The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace

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In this Article, Professor Drummonds examines the division of workplace regulatory authority between the states and the federal government. The Article first explores the decline of the New Deal system of collective bargaining and reviews the debates ignited by this decline. It then reviews the role of state law in regulating the workplace, and illustrates the complex relationship between federal and state law in the workplace by examining reductions in coverage for AIDS in employer-provided group medical plans. The Article sets forth a framework and theory for deciding federal-state authority issues. It analyzes traditional preemption doctrine and recent Supreme Court decisions outside of labor and employment law, and then applies these lessons to preemption doctrine in employment law, urging congressional revision of ERISA's preemption provisions, and judicial abrogation of current Federal Arbitration Act preemption doctrine. The Article concludes by recommending major revisions in the primary preemption doctrines that evolved out of the New Deal-era statutes concerning unionized employees.

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INTRODUCTION

This Article examines the division of workplace regulatory authority between the sister sovereigns\(^1\) and the federal government.\(^2\) Under

\(^1\) Some of my colleagues have expressed irritation over the use of the phrase "sister sovereigns" in this Article. I use the phrase as a synonym for "states" for three reasons. First, the United States Supreme Court has emphasized the status of the states as "sister sovereigns" in its federalism decisions during the past two terms. See, e.g., New York v. United States, 112 S. Ct. 2408, 2417-18 (1992); Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991). Second, the phrase focuses attention on the unique status of the states under the United States Constitution. Third, the language used in political and legal discourse not only reflects a political/legal culture, but helps shape it. Thus, "sister sovereigns" neatly summarizes this Article's thesis—that the states traditionally have played, and should continue to play, a primary role in governing the workplace.

\(^2\) The division of governmental powers between the center and the constituent parts of a political union constitutes a fundamental problem of political philosophy. See generally The Federalist No. 82 (Alexander Hamilton), Nos. 50, 51 (James Madison) (illustrating importance Founders placed on the division of authority between the federal and state governments during the constitutional debate); Laurence H. Tribe, American Constitutional Law § 5-1 to § 6-35, at 297-545 (2d ed. 1988) (discussing conflict between federal legislative authority and state sovereignty and limitations on state and local power). Recent events in the former Soviet Union, the Balkans, India, and Canada illustrate that the problem is not uniquely American. See, e.g., Alma E. Hill, New Policy for the Later Yugoslavia, Atlanta J. & Const., Dec. 28, 1991, at A18 (commenting on Yugoslavia's disintegration and the recognition of Croatia and Slovenia); Martin W.G. King,
the modern Commerce Clause and Civil War Amendments, Congress possesses broad powers to regulate most aspects of the employment relationship. In deciding whether to regulate that relationship, Congress also must decide whether to make federal regulation exclusive or, instead, to allow the states continued regulatory authority consistent with minimum federal standards. This decision—whether federal law should preempt state law—shapes the contours of labor and employment law. Indeed, it often decisively determines the legal rights and duties of employees, employers, and unions. Not surprisingly, lawyers increasingly debate preemption issues in the courts.

Because labor and employment law developed piecemeal over decades, its component parts often were the product of ad hoc policy-making. As a result, commentators and judges typically fail to relate particular disputes to the larger, complex system that now governs the workplace. Instead, there are Title VII disputes, ERISA disputes, union activity disputes, whistleblowing disputes, and so forth. Little attention is paid to how the many parts of the American law of the workplace fit together. This Article analyzes preemption doctrines in labor and employment law as part of this larger, now-emerged system.


Tribe, supra note 2, at 308-10 (discussing interpretation of modern Commerce Clause), 481-82 (discussing use of Civil War Amendments as tool for superseding “state action” with federal labor legislation).

4. In this Article, the terms “regulatory” and “regulation” refer to any governmental intervention in the labor markets. Such regulatory intervention includes administrative regulation, legislative enactments, constitutional rights adjudications, and common law legal developments.

5. See infra part IV.A.

6. In this Article, the term “labor law” refers to legal regulations concerning the organizing of unions, collective bargaining, strikes, boycotts, collective bargaining agreements, and judicial intervention in collective labor disputes. The term “employment law” refers to all other labor market regulation, including non-discrimination statutes, wage and hour rules, child labor regulations, common law wrongful discharge and other tort doctrines affecting the workplace, statutes and administrative regulations addressing workplace safety and worker injury/occupational disease, pension and benefit plan regulation, plant closure laws, and legal rules affecting family and privacy.

7. Several recent works propose changes in labor and employment preemption doctrine on a narrower basis. See, e.g., Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Reg. 355 (1990) (proposing the reform of labor preemption in order to facilitate collective bargaining); Eileen Silverstein, Against Preemption in Labor Law, 24 Conn. L. Rev. 1 (1991) (arguing for a floor of federally protected rights that states should not diminish); Katherine Van Wezel Stone, The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System, 59 U. Chi. L. Rev. 575 (1992) (arguing that the individual rights model of employment relations does not provide an adequate substitute for collective bargaining because individual claims often are deemed preempted by collective bargaining agreements). While I agree with much of what these writers say in the narrower context, the approach followed in this Article develops a framework for
As developed in Part I,\(^8\) beyond the sheer number of cases in the courts, several developments have converged to make a review of pre-emption in labor and employment law timely. Part I.A reviews the revolution that has occurred in the law of the American workplace during the past quarter-century. Many legal rules changed, and there now are more rules governing workplace relationships than ever before. But not only the rules changed, the method for making and enforcing legally binding terms of employment for most employees also changed. The collapse of the New Deal-era system of collective bargaining by unions in private-sector employment\(^9\) and the simultaneous rise of a jurisprudence of individual workplace rights fundamentally has limited private-ordering as the governing mechanism for setting the terms of private employment.\(^{10}\) While much private-ordering of workplace relationships remains, socially-conferred, rather than bargained-for, rights now dominate the landscape of employment law. This raises a fundamental question: who should make the social and regulatory judgments that determine whether a workplace right is to be socially conferred? More fundamentally, in the continuing search for the optimum mix of free market and regulatory policies, who should make the judgment to intrude, or not to intrude, upon the workings of the labor markets? As

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8. See infra part I.

9. See infra part I.A. Significantly, the number of public sector union members increased rapidly in this same 25 year period, while the number of private sector union members declined. See infra text accompanying notes 45-46. Much of this public-sector expansion occurred under governing state, rather than federal, labor relations statutes. An exception is federal civil service employment, which now is governed by the Federal Labor Relations Act, 5 U.S.C. §§ 7101-35 (1988 and Supp. IV 1992). Many commentators have noted the vastly different experiences of private and public sector unions. See, e.g., Samuel Issacharoff, Reconstructing Employment, 104 Harv. L. Rev. 607, 616 (1990) (book review) (“The public sector has come to rival, if not surpass, the private union sector in setting the terms and conditions of the current labor market.”)

10. Many writers have noted the shift from collective bargaining to individual rights. See, e.g., Paul C. Weiler, Governing the Workplace 9-15 (1990) (tracing the decline of collective bargaining and offering explanations for it); Joseph R. Grodin, Past, Present and Future in Wrongful Termination Law, 6 Lab. Law. 97 (1990) (comparing the shift from collective bargaining to a tendency towards adopting a European model of wrongful termination law in which the role of the state is to provide certain basic protections to workers); Theodore J. St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 Chi.-Kent L. Rev. 631, 635-45 (citing several reasons for the diminished role of unions and collective bargaining) (1985); Clyde W. Summers, Labor Law as the Century Turns: A Changing of the Guard, 67 Neb. L. Rev. 7, 10-12 (1988) (describing the move from collective bargaining toward prescribing minimum rights and terms of employment by law). As Professor Grodin aptly describes it:

'I have observed at close range the gradual but ineluctable transition of our legal system away from the characteristically American model in which the role of the state is simply to establish a structure within which collective bargaining may occur, toward the characteristically European model, in which the role of the state is to provide certain basic protections to employees; in short, from process to values.

Grodin, supra, at 97.
Part I.B demonstrates, no theoretical consensus exists about how these judgments should be made.

Beyond this upheaval in the governing structures of employment law, a policy debate now rages about what changes may be required to prepare the law of the American workplace for the 21st century. The internationalization of the labor markets and concern about the slowly sinking American standard of living have generated numerous proposals. One group of proposals seeks to resuscitate the New Deal-era labor


12. See generally Robert Reich, *The Work of Nations* (1991). Reich notes that the world market economy should not be divided between "foreign" and "American" companies. Rather, a distinction should be drawn between companies, regardless of whether foreign or American owned, that manufacture or otherwise employ American workers in the United States and those that do not. *Id.* at 136-53. Thus, Nike, an American corporation, manufactures its shoes in Southeast Asia, while Japanese automobile manufacturers may employ American assembly workers or use American-manufactured parts.

Reich also distinguishes the interests of three categories of workers—symbolic analysts (engineers, managers, lawyers, doctors, financial consultants, advertising executives, scientists and the like), in-person service providers (restaurant, hotel, resort and retail sales employees, janitors, mechanics, secretaries, police and security and the like), and routine production workers. The symbolic analysts face worldwide competition, but enjoy worldwide demand for their services. In contrast, in-person service providers provide service where demand exists, chiefly where symbolic analysts live. Last, American routine production workers, who also face a worldwide labor market, are in the least favorable position because their services often can be provided more cheaply in Latin America, Asia, or elsewhere. For a more detailed discussion, see *id.* at 171-240.

13. See, e.g., Graef S. Crystal, *In Search of Excess* 27-28 (1991) (documenting declining inflation-adjusted pay for most American workers during the past twenty years, demonstrating that American executives' salaries dramatically increased during the same period, and finding that American CEOs' earn far more, as a ratio of average worker pay, than their managerial counterparts in Japan and Western Europe); Frank Levy & Richard J. Murnane, *U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposed Explanations*, 30 J. Econ. Lit. 1333, 1371 (1992) (concluding that there were fewer middle class jobs for men in the mid-1980s than a decade earlier, documenting increased income disparity between men and women, and identifying "the declining position of young, less educated men" as the "single most important change in male income distribution"). At the same time, Americans work more hours than ever before. See Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (1991); *Working Hours Increased for Most Americans*, 139 Lab. Rel. Rep. (BNA) 208 (reporting on Economic Policy Study showing decrease in paid time off from 1969 to 1989). Although these increased hours masked the decline of real wages for more than a decade, a recent Department of Commerce analysis showed that real incomes and average wage rates fell during 1991. See *First Decline in Real Income Since 1982*, 141 Lab. Rel. Rep. (BNA) 54 (1992). See also Weiler & Mundlak, *supra* note 11, at 1909 n.6 (noting that hourly wages of the average employee has decreased since the 1970s).
relations system by changing the statutes affecting unionization.\textsuperscript{14} These proposals spring not only from the traditional argument that unions balance managerial and owner economic leverage over individual employees, but also from a realization that collective bargaining preserves both employee voice and private-ordering. Thus, the practical alternative to collective bargaining with unions may not be unbridled labor markets, but greater intrusion by judges and legislators. Another set of policy options revolves around the concept of employee voice in the governance of the workplace. Mandatory worker-management councils, work teams, quality circles, and the like are proposed for both unionized and non-unionized workplaces as a means to increase rank and file employees' stake and involvement in increasing productivity and competitiveness.\textsuperscript{15} But, if mechanisms for employee empowerment in the high skill workplaces of the future provide a strategic framework,\textsuperscript{16} the question again arises whether the choice of means and degree of market intervention should be decided by federal or state officials. This question takes on renewed urgency in light of the absence of any theoretical consensus on how to proceed.

