² While unionization is a key factor for increasing worker power and well-being, unions do not bargain over how a corporation is run.⁵³ Under Section 8(d) of the NLRA, employers must bargain with the union in good faith only “with respect to wages, hours[,] and other terms and conditions of employment.”⁵⁴ As the Supreme Court stated in *First National Maintenance Corp. v. NLRB*,⁵⁵ “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”⁵⁶ Experimentation at the state level with worker representation on corporate boards will build on successful labor-management collaborations and help build a body of evidence for a successful model.

While having workers on corporate boards is probably lawful under Section 8(a)(2),⁵⁷ this provision would provide clarity on this issue.

⁵¹ See *id.* at 3.

⁵² See Lenore Palladino, *Economic Democracy at Work: Why (and How) Workers Should Be Represented on U.S. Corporate Boards* 1–26 (Feb. 16, 2021) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.3476669>.

⁵³ See Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 83 (2015).

⁵⁴ 29 U.S.C. § 158(d) (2018).

⁵⁵ 452 U.S. 666 (1981).

⁵⁶ *Id.* at 676.

⁵⁷ See Brian Hamer, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 COLUM L. REV. 639, 660 (1981).

5 Place restrictions on the permanent replacement of striking workers or the use of offensive lockouts

The NLRA generally permits employers to replace striking workers and to engage in offensive lockouts, diminishing workers' ability to exercise their economic powers. For years, states and local governments have attempted to regulate in this area but with mixed results.⁵⁸ The Seventh Circuit, for instance, has held that “the state’s effort to make the hiring of replacement workers a crime is so starkly incompatible with federal labor law, which prevails under the Constitution’s Supremacy Clause, that we do not understand how a responsible state legislature could pass, a responsible Governor sign, or any responsible state official contemplate enforcing such legislation.”⁵⁹

This proposal is covered by the PRO Act and is therefore not necessary if the PRO Act passes. Given that more than 30 states have, at some point, passed such strikebreaker laws,⁶⁰ a new preemption scheme should clarify that states and localities can regulate in this high-impact area.

6 Regulate or ban employer “captive audience” meetings

On February 7, 2020, the NLRB sued the State of Oregon in federal court, seeking a declaratory judgment to invalidate a state statute that protects employees who refuse to attend lawful compulsory meetings held by employers during organizing campaigns from adverse employment action.⁶¹ These meetings, referred to as “captive audience” meetings, are workplace meetings that employees are compelled to attend where the employer expresses anti-union views. According to the NLRB, Oregon’s statute is preempted under *Garmon*.⁶² While the district

⁵⁸ See, e.g., *Caterpillar Inc. v. Lyons*, 318 F.Supp.2d 703, 709–11 (C.D. Ill. 2004) (finding unlawful an Illinois law that imposed criminal sanctions on any employer who knowingly employs either professional strikebreakers or knowingly contracts with a day and temporary labor service agency to provide replacements for its employees in the event of a strike or lockout).

⁵⁹ *520 S. Michigan Ave. Assocs., Ltd. v. Levine*, 433 F.3d 961, 965 (7th Cir. 2006).

⁶⁰ See Frank Martorana, *Federal Preemption: State Strikebreaking Laws and the National Labor Policy*, 30 *CATH. U. L. REV.* 521, 523 (1981).

⁶¹ Joshua Fox et al. (Proskauer), *NLRB Sues Oregon Seeking to Invalidate State Law Prohibiting “Captive Audience” Meetings*, *JD SUPRA* (Feb. 20, 2020), <https://www.jdsupra.com/legalnews/nlrbsuesoregonseekingtoinvalidate-26488/>. The Oregon statute, *OR. REV. STAT. ANN.* § 659.785(1) (West 2010) provides that an employer or its agent may not:

discharge, discipline[,] or otherwise penalize or take any adverse employment action against an employee [or threaten to do the same, because the employee] declines to attend or participate in an employer-sponsored meeting or communication with the employer ... if the primary purpose of the meeting or communication is to communicate the opinion of the employer about ... political matters.

Id. The statute defines political matters to include “the decision to join, not join, support or not any lawful political or constituent group.” *OR. REV. STAT. ANN.* § 659.780(5) (West 2010).

⁶² See Fox et al., *supra* note 57.

court ruled in October that the NLRB lacked standing to bring the suit, the NLRB refiled its suit in November 2020, this time alleging a more specific injury.⁶³

Given the General Counsel's attempts to preempt this area of state action, the inclusion of captive audience meetings is critical to protect state action in this area. The PRO Act would ban captive audience meetings. Thus, this reform is not necessary if the PRO Act is passed.