Part II\textsuperscript{17} reviews the role of state law in regulating the workplace. Even in areas of pervasive federal regulation, state law plays a "leading edge" role or otherwise functions as an important complement to federal regulation. This pattern emerges from an examination of five crucial areas of workplace regulation: occupational injury and disease, status discrimination, family issues, privacy issues, and wrongful discharge.

In Part III,\textsuperscript{18} the recent controversy about reductions in coverage for AIDS in employer-provided group medical plans is used to illustrate the complex relationship between federal and state law in the workplace. Excessive focus on federal law obscures the vital role of state law in the complex system of employment law that has evolved, piece by piece, over the past half-century. Even public policy disputes about federal statutes must take into account widespread state regulation of the workplace.

Preemption in employment law also should fit within the larger analytical framework for deciding federal-state authority issues in other areas


\textsuperscript{15} See, e.g., Weiler, \textit{supra} note 10, at 186-224 (discussing alternative types of employee involvement with management); but see Gottesman, \textit{supra} note 14, at 2804-09 (expressing reservations about the efficacy of such alternatives).

\textsuperscript{16} See, e.g., Gettman & Marshall, \textit{supra} note 11, at 1812-14 (arguing that the best strategy for United States companies is to pursue high-productivity per employee rather than low wages); Louis Uchitelle, \textit{Union Leaders Fight for a Place in the President's Workplace of the Future}, N.Y. Times, Aug. 8, 1993, at 32 (reporting that empowering labor held key to workplace of future).

\textsuperscript{17} See \textit{infra} part II, pp. 489-509.

\textsuperscript{18} See \textit{infra} part III, pp. 509-13.
such as economic, environmental, and consumer regulation. Part IV\(^19\) sets forth a framework and theory for deciding such issues generally. This Part distinguishes three dimensions of the preemption problem: (1) the practical and political, (2) the policy-making and normative, and (3) the institutional and interpretive. The Section also reviews the pragmatic and political reasons for the flood of preemption controversies now burdening courts. Second, this Section identifies various considerations that policy-makers may examine in deciding whether exclusive federal regulation is appropriate. Part IV also examines the institutional role of the courts in the preemption controversy. Both the constitutional scheme of dual sovereignty and considerations of political accountability require that the sister sovereigns' regulation of the workplace remain undisturbed unless and until Congress clearly indicates a preemptive intent. Thus, for institutional reasons, judges must resist the temptation to assume a policy-making role.

Part V\(^20\) analyzes traditional preemption doctrine and recent Supreme Court decisions outside of labor and employment law. This review suggests an emerging right-left consensus on the Rehnquist Supreme Court, consistent with the theory of Part IV, supporting a strong constitutionally-based presumption against preemption. Congressional intent to preempt must be "clear and manifest" or "clear and unambiguous." Finally, Part V applies this newly emerging right-left consensus to traditional preemption doctrine and demonstrates the traditional framework's shortcomings.

Part VI\(^21\) then applies these lessons to preemption doctrine in employment law. Preemption decisions under particular employment statutes must make sense not only in terms of the particular statute and preemption doctrine in other areas of the law, but also in terms of the broader, complex system that now governs the workplace.

First, federal employment statutes, including, for example, the wage, hour and child labor laws, status discrimination statutes, and recent enactments concerning privacy and plant closing, typically address preemption issues expressly. Further, these enactments declare that federal regulation is not exclusive. Under this baseline model, preemption occurs only when state enactments conflict directly with federal rights or duties.\(^22\)

The Employee Retirement Income Security Act of 1974\(^23\) ("ERISA") represents an alternative federal preemption regime.\(^24\) It broadly preempts the sister sovereigns from regulatory authority even when state regulation does not directly conflict with the federal enactment. That is,\(^25\)

\(^19\) See infra part IV, pp. 513-28.
\(^20\) See infra part V, pp. 528-34.
\(^21\) See infra part VI, pp. 534-60.
\(^22\) See infra part VI.A, pp. 534-43.
\(^24\) See infra part VI.B, pp. 543-52.
in the ERISA preemption model, Congress not only decides what regulation to adopt federally, but also that beyond federal requirements free market principles control. ERISA's broad preemptive reach is also consistent with the principles outlined in Parts IV and V. Because the retirement and social security of American employees constitutes a matter of paramount federal policy concern, Congress expressly stated a broad preemptive intent in ERISA. Thus, Supreme Court decisions broadly applying ERISA's preemption provision fit the interpretive principles outlined earlier. In some instances, however, the reach of ERISA preemption exceeds its policy rationale. These anomalies are identified and, consistent with the interpretive principles developed earlier, this Article urges amendment by Congress rather than the judiciary.

The Occupational Safety and Health Act of 1971 ("OSHA") represents an intermediate preemption regime. Here again, however, Congress expressly states a preemptive intent. Federal administrative standards divest the states of authority over safety issues covered by the federal standards, but not over issues that fall outside the areas for which federal standards exist. Even within areas covered by federal standards, however, OSHA's cooperative federalism provision allows a kind of reverse preemption if the Secretary of Labor approves state workplace safety plans that meet or exceed federal standards. Thus, once again, decisions under OSHA fit the interpretive principles outlined earlier in the Article.

But one preemption doctrine in employment law—preemption under the Federal Arbitration Act (the "FAA")—finds little support in this analysis. Both as a policy and interpretive matter, current FAA preemption doctrine stands unsupported.

Part VII reviews and urges major revisions in the preemption doctrines that evolved out of the New Deal-era statutes concerning unionized workplaces. After a review of the pragmatic aspects of labor law preemption, the Garmon doctrine, the Machinists doctrine, and section 301, or contract preemption, are reviewed and summarized.

Part VII then criticizes the so-called Garmon preemption doctrine and urges that its primary agency jurisdiction rationale be discarded both as a matter of interpretive and policy analysis. In place of the Garmon doctrine's broad preemptive reach and the numerous exceptions that thirty-five years of case law have added, the Article urges adoption of the narrow conflicts preemption model, which constitutes the baseline

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28. See infra part VI.D., pp. 555-60.
30. See infra part VII.A, pp. 562-64.
32. See infra part VII.C.1., pp. 567-71.
33. See id.
model in employment law generally. There is simply no support for Garmon's complex jurisprudential edifice under the interpretational principles set forth above. As a policy matter, concern that only the National Labor Relations Board (the "NLRB") possesses the institutional competence to decide federal labor relations law issues flies in the face of myriad developments since Garmon. Unions and employers already face a broad range of federal and state court regulation of various aspects of the New Deal-era system of collective bargaining. Further, application of state law, such as wrongful discharge doctrine, may aid, not impede, federal rights. The experience in the public sector further supports the view that state law is not invariably hostile to collective bargaining.

The Machinists doctrine finds more support in the application of the policy and interpretive principles urged in this Article. Where Congress establishes or permits self-help remedies to unions and employers as an affirmative part of the federal labor relations scheme, state regulation conflicts with the unimpeded exercise of the federally-granted right. One anomaly in Machinists case law, however, is identified.

Finally, Part VII addresses section 301 preemption. This doctrine finds no support in the interpretive principles outlined above, nor does a policy analysis support congressional action to save the doctrine. As presently articulated and applied, the doctrine denies unionized employees state law rights and remedies available to non-unionized employees. At the same time, the doctrine fails to protect employers from the prospect that judges and juries will be called upon in many cases to apply the complex provisions of collective bargaining agreements without the aid of the arbitral expertise for which employers and unions contracted. Or worse, existing doctrine may compel ignoring the provisions of collective bargaining agreements entirely, even though such contracts carry obvious evidentiary significance for many state law claims. Finally, the Article suggests a non-preemptive solution to the problems raised by current section 301 preemption doctrine—arbitration pendente lite of all collective contract issues relevant to a unionized employee's individual rights claim.

I. THE SECOND TWENTIETH CENTURY REVOLUTION IN THE LAW OF THE AMERICAN WORKPLACE

This Part examines the decline of the New Deal system of collective bargaining and reviews the debates ignited by this decline.

34. See infra part VII.B.2, pp. 564-67.
35. See infra part VII.C.2., pp. 571-74.
36. See id.

The New Deal system of collective bargaining has failed as the central mechanism for establishing the terms and conditions of private sector employment. This New Deal system, embodied in the 1935 Wagner Act and other enactments, represented the first twentieth century

37. As Professor Pope put it, the New Deal collective bargaining system began its slow "slide toward oblivion" long ago. See James Gray Pope, The Past of Labor Law—and Its Future, 39 UCLA L. Rev. 481, 482 (1991) (book review). For twenty-five years, the percentage of unionized employees in the private sector has been falling, while the percentage of unionized employees in the public sector has been rising. Today, public sector employees are more than three times as likely to be unionized as private-sector employees. See infra notes 45-46 and accompanying text.


Passage of the Norris-LaGuardia Act followed a long history of judicial hostility to labor organizations and their activities. See generally Archibald Cox et al., Cases and Materials on Labor Law 17-51 (1991) [hereinafter Cox, Labor Law] (discussing cases); Felix Frankfurter & Nathan Greene, The Labor Injunction 165-66 (1930) (citing cases where judges avoided previous law prohibiting injunctions and continued to issue injunctions against striking unions). Although the Norris-LaGuardia Act did not provide affirmative rights to unions or employees, it signaled a shift in the federal government's policy from hostility toward unions to one favoring unionization as a means of producing greater equality of bargaining power between employees and corporations. See, e.g., 29 U.S.C. § 102 (stating that Norris-LaGuardia Act is intended to protect freedom of labor and to obtain acceptable terms and conditions of employment).

The 1935 Wagner Act extended the Norris-LaGuardia Act by expressly protecting the right of employees to organize, bargain collectively, and engage in "concerted activities" for "mutual aid and protection." See NLRA § 7, 29 U.S.C. § 157. Moreover, the Wagner Act established the NLRB to supervise the process by which unions could obtain legal status as the authorized collective bargaining representative of employees, see NLRA § 9, 29 U.S.C. § 159, as well as to prosecute and remedy "unfair labor practices" by employers. See NLRA § 8, 29 U.S.C. § 158.

revolution in the law of the workplace. It fundamentally changed the nineteenth and early twentieth century legal doctrine that the employment relationship was largely a matter of contract between individual employees and their employers.40 Paradoxically, while the New Deal’s

Hartley’). Taft-Hartley explicitly recognized an employee’s right to refrain from concerted activities in order to protect an individual from union harassment and coercion. Moreover, it made various acts, generally paralleling those unfair employer labor practices prohibited under the Wagner Act, illegal, including secondary boycotts and other practices Congress deemed abusive. See Taft-Hartley, § 8(a), (b), 61 Stat. at 140-42.


The liberty to exchange labor stood as the foundation of the common law “employment at will” doctrine. See, e.g., Clarke v. Atlantic Stevedoring Co., 163 F. 423, 425 (E.D.N.Y. 1908) (holding that a contract without fixed dates of employment is presumed to be terminable at will). See generally Jay M. Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118 (1976) (examining history and origin of the “employment at will” rule). Further, the common law defenses to employer liability for workplace injury—contributory negligence, assumption of risk, and the fellow-servant rule—were based on the freedom of contract. These defenses, which were known as the “unholy trinity,” barred many workers from any remedies for workplace injury. See generally Matthew W. Finkin et al., Legal Protection for the Individual Employee 523-30 (1989) (examining common law responses to employee injuries).

When workers combined to challenge corporate employment policies, judges, using conspiracy and antitrust doctrines, created the labor injunction to protect freedom of contract. See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (holding that printing press manufacturer has right to injunction under Sherman Act against defendant unions); In re Debs, 158 U.S. 564 (1895) (holding that federal government could punish defendants for organizing strike against Pullman sleeping cars because strike affected interstate commerce). See generally William E. Forbath, Law and the Shaping of the American Labor Movement 58-127 (1991); Frankfurter, supra note 39, at 17-18, 23, 82-133. Eventually, the widespread use of the labor injunction led Congress to enact the Norris-LaGuardia Act.

For an excellent summary of several recent books chronicling specific episodes of labor strife during the late 19th century, see Joshua B. Freeman, Andrew and Me, 255 The Nation, Nov. 16, 1992, at 572-80; see also Nell Painter, Standing at Armageddon 1877-1919 (1987) (providing general historical summary of economic, political and cultural strife during this turbulent period of American history); Robert B. Reich, On the Slag Heap of History, N.Y Times, Nov. 8, 1992, § 7, at 15 (book review of William Serrin, The
minimum labor standards legislation and collective bargaining statutes repudiated the old regime's emphasis on the sanctity of individual employment contracts, the principle of private-ordering remained at the center of the New Deal legislative scheme. Contracts—albeit collective contracts—still defined the terms and conditions of a worker's employment. The traditional American reluctance to legislate directly the terms of employment thus was preserved. Even disputes about contract rules were channeled through a system of private dispute resolution—the federally-preferred alternative dispute resolution procedure known as grievance-arbitration.

The New Deal collective bargaining system peaked in the 1950s. At that time, approximately forty percent of the private-sector, non-agricultural workforce was unionized. A decline then began, however. By

Glory and Tragedy of an American Steel Town (1992), which describes the infamous Homestead Strike of 1882).
42. See supra notes 38-39 and accompanying text.
43. Traditionally, American workers have been viewed as culturally less inclined than European workers to directly promote their interests through the political process. See, e.g., Derek C. Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394, 1400 (1971) (discussing distinctive factors underlying development of American labor law and how those factors have caused American laws and regulatory processes to differ from those of other countries); Grodin, supra note 10, at 97 (discussing the evolution of wrongful termination law). Professor Forbath, however, disputes this classical interpretation and argues that American labor and employment law not only reflected political culture, but helped shape it. See Forbath, supra note 40. Indeed, some argue that the fear of such direct labor legislation prompted President Franklin Delano Roosevelt to seek an alternative means of diffusing social tensions while preserving a system of private ordering. See Christopher Tomlins, The State and the Unions 105 (1985). For the view that upheaval in the streets usually precedes American legal reform, see Alan Hyde, A Theory of Labor Legislation, 38 Buff. L. Rev. 383 (1990) (arguing that the timing of labor legislation is shaped by the needs of the governing elites to define labor's societal position and that industrial unrest plays a significant role in the process) and Michael Goldfield, Worker Insurgency, Radical Organization, and the New Deal Labor Legislation, 83 Am. Pol. Sci. Rev. 1257 (1989) (arguing that worker insurgency and radical organizations strongly influenced final form and passage of NLRA).
44. For a discussion of current issues in grievance arbitration under the labor relations statute, see Gary Minda, Arbitration in the Post-Cold-War Era—Justice Kennedy’s View of Postexpiration Arbitrability in Litton Financial Printing Division v. NLRB, 22 Stetson L. Rev. 83 (1992).

Collective bargaining in major American manufacturing industries has acted as a trendsetter for the entire economy. As unionized workers won higher pay, an eight-hour
1992, only 11.5% of the private-sector, non-agricultural workforce was unionized. Startlingly, this percentage has fallen below the fifteen percent that were unionized when the New Deal collective bargaining statute was enacted in 1935. Many explanations have been offered for this decline, including structural changes in the labor markets, increased foreign competition, the cultural preferences of employees, the bureaucratization of unions, rogue employer illegality and ineffective NLRB remedies, and hostile judicial and administrative law decisions, especially during the Reagan years. It seems likely that all these
day, pension and medical insurance benefits, and greater job security, similar employment terms and conditions were extended to many of the 60% of American workers who were not union members. These gains, however, generally were not legislated or judicially imposed. Rather, they were obtained through employer-employee collective bargaining or extended unilaterally by employers to attract labor and to create or reward employee loyalty and productivity without unionization. With few exceptions, the principle of private-ordering remained intact.

46. See Proportion of Union Members Hits 15.8 Percent, 142 Lab. Rel. Rep. (BNA) 180 (Feb. 15, 1993) (reporting the latest United States Bureau of Labor Statistics survey on the decline in union membership). In comparison, public sector unionization continued its now decades-old rise, reaching 36.7%. See id. Today, though far more employees work in the private-sector, 40% of all union members now work in the public sector. See id. Consequently, it is important to distinguish between the private and public sectors in analyzing trends in unionization. Unless otherwise noted, the figures given in this article exclude agricultural employment.

47. See, e.g., Weiler, supra note 45, at 1017.

48. See, e.g., Leo Troy, Market Forces and Union Decline: A Response to Paul Weiler, 59 U. Chi. L. Rev. 681, 682-84 (1992) (attributing decline in private-sector unionism and collective bargaining to natural market forces, structural changes in the American economy, increased domestic and foreign competition, and increased employee opposition to private-sector unionization).

49. See id. at 682, 688.

50. See id. at 687-88; Issacharoff, supra note 9, at 631-32.

51. See Issacharoff, supra note 9, at 630.

52. See, e.g., Weiler, supra note 45, at 1016-21 (analyzing NLRB data and concluding that 5% of employees who vote for unions in NLRB-sponsored elections each year are fired illegally, that such illegal firings occur in every third NLRB election, and that these figures undercount the total number of illegal firings); Paul C. Weiler, Striking a New Balance: Freedom of Contract and Prospects for Union Representation, 98 Harv. L. Rev. 251 (1984) [hereinafter Weiler, Striking a New Balance] (attributing decline of collective bargaining to increasing employers' use of illegal tactics to resist union representation of employees); Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983) [hereinafter Weiler, Promises to Keep] (arguing that legal procedures by which employees make their choice about union representation should be changed to system of instant elections). Compare LaLonde & Meltzer, supra note 45, at 953-55 (disputing Weiler's data and conclusions but conceding that illegal firings occur in one in every twenty NLRB-sponsored elections).

53. See, e.g., James B. Atleson, Reflections on Labor, Power, and Society, 44 Md. L. Rev. 841 (1985) (analyzing impact of increasing concentration of capital on labor and the role of the law in ignoring or thwarting union efforts to equalize bargaining power); William B. Gould IV, Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform, 38 Stan. L. Rev. 937 (1986) (discussing the decline of the American unions and need for labor reform); Lee Modjeska, The Reagan NLRB, Phase I, 46 Ohio St. L.J. 95 (1985) (reviewing and analyzing significant NLRB decisions and their impact upon national labor policy); Stone, supra note 7, at 578-84 (1992) (citing and discussing numerous articles); Richard Trumka, Why Labor
factors have contributed to the decline of union membership.

Yet, American employees, as distinct from unions, now enjoy greater legal protection than ever before. Just as the regime of collective bargaining receded, employees slowly were accumulating a panoply of individual rights. In a series of unconnected developments in Congress, state legislatures, and the common law, employees won numerous socially-conferring workplace rights. From freedom from sexual harassment to family leave, to workplace safety, to early notice and/or severance pay upon plant closure, to workplace privacy, to wrongful discharge, both union and non-union workers possess rights far exceeding those recognized only a generation ago. Unlike the New Deal collective bargaining regime, however, these rights were derived from an individual's status as a worker, rather than from any notion of contract or exchange. Moreover, these new rights often carried powerful remedies.

Law Has Failed, 89 W. Va. L. Rev. 871 (1987) (arguing that recent NLRB decisions have been anti-labor, that NLRB has been dominated by the far-right, and advocating the abolition of the Wagner Act, Taft Hartley, and Landrum-Griffin acts).

54. See, e.g., Harris v. Forklift Sys., Inc., 62 U.S.L.W. 4084 (U.S. Nov. 9, 1993) (No. 92-1168) (holding that sexual harassment claim based on hostile or abusive work environment actionable even though defendant's conduct does not "seriously affect [the employee's] psychological well-being" or lead the employee to "suffer injury"); Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986) (holding claim of "hostile environment" sexual harassment is a type of sex discrimination actionable under Title VII).


60. Throughout Anglo-American legal history, the framework for governing the relations of human beings jointly engaged in productive enterprises has fluctuated between a status-based model and a contract-based model. See, e.g., E. H. Phelps Brown, The Economics of Labor 9-48 (1962) (discussing the status of workers before the contract of service, the rise of unions, and state regulation); Robert Cottrol, Law, Labor and Liberal Ideology: Explorations on the History of A Two-Edged Sword, 67 Tul. L. Rev. 1531, 1534 (1993) (reviewing three recently published studies of labor and employment law history analyzing from 1350 to 1932, including Robert Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture (1991)).


The emerging system of individual rights in employment law has resulted in a litigation explosion. Often these disputes do not concern the facts underlying the legal claims or the law, but rather the various defenses to a court's assertion of jurisdiction to deprive a
B. The Theoretical Debate

Academics belatedly noticed the forty-year decline in private-sector union membership and the increasing irrelevance of New Deal labor relations law to most American workers. But, gradually, the New Deal system came under intense attack from across the ideological-jurisprudential spectrum. This debate, however, does not concern the causes of union decline, but rather its desirability.

Neoclassical law and economics scholars directly attacked the premises and policies of the New Deal legislation. They challenged the notion, explicit in the 1935 Wagner Act and still part of the United States Code, that most individuals, acting alone, lack sufficient equality of bargaining power for market mechanisms to function properly. The neoclassical scholars also rejected the New Deal solution—the encouragement and protection of collective bargaining by employees to balance the collective power of capital. According to Judge Posner’s now famous
analysis, "[t]he NLRA is a kind of reverse Sherman Act, designed to encourage [the] cartelization of labor markets . . . ."67 In the neoclassical view, while unionization permits union members to earn higher wages in the labor markets, their increased wages are often at the expense of other workers or consumers.68 According to this view, employers will relocate to seek lower labor costs, increase capital expenditures to reduce the demand for labor, raise consumer prices, or simply close operations in the United States due to competition in other countries.

Although the neoclassical argument that union wages69 reduce the demand for labor and increase consumer prices carries force, other commentators point out that an economic analysis of labor law is not so simple.70 These commentators reject the implicit assumption underlying much of the neoclassical argument—that labor markets are properly analyzed through a spot market model—and argue that a relational contract model more aptly describes many employees' circumstances.71 According to this view, because employees invest human capital in their employment, often lack relevant information, and often face high transaction costs in changing employers, the labor market within a firm, rather than an external spot market, is the relevant labor market to analyze.72 Moreover, according to this view, even if one views a union as a cartel monopolizing the supply of labor, employers often also enjoy monopsonistic powers over their employees; unionization thus often results in a bilateral monopoly.73 As a result, labor markets do not satisfy the conditions necessary for a perfect labor market.74 Additionally, these critics also argue


69. The law and economics school appears to define "wages" to include working conditions, such as safer conditions, job security, seniority rights, and the like. See id. at 305.