7 Provide for enhanced access rules for unions and worker representatives for those seeking to organize unions where there is no collective bargaining representative

While the PRO Act provides employees with fair access to employers' electronic communication systems, it does not address labor's access to employers' premises during an organizing campaign. State or local action in this area will balance the playing field without infringing on the NLRA scheme. While the PRO Act provides for some access, access rules could always be enhanced at the state and local level. Thus, a provision on access would allow for continual state and local innovation.

8 Provide for enhanced labor standards related to wages, hours of work, and/or benefits

Federal preemption law has prohibited state and local governments from providing enhanced legal standards if it is determined to interfere with the economic forces that labor or management can employ in reaching an agreement. Field preemption has even been used to stop states from passing laws that improve working conditions for all workers (not just unionized workers) in an area because of their applicability and potential beneficial effect to unionized workers. In *520 South Michigan Avenue Associates, Ltd. v. Shannon*,⁶⁴ the Seventh Circuit found a statute providing for paid breaks, meals, and room for breaks was preempted under the NLRA even though it was a general statute that applied regardless of unionization.⁶⁵ The Court reasoned that while

⁶³ *Id.*

⁶⁴ 549 F.3d 1119 (7th Cir. 2008).

⁶⁵ *See Id.* at 1139.

the law facially affected union and nonunion employees equally, it did not constitute a genuine minimum labor standard because it only effectually regulated one county (Cook County) based on the size of applicability;⁶⁶ it was a stringent law, which a union would have a hard time obtaining in negotiations. And in *Chamber of Commerce v. Bragdon*,⁶⁷ the Chamber of Commerce sued a California county and county officials, challenging an ordinance that required employers to pay “prevailing wages” to employees on private construction projects costing over \$500,000.⁶⁸ The Ninth Circuit held that the ordinance was preempted, reasoning that it was much more invasive than laws of general applicability on employment standards that had been upheld.⁶⁹

State and local governments should have the ability to enact labor-neutral, progressive employment policy regarding wages and terms and conditions of employment. This expansion of *Machinists* to these laws of general applicability have effectively undermined progressive, union-neutral policies because of their perceived effect on potential union negotiations.

9 Facilitate collective bargaining across an industry

With union density under 11 percent, unions today often lack the power to engage in multi-employer bargaining, nor is the U.S. system set up for such a regime. Broader-based bargaining—whether by sector, supply chain, industry, or region—can help strengthen worker power in a variety of ways, including by providing broad compensation floors covering most workers while still encouraging enterprise-level bargaining to occur that accounts for different union strategies, workplaces, and bargaining and/or power dynamics.⁷⁰

Sectoral bargaining should be presumptively lawful with certain conditions (e.g., members have to be elected by workers, and employer interference with the elections must be prohibited); if there is a union in the workplace, the union can nominate people for the council; and no actions of the council can conflict with any provisions of a collective bargaining agreement.

⁶⁶ See *id.* at 1131.

⁶⁷ 64 F.3d 497 (9th Cir. 1995).

⁶⁸ See *id.* at 504.

⁶⁹ See *id.* at 502–04. See also *California Grocers Assn. v. City of L.A.*, 98 Cal. Rptr. 3d 34, 53 (Cal. Ct. App. 2009) (finding ordinance requiring grocery stores to retain their former staff for 90 days after a change in ownership preempted under *Machinists* because NLRA sets forth rules on successorship, even though the ordinance protected union and nonunion workers).

⁷⁰ See David Madland, *How to Promote Sectoral Bargaining in the United States*, CTR. FOR AM. PROGRESS ACTION FUND (Jul. 10, 2019, 12:01 AM), <https://www.americanprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states/>.

10 Regulate employer’s use of state or local funds to attempt to defeat union organizing campaigns

In *Chamber of Commerce v. Brown*,⁷¹ the Supreme Court held that a California statute prohibiting grant recipients and private employers receiving more than \$10,000 in state program funds in any year from using such funds “to assist, promote, or deter union organizing” was unconstitutional.⁷² The Supreme Court reasoned that the law was preempted under *Machinists* because it regulated within “a zone protected and reserved for market freedom.”⁷³ Because California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition, California could not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.