70. See, e.g., Richard B. Freeman & James L. Medoff, What Do Unions Do? 246-47 (1984) (arguing that unions can be efficient mechanisms for governing the workplace and positively affect productivity); see also Hylton, supra note 63.

71. See Gottesman, supra note 14, at 2783-87.


73. See Gottesman, supra note 14, at 2782-83. Monopsony is a condition of a market in which only one buyer exists for a particular commodity. See Black's Law Dictionary 1007 (6th ed. 1990).

74. See Leslie, supra note 72, at 25-26 (noting that in addition to their investment of human capital, workers lack complete information and may be unwilling to relocate their residence, may be thwarted by "no-raid" understandings among employers, and may suffer unique costs, such as loss of pensions and fringe benefits, by changing jobs).
that unions efficiently solve public goods problems. Thus, even if neoclassical efficiency assumptions dominate, some type of market intervention is justified. Finally, the critics of the neoclassical scholars assert that redistribution of wealth, in addition to efficiency, is an appropriate goal for labor and employment law. The New Deal collective bargaining statutes also fell under attack from the "left." Critical legal scholars attacked the New Deal assumptions that the labor laws instituted a workable, neutral legal regime for governing the workplace as a mini-democracy. In a thought-provoking 1978 article, Professor Karl Klare argued that, though the New Deal labor statutes were "radical" in their conception, they were "defanged" by early judicial interpretations that favored preserving the status quo and marginalized the involvement of rank and file employees. Later, Klare's theory of judicial sabotage was rebutted. His larger point, however, that judicially-made labor law not only reflects policy choices, but defines—and confines—them, stood unanswered.

Three years later, Professor Katherine van Wezel argued that

75. See Freeman & Medoff, supra note 70, at 8-9; Gottesman, supra note 14, at 2789-90; see also Hylton, supra note 63, at 477-85.
78. In response, Professor Finkin convincingly argued that Professor Klare greatly exaggerated the Wagner Act's "radical" potential and that judicial interpretation of the Act remained true to its policies and legislative history. See Matthew W. Finkin, Revisionism in Labor Law, 43 Md. L. Rev. 23, 25 (1984). This, in turn, led Klare to respond to Finkin, see Karl E. Klare, Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin, 44 Md. L. Rev. 731 (1985), Finkin to respond to Klare, see Matthew W. Finkin, Does Karl Klare Protest Too Much?, 44 Md. L. Rev. 1100 (1985), and, finally, for Klare to close the exchange with one final salvo, see Karl E. Klare, Lost Opportunity: Concluding Thoughts on the Finkin Critique, 44 Md. L. Rev. 1111 (1985).

Briefly, the Klare-Finkin debate concerned four Supreme Court decisions: (1) NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (creating the doctrine of permanent replacement of strikers); (2) NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (holding that employer properly fired an entire workforce for threatening a work-stoppage in order to change labor agreement terms); (3) NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (condemning sit-down strikes); and (4) Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (requiring that even the NLRB's limited reinstatement and back pay remedy for anti-union discrimination be subject to offsets for other earnings and employee's duty to mitigate).
79. See Katherine van Wezel Stone, The Post-War Paradigm In American Labor Law, 90 Yale L.J. 1509 (1981). Professor Stone argues that the "industrial pluralist model of collective bargaining represents an ideology shared by legal theorists, judges, industrial sociologists, and labor economists." Id. at 1515.
"the theory of [the New Deal labor relations system] rests upon an assertion of equal power or potentially equal power between management and labor"—a fatally flawed assumption.\(^8\) According to Professor Stone, the New Deal labor laws placed too much emphasis on private arbitration as a means of securing remedies for aggrieved workers, subordinated individual employee rights to union interests, and limited labor to procedural rights, like the right to bargain and to arbitrate disputes.\(^8\) Thus, "[u]nder the guise of government regulation and protection, [the liberal industrial pluralist] interpretation delegated the crucial aspects of collective bargaining to a private forum, shielded from public penetration. Such half-way measures are characteristic of many liberal social programs of the last generation."\(^8\) Finally, other voices from the left questioned the New Deal system's effectiveness. While accepting that collective efforts are consistent in principle with feminist theories, Professor Marion Crain, a leading feminist scholar of labor law, noted that the Wagner Act system was hierarchal and adversarial—an example of the male preoccupation with the patriarchal notion of "power over" rather than feminist notion of "power to."\(^8\) Finally, several prominent labor leaders called for the repeal of the New Deal labor laws. They argued that unions would be better off with unregulated labor-management relations than with the many restrictions that judicial and administrative interpretations of the labor laws have imposed on unions.\(^8\)

Legislation of the terms and conditions of employment, however, also

80. Id. at 1577, 1579-80.
81. Id. at 1516.
82. Id. at 1517. See also James B. Atleson, Values and Assumptions in American Labor Law 1-34 (1983) (criticizing premises of New Deal labor relations system, including the right to strike, unprotected status of sitdown and slowdown strikes, the restricted scope of bargaining, and the status categories of employee, supervisor, manager, and employer). For a historian's review of the works of leading critical scholars in employment and labor law, see Wythe Holt, The New American Labor Law History, 30 Lab. Hist. 275 (1989).
84. See, e.g., Trumka, supra note 53, at 877 (1987) (arguing that labor law has failed to secure the rights of workers); Lane Kirkland, Kirkland Says Many Unions Avoiding NLRB, 132 Lab. Rel. Rep. (BNA) 13, 13 (1989) (arguing that labor relations statutes often "forbid[,] [unionists] from showing solidarity and direct union support"); UE President Calls on Labor to Take More Aggressive Stance, 139 Lab. Rel. Rep. (BNA) 417 (April 13, 1992) (reporting international union president's call for "comprehensive labor law reform" or, absent reform, repeal of the New Deal-era labor statutes) ("I would rather have no [labor] laws at all than have the laws today that do nothing but stifle us."). For a more neutral depiction of the Act's remedy problems, see Cox, Labor Law, supra note 39, at 261-71 (describing severe delays, inadequate enforcement of reinstatement rights, and limited equitable back pay relief requiring deduction of mitigation income for illegal discrimination under the Act).
presents problems. For one thing, legislated solutions to perceived problems may not work. The 1988 Worker Adjustment and Retraining Notification Act,\textsuperscript{85} for example, mandates 60 days advance notice to employees regarding plant closures or major layoffs. Because of numerous limitations and exceptions in the law, however, it has had little impact.\textsuperscript{86} Further, OSHA,\textsuperscript{87} while federalizing the requirement of a reasonably safe workplace, required a federal administrative agency to promulgate safety standards for virtually every workplace in America, in every region, in every industry, and for every occupation. Many standards either have been poorly conceived or are hopelessly outdated.\textsuperscript{88}

In addition, theoretical problems arise.\textsuperscript{89} While legislation addressing the terms of employment allows employees to substitute their collective political and voting power for their often inadequate bargaining power, the issues presented may often be "too complex and too varied to be dealt with by government."\textsuperscript{90} Governmental regulatory schemes, particularly federal ones, often suffer from lack of effective enforcement.\textsuperscript{91} Further, legislation may often result from interest group lobbying, rather than capturing the voice and aspirations of rank and file employees.\textsuperscript{92} Even judicially-conferred, as opposed to legislatively-conferred, rights, such as the upheaval in wrongful discharge law over the past decade,\textsuperscript{93} face criticism from both the left and the right.\textsuperscript{94}

Missing from much of the academic and policy debate, however, is an acknowledgment or analysis of the influential role that state, as opposed to federal, law has played in the revolution in the workplace. Part II examines this role.

\textsuperscript{86} See Sylvia Nasar, Layoff Law Impact is Almost Nil, N.Y. Times, Aug. 3, 1993, at D1 (reporting that the number of workers who receive required notice is no higher than before the law passed).
\textsuperscript{88} See generally Finkin, \textit{supra} note 40, at 317-417; Mark Rothstein et al., Employment Law 601-28 (2d ed. 1991).
\textsuperscript{89} See generally Weiler, \textit{supra} note 10, at 152-61.
\textsuperscript{90} Gottesman, \textit{supra} note 14, at 2794.
\textsuperscript{92} See, e.g., Weiler, \textit{supra} note 10, at 159-61, 181-83.
\textsuperscript{93} See generally Peck, \textit{supra} note 59, at 719.
\textsuperscript{94} See generally Crain, \textit{Images of Power, supra} note 83, at 485 (supporting increased empowerment of employees through "participation in the process of workplace governance" rather than through safeguarding individual entitlements); Epstein, \textit{Contract at Will, supra} note 66 (providing a neoclassical defense of traditional doctrine that employment relationship can be terminated by either party at any time). For an excellent summary of the major schools of legal scholarship, including the traditional, law and economics, critical, feminist, race theory and the narrative, see Matthew W. Finkin, \textit{Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog}, 46 Miami L. Rev. 1101 (1992).
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II. STATE LAW AND THE REVOLUTION IN THE WORKPLACE

The federal government extensively regulates the American workplace. The Fair Labor Standards Act,95 the Equal Pay Act,96 Title VII of the Civil Rights Act of 1964,97 the Age Discrimination in Employment Act,98 the Pregnancy Discrimination Act,99 the Americans With Disabilities Act,100 the Occupational Safety and Health Act,101 the Employee Retirement Income Security Act,102 the Polygraph Protection Act,103 the Worker Adjustment and Retraining Notification Act,104 the Drug-Free Workplace Act,105 and the Family and Medical Leave Act106—to name only a few of the dozens of federal enactments—illustrate the breadth of federal regulation.107 Additional federal regulation, such as an electronic monitoring statute, also may be on the way.108

108. The House Education and Labor Committee approved the Privacy for Consumers and Workers Act on July 31, 1992. See Workplace Eavesdropping Limits Approved By House Committee, 10 Employee Rel. Wkly. (BNA) 886 (Aug. 10, 1992). A similar measure is before the Senate Committee on Labor and Human Resources. See New Version of Worker Monitoring Restrictions Introduced, 7 Individual Employee Rts. (BNA) 19 (Oct. 6, 1992) (reporting introduction of S.3238 and summarizing its provisions). For a review
But, as extensive as federal regulation of the workplace has become, the law of the American workplace includes another important element—state law. Historically, the states regulated the employment relationship. Moreover, state law played a leading role in more recent developments—from sexual harassment and family leave issues, to disabilities discrimination and drug testing, to the intellectual issues of workplace monitoring. See Workplace Privacy, 10 Employment Rel. Wkly. (BNA) 535-36 (May 18, 1992).


110. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (holding that state law establishing wages for female hotel employees is valid exercise of state regulation); see also Payne v. Western & Atl. R.R., 81 Tenn. 507, 520 (Tenn. 1884) (holding that state exceeded common law in regulating employer-employee relationship); Jordan v. State, 103 S.W. 633, 636 (Tex. Crim. App. 1907) (holding that state exceeded police powers in regulating employer-employee relationship).

111. Compare Holien v. Sears Roebuck & Co., 689 P.2d 1292, 1299-1300 (Or. 1984) (en banc) (providing tort remedy for wrongful discharge where plaintiff was sexually harassed) and Monge v. Beebe Rubber Co., 316 A.2d 549, 552 (N.H. 1974) (providing contract remedy for breach of oral contract where employee was maliciously fired after refusing sexual advances) with Meritor Savings Bank v. Vinson, 477 U.S. 57, 73 (1986) (providing relief under Title VII for "hostile environment" sexual harassment where plaintiff was publicly fondled and forcibly raped by bank vice president).


property rights of employees and employers—state law led the individual rights revolution. Nor does the future appear to offer early reprise from the determination of state legislatures to regulate this central relationship of life.

Further, state common law judges have created wrongful discharge and other tort remedies to avoid the harshness of the employment-at-will

App. 1985) (holding that employer illegally discriminated against job applicant on the basis of color blindness where employer did not establish that test was bona fide occupational requirement).


116. Other examples of state regulation include: establishing conditions for video display terminal uses see, e.g., ILC Data Device Corp. v. County of Suffolk, 182 A.D.2d 293, 295 (N.Y. App. Div. 1992), appeal denied, 613 N.E.2d 965 (N.Y. 1993); prohibiting smoking in the workplace, see Workplace Smoking Restrictions Spreading Report Says, 7 Individual Employment Rts. (BNA) 12 (June 30, 1992), protecting private use of legal products, most commonly tobacco, outside the workplace, see Wisconsin Bars Bias For Off-Duty Use of Lawful Products, 7 Individual Employment Rts. (BNA) 9 (May 19, 1992), and prohibiting genetic testing in connection with employment, see New Wisconsin Law Restricts Genetic Testing in the Workplace, 10 Employee Rel. Wkly. (BNA) 314 (Mar. 23, 1992).


These causes of action often provide employees with jury trials and damages for perceived unjust or wrongful treatment. Today, multi-million dollar jury verdicts are common. Indeed, the costs of employment litigation and its effect on the competitiveness of American business are hotly debated.

(N.Y. 1983) (refusing to recognize cause of action for abusive discharge of an at-will employee).


See supra note 118 and cases cited therein. Even where other remedies are provided courts increasingly recognize damages and jury trial remedies. See, e.g., Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1303 (Or. 1984) (allowing common law remedy despite existence of statutory remedy); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 898-99 (Tenn. 1992) (holding that statutory remedies are not exclusive remedies available to employee discharged or discriminated against for serving on jury).


A recent Rand Corporation study found that a litigation explosion in the 1980s over employer liability for wrongful termination has led to significant drops in employment. See Rand Study Links Liability, Job Loss, 7 Individual Employment Rts. (BNA) 15 (Aug. 11, 1992) (noting that a tort cause of action for wrongful discharge had no significant impact on employment in manufacturing, but led to a 3% decline in non-manufacturing industries.) In addition to the direct and indirect costs of litigation, employment law regulation affects the allocation of costs in many other areas, such as catastrophic illnesses like AIDS and cancer. Concern about American competitiveness, in turn, sometimes generates proposals for even more regulation. See, e.g., Joint Approach to Raising Skills of Workforce Sought, 140 Lab. Rel. Rep. (BNA) 116 (May 25, 1992) (reporting union official's Senate testimony advocating enactment of legislation contain-
This Part now examines the role of state law in more detail in several critical areas of workplace regulation: (a) workplace injury and occupational disease, (b) status discrimination, (c) accommodation of family and other issues of concern to persons working both inside and outside the home, (d) privacy in the workplace, and (e) wrongful discharge.

A. The State Role in the Compensation and Prevention of Workplace Injury and Occupational Disease

Workplace injuries and occupational disease involve tremendous costs for employees and employers alike. For that reason, the equitable allocation of these costs, and their reduction by preventative safety measures, remain issues near the top of the employment law agenda. Yet, even under OSHA, the high-water mark of detailed federal regulation, the states retain a crucial role.

First, and most obvious, compensation for workplace injury or disease remains for most American workers primarily a state law issue. Since the Progressive Era, state no-fault workers' compensation statutes have covered workplace injury; many of these statutes now cover occupational diseases as well. Moreover, notwithstanding the exclusive remedy bar against employer negligence liability to employees, which is a feature of

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125. See generally Arthur Larson, The Nature and Origins of Workmen's Compensation, 37 Cornell L. Q. 206, 231-34 (1952) (discussing development of workmens' compen-
virtually all state workers' compensation statutes, employee damages actions against employers are often allowed where workplace hazards result from intentional or reckless conduct or where the dual capacity doctrine allows an employee to sue an employer for a defective product that has injured the employee. Additionally, workers suffering injury or occupational disease increasingly bring state law third party products liability claims against the manufacturers and suppliers of workplace equipment. Finally, employer liability under state law for toxic

sation in the United States to demonstrate its unique intermediate character and to dispel the strict-liability-trust fallacy).


126. See, e.g., Snider v. Consolidation Coal Co., 973 F.2d 555, 560-61 (7th Cir. 1992) (awarding back pay to victim of sexual harassment based on finding that no reasonable employee would have continued working for employer under the circumstances), cert. denied, 113 S.Ct. 981 (1993); Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989) (holding employee liable to employee for battery where substantial certainty that clean-up employees exposed to PCBs without warning or protective gear would be injured); Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 612 P.2d 948, 955 (Cal. 1980) (allowing cause of action based on aggravation of asbestos-related disease on fraud theory); Millison v. E.I. du Pont De Nemours & Co., 501 A.2d 505, 516-17 (N.J. 1985) (holding that fraudulently concealing knowledge of pre-existing asbestos-related diseases sufficient for civil fraud claim); Brady v. Safety-Kleen Corp. 576 N.E.2d 722, 729-30 (Ohio 1991) (holding an Ohio statute regulating claims against employers for intentional torts unconstitutional because it would violate workers' compensation provision of state constitution).


129. See generally Finkin, supra note 40, at 693 n.1 ("With growing frequency, injured workers are able to obtain separate damages recovery against third parties based upon a theory of product liability.") (citing Gordon v. Niagara Mach. & Tool Works, 574 F.2d
exposures in the workplace remains unsettled, including whether an employer may be liable for birth defects in children conceived by employees who have been exposed to toxic substances in the workplace.\textsuperscript{130} Shifting focus from compensation for worker injury to its prevention, one finds that, though OSHA standards preempt some state safety regulation,\textsuperscript{131} much regulatory authority is left to the states. Indeed, OSHA preempts state safety regulations only to the extent that those regulations address safety issues covered by federal OSHA standards.\textsuperscript{132} Consequently, the states remain free to regulate the many issues not addressed by specific OSHA safety standards. Even more significantly, about half of the states regulate workplace safety under state plans approved by the Secretary of Labor.\textsuperscript{133} Although such plans require federal approval, they amount to a reverse preemption of OSHA regulations.\textsuperscript{134} Further, because of a perceived laxity in federal enforcement of OSHA standards, state criminal prosecutions of serious wrongdoing have increased.\textsuperscript{135}

1182 (5th Cir. 1978) and Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984)); Mark Rothstein, Occupational Safety and Health Law, §§ 510-12 (3d ed. 1990) (discussing the availability of actions against third parties, such as insurance companies, unions, and government agencies where cause of action against employer is unavailable); Rothstein, supra note 88, at 760-61 (discussing third party actions against other employers, insurance companies, and manufacturers of defective products where cause of action cannot be brought against employer).


131. See Gade v. National Solid Wastes Management Assoc., 112 S. Ct. 2374, (1992) (holding OSHA preempts state laws regulating safety issues covered by federal safety standards even though state laws have "dual impact or purpose" of protecting employees and members of the public).


133. In addition, OSHA § 4(b)(4), 29 U.S.C. § 653(b)(4), preserves "the common law or statutory rights, duties, or liabilities of employers and employees under any [state] law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." In addition, OSHA § 18(b), 29 U.S.C. § 667(b), authorizes a state to develop a state plan for workplace safety, subject to the Secretary of Labor's approval. Twenty-two states and the Virgin Islands and Puerto Rico have devised plans to enforce state standards and have received federal approval. See 29 C.F.R. § 1952 (1992). Connecticut and New York have received federal approval of their plans to enforce state health and safety standards for state and local government employees. See 29 C.F.R. § 1956 (1992).

134. See Gade, 112 S. Ct. at 2386 n.2.

135. See, e.g., People v. Chicago Magnet Wire Corp., 534 N.E.2d 962 (Ill.), cert. denied, 493 U.S. 809 (1989) (holding that OSHA does not preempt state criminal prosecutions); People v. Hegedus, 443 N.W.2d 127 (Mich. 1989) (holding that OSHA does not preempt state criminal law prosecution for involuntary manslaughter in connection with carbon monoxide poisoning of employee). See also Rothstein, supra note 88, at 664. ("There is an unmistakable irony surrounding the issue of OSHA pre-emption. The fed-
Finally, the worker right-to-know movement originated in the states—only later did OSHA propose standards for disclosing to workers the hazards associated with certain toxic substances in the workplace.

B. State Regulation of Status Discrimination

State anti-discrimination laws not only preceded Title VII of the Civil Rights Act of 1964 and other federal status discrimination statutes, but continue today as an important component in the overall regulatory system for discrimination in the workplace. This Section examines remedies for status discrimination, the breadth of anti-discrimination provisions, and burdens of proof. It turns first to the central question of remedies.

1. The Search for Remedies

State law remedies for status discrimination often exceed those available under federal law. Consider, for example, sexual harassment. The United States Supreme Court did not recognize sexual harassment as a Title VII violation until 1986 and then only equitable relief, not damages, was available. Yet, state courts already provided remedies for such conduct under state common law tort causes of action for assault, battery, false imprisonment, intentional infliction of emotional distress, privacy, and wrongful discharge.


140. See, e.g., Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986) (finding Title VII violation where waitress terminated because she refused to wear sexually suggestive uniform as well as refused employer’s requests for sexual favors); Phillips v. Smalley Maintenance Servs., Inc., 435 So.2d 705 (Ala. 1983) (holding that employee’s right to privacy violated where manager questioned plaintiff about sexual habits after plaintiff spurned sexual requests); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (holding that plaintiff’s dismissal after declining foreman’s request for date breached implied covenant of good faith); Holien v. Sears, Roebuck & Co., 689 P.2d 1292 (Or. 1984) (holding that employee fired for refusing sexual advance wrongfully discharged).
victims of sexual harassment substantial advantages over Title VII actions—\(^{141}\)the availability of jury trials, tort damages for emotional distress and mental anguish, and punitive damages.\(^{142}\) Even after the Civil Rights Act of 1991\(^ {143}\) amended Title VII to establish federal jury trials and damages remedies, claims under state law will continue to go forward because of questions about the retroactive application of the 1991 amendments\(^ {144}\) and the strict limits placed on Title VII damages.\(^ {145}\) Further, state law may recognize an employer's liability for a

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\(^{141}\) The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, amended Title VII to provide jury trials and emotional distress and punitive damages. Yet, many commentators still criticize Title VII as inadequate to redress sexual harassment in the workplace. See, e.g., Susan Estrich, *Sex At Work*, 43 Stan. L. Rev. 813 (1991). Indeed, many argue that *Meritor Savings Bank*, 477 U.S. 57 (1986), throws into question whether an employer is liable to an employee for a supervisor's sexual harassment. As evidence, they point to the Supreme Court's statement that "Title VII . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72.