Similarly in *Healthcare Ass’n of New York State v. Cuomo*,⁷⁴ a New York law that prohibited an employer from using state funds and facilities for the purpose of influencing employees to support or to oppose unionization, and that prohibited an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract, was preempted under *Machinists*.⁷⁵ The district court cited the proposition from *Brown* that “it is not permissible for a State to use its spending power to advance an interest that—even if legitimate in the absence of the NLRA—frustrates the comprehensive federal scheme established by that Act.”⁷⁶

Providing that states and localities have the power not to use their own funds to support anti-union efforts would provide a high-impact manner for states to promote progressive labor relations at the state and local level.

⁷¹ 554 U.S. 60 (2008).

⁷² See *id.* at 65.

⁷³ *Id.* at 66 (quoting *Bldg. & Const. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (Boston Harbor)*, 507 U.S. 218, 227 (1993)).

⁷⁴ No. 1:03-CV-0413 (NPM), 2011 WL 7983371 (N.D.N.Y. Sept. 7, 2011).

⁷⁵ See *id.* at *1.

⁷⁶ *Id.* at *7 (quoting *Brown*, 554 U.S. at 73-74).

11

Condition state funding on labor peace or neutrality agreements

State and local jurisdictions have explored requiring bidders through procurement processes to enter what are called “labor peace agreements” as a condition of operating under their state licenses or performing under their state contracts. Labor peace agreements often require neutrality, requiring an employer to remain neutral during the organizing campaign, and they sometimes provide more substantive access and other provisions.

Restricting the expenditure of state and local funding on defeating union organizing and requiring contractors to abide by labor peace or neutrality agreements are effective tools in building worker power, but they have faced successful court preemption challenges. In *Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County*,⁷⁷ the Court found the labor peace agreement required for contractors transporting and providing other services to elderly and disabled citizens to be preempted, reasoning that the City had contractual remedies for service interruptions that demonstrated that the ordinance was an attempt to substitute the County’s labor relations views for that of the NLRA.⁷⁸ The Court distinguished labor peace agreements from PLAs, which were “tried and true.”⁷⁹ Thus, a new preemption scheme must make it clear that states and localities can use their purchasing power to promote labor peace agreements.

12

Consider an employer’s prior unfair labor practices in the award of public funds

The Supreme Court has broadly interpreted the state and local prohibition on regulatory activity. In *Gould*,⁸⁰ the Court held that Wisconsin’s policy of refusing to purchase goods and services from three-time NLRA violators was preempted under *Garmon* because it imposed a “supplemental sanction” that conflicted with the NLRA’s “integrated scheme of regulation.”⁸¹ While Wisconsin claimed that its debarment statute was “an exercise of the State’s spending power rather than its regulatory power,” the Court dismissed this as “a distinction without a difference.”⁸² “[T]he point

⁷⁷ 431 F.3d 277 (7th Cir. 2005).

⁷⁸ See *id.* at 281–82.

⁷⁹ *Id.* at 282.

⁸⁰ 475 U.S. 282 (1986).

⁸¹ See *id.* at 286–289 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

⁸² *Id.* at 287.

of the statute [was] to deter labor law violations,” and “for all practical purposes” the spending restriction was “tantamount to regulation.”⁸³ Wisconsin’s choice “to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict” between the state and federal schemes; hence the statute was preempted.⁸⁴ And in the *Golden State Transit Corp. v. City of Los Angeles* cases,⁸⁵ the Court held that the city council could not condition the renewal of an employer’s taxicab operating license on the employer’s resolution of a labor dispute with its employees.⁸⁶

Permitting states and localities to utilize their spending power to discourage employers from violating labor laws would positively affect U.S. labor rights.

⁸³ *Id.* at 287–289.

⁸⁴ *Id.* at 289.

⁸⁵ *Golden State Transit Corp. v. City of L.A. (Golden State I)*, 475 U.S. 608 (1986); *Golden State Transit Corp. v. City of L.A. (Golden State II)*, 493 U.S. 103 (1989).

⁸⁶ See *Golden State I*, 475 U.S. at 106.

CONCLUSION

The extensive, judicially created preemption doctrines have deployed labor law in a manner that was never intended by Congress in its passing of the National Labor Relations Act. And the Supreme Court has missed opportunity after opportunity to reassess and readjust. Just as in other areas of worker protection law, states and localities can and should be leading, trying new models, experimenting, and passing laws that rebalance the equation, so that workers get a fair deal. So long as a new preemption scheme provides a well-enumerated floor, we can experiment without creating a race to the bottom.

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