\(^{144}\) See infra text accompanying note 155.

\(^{145}\) See, e.g., Stockett v. Tolin, 791 F. Supp. 1536, 1561 (S.D. Fla. 1992) (affirming award of $250,000 in compensatory damages, including emotional distress damages, and $1 million in punitive damages under tort theories of action where owner of film studio habitually asked and "ordered" employees to have sex with him).

Title VII caps damages for intentional discrimination as follows:

\[\text{[T]he amount of punitive damages awarded under this section, shall not exceed, for each complaining party—} \]

\[(A) \text{ in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, } 50,000; \]

\[(B) \text{ in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, } 100,000; \text{ and} \]

\[(C) \text{ in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, } 200,000; \text{ and} \]

\[(D) \text{ in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, } 300,000. \]


In one recent conference on employment law developments, a management-attorney suggested that plaintiff's may seek to avoid the Title VII caps by proceeding under state law. See *Maximum Punitive Damage Awards Apply to Each Individual in Class Action*, 10 Employee Rel. Wkly. (BNA) 629 (June 8, 1992).
supervisor’s sexual harassment of another employee in situations where Title VII does not. In Meritor Savings Bank v. Vinson, the Supreme Court cast into doubt whether an employer is liable for a supervisor’s acts, at least in hostile or abusive environment—as opposed to quid pro quo—sexual harassment cases. Conversely, state law often holds an employer vicariously liable under a theory of respondeat superior for a supervisor’s misconduct.

State law theories also appeared in workplace racial discrimination cases. Although section 1981 of the Civil Rights Act of 1866

146. 477 U.S. 57 (1986).
147. A hostile or abusive environment exists when an employee is subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature that is sufficiently severe or pervasive to alter the conditions of the victim’s employment such that a reasonable person, or a reasonable person of the victim’s gender, would consider the working environment abusive. See, e.g., Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991). But see, e.g., Rabidue v. Oscola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (holding that plaintiff failed to sustain burden of proof under Title VII even though male employee customarily used vulgar and obscene language to refer to women, directed obscenities at plaintiff, and workplace contained posters of nude and scantily clad women), cert. denied, 481 U.S. 1041 (1987). See generally Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449 (1984) (arguing against the use of disparate impact analysis in sexual harassment claims in favor of “abusive working environment” test).
148. In quid pro quo sexual harassment cases, a supervisor conditions an employment benefit on sexual favors. See Meritor Savings Bank, 477 U.S. at 65; see also Catherine MacKinnon, supra note 142, at 32-47 (discussing quid pro quo sexual harassment).
149. See, e.g., Oregon Bureau of Labor & Indus., Oregon Civil Rights Laws Handbook 95 (1992) (stating that employer is liable for supervisor’s acts “regardless of whether: . . . (c) the employer knew or should have known of the occurrence of the specific acts complained of”); Potts v. BE & K Constr. Co., 604 So.2d 398 (Ala. 1992) (holding that employer must take adequate steps to remedy employee’s tortious conduct); New York Task Force on Sex Harassment Recommends Strict Employer Liability, 10 Employee Rel. Wkly. (BNA) 1352 (Dec. 14, 1992) (reporting that state law commission suggested amending New York law to make employers strictly liable for discriminatory conduct of supervisors and managers if the employer knew, or should have known, about the conduct and failed to act).
150. See, e.g., Agarwal v. Johnson, 603 P.2d 58 (Cal. 1979) (holding employer liable for supervisor’s wilful misconduct and affirming award of compensatory and punitive damages for defamation and intentional infliction of emotional distress); Alcorn v. Anbro Eng’g, Inc., 468 P.2d 216 (Cal. 1970) (holding that supervisor’s racial epithets sufficient to state cause of action for intentional infliction of emotional distress); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (holding employer liable for employee’s assault and battery where employee refused to serve black plaintiff and “snatched” buffet plate from plaintiff’s hands); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) (holding that plaintiff’s allegations that employer permitted racial slurs and comments attacking his Mexican-American heritage was sufficient to support cause of action for tort of outrage).

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
provided unlimited liability for racial harassment before *Patterson v. McLean Credit Union*, and does once again with enactment of the Civil Rights Act of 1991, only retroactive application of the 1991 law would prevent a two year gap in section 1981's coverage of racial harassment in the workplace.

State racial discrimination laws also provide for jury trials and unlimited compensatory damages for wrongful discharge and other acts of discrimination. As the Oklahoma Supreme Court recognized in a recent opinion, allowing supplemental state law remedies for Title VII racial discrimination violations may further both federal non-discrimination policies and be consistent with, and merely supplemental to, Title VII remedies.

152. Before *McLean Credit Union*, the Supreme Court held that § 1981 created an implied cause of action for damages applicable to racially-motivated discharges. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that "[i]f [plaintiff] on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case..."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII prohibits racial discrimination against white employees). See generally *Comment, Developments In the Law: Section 1981*, Harv. C.R.-C.L. L. Rev. 20, 29-35 (1980) [hereinafter *Section 1981*] (providing comprehensive review of § 1981's legislative history).

153. *491 U.S. 164 (1989).* In *McLean Credit Union*, Justice Kennedy, in a 5-4 decision, held that § 1981 prohibits racial discrimination only in the making and enforcement of contracts, not racial harassment occurring after the formation of an employment contract. *Id.* at 176-78 (emphasis added). This holding was contrary to the prior understandings of most courts. *See id.* at 189, 210 (Brennan, J., concurring in part and dissenting in part).


156. In one recent California case, for example, a black professor won a $1.4 million verdict for a racially-affected tenure denial. See *Clark v. Claremont Univ.*, 8 Cal. Rptr. 151 (Cal. Ct. App. 1992).

2. Broader Discrimination Prohibitions

State law sometimes covers a broader range of discrimination than federal law. Private-sector disabilities discrimination, for example, except for federal contractors and grant recipients, remained outside federal law until the Americans with Disabilities Act of 1990 (the "ADA") took effect in July 1992. Many state laws, however, not only prohibited private-sector disabilities discrimination before ADA's passage, but also provided damages remedies. Indeed, state law provided models for federal legislation as well as practical experience about how a national prohibition on disabilities discrimination might affect private-sector employers. It also is likely that business opposition to federal legislation was dulled because state laws already covered many businesses.

Sexual orientation discrimination provides another example. Sexual orientation generally is not protected under the United States Constitution. Nor is Title VII generally thought to apply. Statutory regulation of this form of employment discrimination exists in some states,
and there are many local government ordinances.\textsuperscript{166} While the effectiveness and pervasiveness of state regulation against sexual orientation discrimination in the workplace may be questioned,\textsuperscript{167} the probability of the people, or their representatives, acting to prohibit such discrimination at the state and local level\textsuperscript{168} often may exceed the probability of enacting such legislation at the federal level. State law also provides a potential tort remedy to gay or lesbian persons where privacy or political activity statutes are violated.\textsuperscript{169} Moreover, local governments, acting under state law authority, increasingly are providing medical insurance benefits to domestic partners of employees.\textsuperscript{170} Finally, many states prohibit marital status discrimination; federal law does not.\textsuperscript{171}

3. Burden of Proof Rules

Twice in the past four years, the Supreme Court has announced new burden of proof rules that were widely regarded as significantly changing the law and making it more difficult for plaintiffs to win lawsuits.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{166} See Sexual Orientation and the Law, supra note 162, at 1667-70 & nn. 51-56.
\item \textsuperscript{167} Judge Canby was not impressed with state and local regulation of sexual orientation discrimination. He stated in dissent: “One state broadly bars employment discrimination against homosexuals, two other states more narrowly bar discrimination against homosexuals, and a few cities bar some types of discrimination. That showing is clearly insufficient to deprive homosexuals of the status of a suspect classification.” High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377-78 (9th Cir. 1990) (citations omitted) (Canby, J., dissenting from denial of petition for rehearing en banc).
\item \textsuperscript{168} Gay and lesbian individuals comprise approximately ten percent of the United States population—about 25 million people—and employment discrimination constitutes the largest category of discrimination. See Gay, Lesbian Employees Seeking Recognition in the Workplace, 10 Employee Rel. Wkly. (BNA) 731, 731 (July 6, 1992). A “major employment issue[s] for gays and lesbians . . . [is] the passage of non-discrimination policies in employment in all 50 states.” Id. at 732. Many companies, among them Xerox, US West, Lotus Development Corporation, Levi Strauss & Co., and Woodward & Lothrop, prohibit discrimination based on sexual orientation. Id. at 731-32.
\item \textsuperscript{170} See, e.g., San Mateo County Extends Benefits To Domestic Partners, Adult Dependents, 10 Employee Rel. Wkly. (BNA) 613 (June 1, 1992).
\item \textsuperscript{171} By 1990, 22 states prohibited discrimination based on marital status. See Mack A. Player et al., Employment Discrimination Law 325 (1988). There are two basic models. Some states, such as New York, New Jersey, and Michigan, only prohibit discrimination based on whether the employee is married, single, or divorced. Other states prohibit an employer from making an employment decision based on the identity or activities of one’s spouse. See Illinois Law Prohibits Discrimination on Basis of Marital Status, 10 Employee Rel. Wkly. (BNA) 1356 (Dec. 14, 1992) (discussing laws in Illinois, Hawaii, Montana, Minnesota, and Washington in the latter group).
\item \textsuperscript{172} See St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993) (holding that, in intentional discrimination cases, plaintiff bears burden of persuading trier of fact that
While Congress promptly overturned the Court's new rule in unintentional discrimination, or "disparate impact" cases,\(^{173}\) the Supreme Court's latest decision in intentional discrimination cases again has unsettled the burden of proof rules for intentional or "disparate treatment" cases.\(^{174}\) Again, electing a state law remedy may avoid such uncertainty.

**C. State Regulation Accommodating Persons Working Inside and Outside the Home**

If our economy in the next decades is to tap fully the human resources potential of our citizens, women must continue to make progress against the glass ceiling\(^ {175}\) in the manager's office and the stereotyping that infects blue collar occupations like the construction trades.\(^ {176}\) But if women are taking their places with men in the world of work outside of home, then recognition of their traditional child-bearing and nurturing responsibilities must follow. Although men, too, can step forward to bear more of these responsibilities, women seem likely to play a special role. The important debate between "sameness" and "difference" feminists aside,\(^ {177}\) what rules of the workplace do these realities counsel? State law again has led the way.

When the Supreme Court declared in 1976 that discrimination against pregnant women did not constitute sex discrimination,\(^ {178}\) many state courts and legislatures refused to follow.\(^ {179}\) Instead, they applied state gender discrimination laws to discrimination based on pregnancy.\(^ {180}\)

discriminatory animus motivated employer's action, even though plaintiff has demonstrated that employer's defense that legitimate, non-discriminatory reasons led to act is false and pretextual); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (replacing “business necessity” defense in disparate impact discrimination cases with “substantial business justification” defense and shifting burden of proof from defendant to plaintiff), overruled by Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75.

173. The Civil Rights Act of 1991, § 105, 105 Stat. at 1074-75, overrules Wards Cove and reinstates ‘business necessity’ defense as an affirmative defense on which the employer bears the burden of proof. For discussions of the act’s complex legislative history, see § 105(b), 105 Stat. at 1075 and Rothstein, supra note 88.

174. A few weeks after the decision in St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742 (1993), efforts already were underway in Congress to overturn the decision. See Legislation to Overturn, Debate Follow Hicks Decision, Fair Empl. Prac. Rep. (BNA) (July 19, 1993).


177. See, e.g., Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989) (offering an alternative vision of gender). Resolving “the deep split among American feminists between ‘sameness’ and ‘difference’” adherents is “the major challenge for modern feminism.” Id. at 798 & n.2.


Although the federal Pregnancy Discrimination Act amended Title VII to permit pregnancy discrimination claims in 1978, state law protected against restrictive judicial and administrative interpretations of federal coverage.

But efforts to accommodate the new realities in the workplace soon went far beyond the now almost quaint-sounding equal treatment principle of the federal Pregnancy Discrimination Act. Even though the Pregnancy Discrimination Act requires that women receive pregnancy leave equal to that allowed for other disabilities, states responded with new parental and family leave laws granting women—and men—unpaid leave to care for children, parents, or sick family members. On the federal level, legislative efforts to enact family leave legislation twice resulted in presidential vetoes before President Clinton signed the Family and Medical Leave Act into law this year.


182. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (holding PDA prohibits unequal treatment of male employees spouses regarding pregnancy-related medical insurance benefits as compared to female employees). The PDA also prohibits discrimination against women who choose to terminate their pregnancies, but an employer's medical plan may exclude coverage of abortions. See 29 C.F.R. § 1604.10(b) (1993); 29 C.F.R. app. § 1604 questions 34-36 (1993) ("Questions and Answers On The Pregnancy Discrimination Act").


185. California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 291 (1987). Guerra rejected a preemption challenge to a California statute requiring four-month, unpaid pregnancy disability leave. See id. at 292. The majority opinion, written by Justice Marshall, interpreted the PDA to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." Id. at 285 (citations omitted). Thus, a state could mandate more than equal treatment of pregnancy compared to other disabilities as long as the mother remained "disabled." See id. at 290.


Privacy stands poised as the workplace issue of the 1990s. Consider the wide range of privacy issues presented: drug and polygraph testing, electronic monitoring, improper disclosure of HIV test results, humiliating public questioning of employees, and employers' regulation of employees' lives outside work.\textsuperscript{188} Again, the sister sovereigns have led the way in addressing these emerging areas of concern.

1. Technological Testing

Drug testing of public employees is partially regulated under the Fourteenth and Fourth Amendments to the United States Constitution.\textsuperscript{189} For union members, drug testing constitutes a mandatory subject of collective bargaining.\textsuperscript{190} Non-union, private-sector employees, however, are not protected under the Constitution from invasive private employer drug testing. Consequently, some states statutorily regulate employee drug testing,\textsuperscript{191} while others provide state constitutional protections\textsuperscript{192} or would "strangle" flexibility for both employees and employers. \textit{Id.} Oregon state officials report, however, that the state's family leave law has encountered little resistance from employers. \textit{See id.} at 1676 (reporting study of Oregon family leave bill that found that 91% of Oregon employers indicated that the state law had caused little problem).


\textsuperscript{190} \textit{See} Johnson-Bateman Co., 295 N.L.R.B. 180, 188 (1989) (ruling that employer has duty to bargain with unions over drug testing of employees); Minneapolis Star Tribune, 295 N.L.R.B. 543 (1989) (ruling that applicants are not considered employees for bargaining purposes and that employer has no duty to bargain over drug testing of applicants).

\textsuperscript{191} \textit{See, e.g.,} Conn. Gen. Stat. Ann. § 31-51x (West Supp. 1993) (prohibiting random drug testing of employees, except for and employees in safety-sensitive positions or those who voluntarily enter an employee assistance program); Md. Code Ann., Health-Gen. § 17-214.1 (1992) (providing drug test employees, but requiring employers to provide employees who test positively a written copies of their test results, the employer's drug abuse policy, and the employer's intent to discipline the employee); Vt. Stat. Ann. tit. 21, §§ 513 (1992) (prohibiting random drug testing except where employer has probable cause to believe that employee is using drugs and employer provides a rehabilitation program). By 1989, nine states—Connecticut, Iowa, Maine, Minnesota, Montana,
recognize common law claims. In some cases, even for public employees, state law protections exceed those mandated by the federal Constitution.

Technological testing issues arise in other areas as well. For example, although the federal Polygraph Protection Act of 1988 now restricts employee polygraph testing, the states were first in imposing restrictions on such examinations. Further, genetic testing regulations also follow the pattern of mixed federal-state decision-making.

Nebraska, Rhode Island, and Vermont—had enacted laws regulating drug testing. See Rothstein, supra note 88, at 192-93. In contrast, Utah encourages drug testing, provided managers also submit to such testing. See Utah Code Ann. § 34-38-3 (1988).


195. 29 U.S.C. § 2001 (1988). "As many as two million polygraphs were performed each year in the private-sector prior to passage of the Employee Polygraph Protection Act. Roughly 85 percent of these polygraphs are now prohibited." Rothstein, supra note 88, at 143.


In the 1970s, states began to restrict genetic testing in connection with specific conditions, such as sickle cell anemia. See Rothstein, supra note 88, at 207. As the Human Genome Project and other genetic research projects continue to reveal the secrets of genetic coding, however, demands for protection against intrusive employer screening have increased. See Philip J. Hilts, Panel Reports Genetic Screening Has Cost Some Their Health Plans, N.Y. Times, Nov. 5, 1993, at A20 (reporting on findings of National Academy of Science survey that some American workers have lost jobs or health insurance on the basis of information obtained through genetic testing and on recommendations that federal regulation necessary). Some states, like Oregon and Wisconsin, have enacted broad restrictions against genetic screening. See Or. Rev. Stat. Ann. § 659.227 (Supp. 1992); 1991 Wis. Laws 117; see also Wisconsin Prohibits Genetic, Polygraph Testing, 7 Individual Employee Rts. (BNA) 2, 3 (June 2, 1992) (reporting amendments to Wiscon-
2. Monitoring

Technology also presents other challenges to the privacy of employees. As Professor Westin has observed, "supervisory monitoring goes back as far as the pyramids . . . what you have today is a new capacity to use that supervisory monitoring made possible by computers." 198 Technological monitoring of employees occurs in at least five contexts: (1) computer monitoring of key stroke and video display terminal operators, 199 (2) telephone call accounting, 200 (3) telephone call monitoring, 201 (4) review of employee electronic mail ("E-mail"), 202 and (5) trip monitoring of truck drivers. 203 While Congress is considering legislation in these areas, 204 the states already have been active. 205

3. Other Examples of State Law Privacy Regulation

State tort law also regulates other aspects of privacy, including the right to pursue private relationships outside of work 206 and the right to

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200. Telephone call accounting records the length, time, and destination of employee telephone calls without the employee's knowledge. See Rosenblum, supra note 188, at 87.

201. Telephone call monitoring enables the employer or supervisor to listen to and record the substance of conversations. See id.


205. West Virginia was the first state to enact protective legislation. California, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, and Rhode Island also have introduced legislation. See Katzef, supra note 204, at 1.

be free from public questioning and intrusive searches.\textsuperscript{207}

E. Wrongful Discharge

In his seminal article almost twenty years ago,\textsuperscript{208} Clyde Summers recognized that most private-sector employees enjoy neither the job security protection of civil service employees nor the just cause protections common in union contracts. As Professor Summers' article foreshadowed, the erosion of the common law employment-at-will doctrine by public policy wrongful discharge and other tort doctrines represents one of the great upheavals of legal doctrine in our time.\textsuperscript{209} Though volumes have been written about this phenomenon,\textsuperscript{210} the point here is that, once again, state employment law holds center stage. Recently, however, some commentators have called for the enactment of federal legislation to govern this area.\textsuperscript{211}

F. Miscellaneous Areas of State Regulation

In addition to workplace safety, discrimination, family, privacy, and termination, many other aspects of the employment relationship are state-regulated.

In the child labor area, state law remedies for oppressive child labor\textsuperscript{212} co-exist with federal regulation of child labor under the Fair Labor Standards Act.\textsuperscript{213} Violations of the Fair Labor Standards Act's restrictions on the working hours and activities of school age children are endemic, however.\textsuperscript{214} State law remedies may allow parents to bring actions


\textsuperscript{209.} See supra notes 10 & 208 and articles cited therein.

\textsuperscript{210.} See generally Peck, supra note 59.


\textsuperscript{213.} 29 U.S.C. §§ 201-19 (1988 & Supp. IV 1993). FLSA § 18, 29 U.S.C. § 218 states that "no provision of this chapter relating to the employment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter."

\textsuperscript{214.} See Child Labor Violations, 140 Lab. Rel. Rep. (BNA) 220 (June 15, 1992) (re-
against their child’s employer215 or authorize state administrative officials to enforce state and federal law directly.216

Negligent hiring, training, and supervision suits constitute another area of state common law regulation.217 Churches that employ child sex abusers as ministers,218 or cities that hire sex abusers as playground maintenance employees,219 or bars that hire employees with histories of assaulting people220 may face tort liability for negligent hiring, training, or supervision. Federal law does not reach such cases.

In some areas of employment, such as high-technology jobs, non-competition agreements and restrictions on an employee’s use of employer trade secrets generally are enforceable subject to state law limits.221 Again, much regulation in this important area of employment law largely arises from the sister sovereign states,222 rather than from the federal government.223

porting that 41% of all employers investigated for child labor violations in 1990 were found violating the law and that two years into recently heightened federal child-labor enforcement program a 28% violation rate exists. See also Labor Department Wage and Hour Enforcement Lacking, 140 Lab. Rel. Rep. (BNA) 215 (June 15, 1992) (describing Labor Department inspector general’s list of ten “trouble spots” in FLSA enforcement).


221. See, e.g., Perry v. Moran, 748 P.2d 224 (Wash. 1989) (holding accountant’s covenant not to provide services to clients of former employer valid and enforceable), cert. denied, 492 U.S. 911 (1990); Reed, Roberts Associs., Inc. v. Strauman, 353 N.E.2d 590 (N.Y. 1976) (holding that restrictive covenant not enforceable where employee’s knowledge did not qualify for protection as trade secret and his skills were not unique); Kadis v. Britt, 29 S.E.2d 543 (N.C. 1944) (holding covenant void for public policy reasons where it prevents a delivery man from working in only occupation in which he is trained).

222. See, e.g., Si Handling Sys., Inc. v. Heisley, 753 F.2d 1244 (3d Cir. 1985) (federal court applied state law to find that trade secret protection for some aspects of design system); Leo Silfen, Inc. v. Cream, 278 N.E.2d 636 (N.Y. 1972) (holding that former employee was not liable for any wrongful conduct for soliciting former employer’s customers whose names could be readily found from a source other than the former employer’s customer list).

223. See, e.g., Baxter Int’l, Inc. v. Morris, 976 F.2d 1189, 1197 (8th Cir. 1992) (limit-
In sum, the question is not whether this pervasive state regulation of the employment relationship is wise or desirable. Rather, it is that state legislatures and judges often, indeed most often, decide the appropriate mix between the free market and government intervention. Thus, far from being a marginal or interstitial aspect of our system of workplace governance, state law a often plays a vital and "leading edge" role.

III. AN ILLUSTRATION: AIDS COVERAGE IN WORKPLACE MEDICAL PLANS

Despite the centrality of state law in our regulatory system of workplace governance, national debates over employment law issues sometimes ignore the complex relationships between federal and state law. The much debated issue of the coverage of AIDS in workplace medical plans provides an example.224

In McGann v. H & H Music Co.,225 an employee with AIDS informed his employer that he had contracted the disease. At that time, the employer's medical plan provided up to $1 million in coverage for most medical conditions, including AIDS. After learning of the employee's condition, however, the employer implemented a $5,000 cap on the plan's coverage for AIDS, effectively denying the employee further coverage. In turn, the employee filed an ERISA claim in federal court alleging interference with his right under ERISA to receive the benefits of his employer's ERISA covered medical plan.226 The district court granted

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224. See, e.g., Milt Freudenheim, Patients Cite Bias in AIDS Coverage by Health Plans, N.Y. Times, June 1, 1993, at A1; Health Insurance Caps Primary Concern of Employees With AIDS, Attorney Says, 10 Employee Rel. Wkly. (BNA) 1123 (Oct. 19, 1992). Such coverage is important to homosexuals, intravenous drug users, hemophiliacs, and the partners of other persons at risk being infected with HIV. The Centers for Disease Control estimates that two out of three large companies have at least one HIV-positive employee, as do one in ten small companies. See Business and Labor Groups Join CDC in Laundering AIDS Program, 141 Lab. Rel. Rep. (BNA) 419, 429 (1992). It is estimated that approximately a million people in the United States, or one out of 250, are HIV-positive. See id. The average expenditure for a person who develops AIDS is approximately $100,000—and rising. See Health Insurance Caps Primary Concern of Employees With AIDS, Attorney Says, supra, at 1123.

The legal issues implicate a range of interests. Many argue that the precedent established in the case of AIDS may affect the availability of medical coverage for other conditions, such as breast cancer, premature births, birth defects, genetic disorders, cystic fibrosis, and leukemia. See Congress Urged to Amend Pension Law to Prevent Health Coverage Reductions, 10 Employee Rel. Wkly. (BNA) 1337 (Dec. 7, 1992). This concern prompted such groups as the American Association of Retired Persons to file an amicus curiae brief supporting the petition for certiorari in McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992).

225. 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992).

the employer's motion for summary judgment. On appeal, the Fifth Circuit also ruled against the employee, finding that the employer's motivation in selectively cutting medical coverage of AIDS was to reduce costs, not to interfere with this particular employee's rights under the employer's medical plan. The Supreme Court's denial of review received much attention in the press.

To be sure, the federal law issue—whether ERISA's retaliation/interference provisions allow an employer to shape a medical plan to avoid or minimize exposure for illnesses already contracted by employees—presents an important issue. But suppose the Supreme Court had granted certiorari and reversed the Fifth Circuit in H & H Music. Suppose that the Court instead had ruled that a change in a benefit affecting an employee, or an employee's covered dependents, who already had suffered the previously-covered condition constituted interference with, or retaliation for, the exercise of ERISA rights. Such a ruling, or even congressional amendment of ERISA's non-interference provision, doubtless would benefit those employees and families already suffering from diseases like AIDS.

But what about presently healthy persons who face AIDS or other catastrophic diseases in the future? Even if the Supreme Court had reversed H & H Music, nothing in ERISA would have prevented employers from selectively limiting coverage or benefits for catastrophic illnesses prospectively—that is, as to employees and dependents not already in-

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231. One would think that a medical insurance plan—whether provided through an insurance carrier or via a self-insured employer plan—should cover all risks that eventuate while the risk is covered by the plan. In other words, when a carrier or employer agrees to provide certain coverage, the medical plan should not be able to avoid liability retroactively. Analogously, if I suffer personal injury in an auto accident, my first party insurance should cover all costs of the injury even though some of them may not be incurred until after the policy has lapsed or been amended. It is the time of claim, not the time costs are actually incurred, which should measure whether the risk was within the bargained-for coverage.

Although the H & H Music court assumed that only actions for the purpose of interfering with ERISA rights fell within ERISA's retaliation/interference clause, the statutory language—"discrimination for exercising any [ERISA] right"—arguably would appear to cover any adverse action based on an employee's assertion of a claim.

232. Legislation has been introduced in the Congress to amend ERISA to prevent retroactive reduction of benefits. See H.R. 6147, 102d Cong., 1st Sess. (1992).
In general, ERISA simply does not regulate the level of pension or medical benefits provided. Cost-driven reductions in the scope of an employer-provided health plan, even those targeted at particular medical conditions, thus generally are allowed under the federal regulatory scheme embodied in ERISA.

The sister sovereigns, however, have long regulated insurance benefits, including those in employer-provided medical plans. In fact, “state laws regulating the substantive terms of insurance contracts were commonplace well before the mid-1970s, when Congress considered ERISA.” States increasingly adopted “mandated benefit” laws in the 1980s. Typically, such laws mandate certain types of coverage, such as prenatal care, well-baby care, drug and alcohol treatment, mental health services, optometric and chiropractic services, and reconstructive surgery for mastectomy patients.

Not only do the states extensively regulate the coverages in workplace and other medical plans, but such state insurance regulation receives express deference under federal law. ERISA, in fact, contains an express non-preemption, or saving, clause exempting state insurance regulation

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233. Catastrophic illness remains a major threat to the health and economic security of many workers and their families. One study has suggested that one in four American families will face a catastrophic illness and that most have inadequate medical insurance for such illnesses. See Waks, supra note 230.


235. “With regard to an employer’s right to change medical plans, Congress evidenced its recognition of the need for flexibility . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation.” Moore v. Metropolitan Life Ins., 856 F.2d 488, 492 (2d Cir. 1988).

Since 1992, however, the ADA may prevent selective reductions in medical plan coverages of particular conditions like AIDS. An employer must not only act without any purpose to discriminate, but also must prove affirmatively that the particular reduction is justified “by legitimate actuarial data, or by actual or reasonably anticipated experience, and that conditions with comparable actuarial data and/or experience are treated the same way.” EEOC Issues Guidance on ADA Application to Health Insurance, 20 Pens. & Ben. Rep. 1275 (June 14, 1993) (emphasis added). Under this regulation, an employer would violate the ADA if it reduced coverage for AIDS, but not heart disease, if both conditions had similar cost data.

236. Metropolitan Life, 471 U.S. at 742.

237. See id. at 728 n.3 & at 729-30 nn.9-10.

238. See id. at 729-30; Rothstein, supra note 88, at 445-57.

from ERISA preemption. Pursuant to this provision, problems like the one illustrated by *H & H Music*—coverage of AIDS in employer-provided medical plans—may be addressed through state legislation. Indeed, several states have enacted legislation effectively mandating coverage of AIDS or otherwise prohibiting discrimination against persons with AIDS. Under the scheme of the federal ERISA provisions noted above, state regulation constitutes an integral part of the overall American system of employment law. So whatever the merits of a particular "mandated benefit" as a matter of policy, in the American system of workplace regulation, the forum for debating and resolving the public policy issue traditionally has been the states.

But, alas, for persons looking to the political process in the states to regulate employer-provided medical plans, there is a catch. Although ERISA preserved the traditional state law role with respect to insurance regulation, self-insured employers escape such state regulation by virtue of the so-called "deemer clause." As construed by the Supreme Court, the deemer clause "exempt(s) self-funded ERISA plans from state laws that regulat[e] ‘insurance’ within the meaning of the saving clause." In other words, state-level regulations may address a social issue like AIDS coverage if the employer provides health care through a traditional plan provided by a carrier like Blue Cross, but not if the employer maintains a self-insured plan.

The example of AIDS coverage in employer-sponsored medical plans carries important lessons. First, under the system of American

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240. See ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (ERISA preemption clause does not apply to "any law of any State which regulates insurance").

241. See Rothstein, supra note 88, at 203. Professor Rothstein and his colleagues also report that "every state law now provides that AIDS and AIDS-related conditions are disabilities." See id. at 336 n.1.

242. Of course, someone has to pay for legislatively mandated benefits.


244. FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990). The disparity between ERISA's treatment of medical plans provided through insurance companies and self-insured plans is an anomaly created by Congress; the court has "no choice but to begin with the language employed by Congress. . . ." Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 740 (1985).

245. The distinction between self-insured and insured medical plans is not as clear as it may appear. Are employer-pays plans, with back-up stop-loss coverage from a carrier, self-insured or insured plans? The characterization may determine whether state mandated-benefit laws apply to the plan. See, e.g., United Food & Commercial Workers & Employees Ariz. Health & Welfare Trust v. Pacyga, 801 F.2d 1157 (9th Cir. 1986) (holding that stop-loss plan is a self-insured plan); see also General Motors Corp. v. California State Bd. of Equalization, 815 F.2d 1305 (9th Cir. 1987) (holding that plan with minimum premium feature is insured plan), cert. denied, 485 U.S. 941 (1988). Not all agree that an employer-paid plan with stop-loss protection is a self-insured plan, however. See, e.g., Eccles & Gordan, 1 ERISA Litigation Reporter 3-4 (1991). Further, traditional insurance companies continue to administer many self-funded plans.
employment law that evolved during the past half-century, the states historically have regulated the content of workplace medical plans. This is also true of many other aspects of the employment law system. Thus, looking at the overall system, the AIDS controversy primarily raised state policy issues. Second, ERISA preemption law limits this authority—in this instance, along the anomalous line between self-insured and insured medical plans. Third, elucidating these limits raises political, normative and institutional issues—issues of federalism. To those issues this Article now turns.

IV. THE THEORY OF PREEMPTION IN THE LARGER CONTEXT

The division of authority between the state and the federal governments in employment and labor law falls within the broader problem of dividing regulatory authority more generally—for example, in environmental, consumer, and business regulation. Particular preemption decisions in labor and employment law must make sense not only from the perspective of the overall, complex system of integrated state and federal regulation that has evolved to govern the workplace, but also from the perspective of this broader tradition of federalism as well.

For two centuries, striking the right balance between centralized and decentralized authority has presented a continuing problem for our governmental system. The Constitution reflects a compromise—both the states and the federal government possess sovereign powers. Indeed,

246. Self-insured plans are common in larger business enterprises and most Fortune 500 companies self-insure their medical plans. Small businesses traditionally used insurance carriers. But, because of the anomaly in ERISA preemption law, many smaller employers have an incentive to switch to self-insured plans (perhaps to stop-loss coverage) to escape state mandated benefit laws. See Health Insurance Caps Primary Concern of Employees with AIDS, Attorney Says, 10 Employee Rel. Wkly. (BNA) 1123 (Oct. 19, 1992) ("Most large employers are self-insured.") Professor Rothstein notes that "many advantages" result from self-insuring, not the least of which is avoiding state mandated coverages. See id. According to testimony at a congressional hearing in December, 1992, two-thirds of health plans are now self-insured. See Congress Urged to Amend Pension Law to Prevent Health Coverage Reductions, 10 Employee Rel. Wkly. (BNA) 1337 (Dec. 7, 1992).


248. As Justice Scalia once put it:

We have to bear in mind that [federalism] is a form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two.


Many distinct questions arise under the banner of federalism. One concerns the constitutional powers of the Congress. See, e.g. New York v. United States, 112 S. Ct. 2408
the historian Samuel Eliot Morrison went so far as to describe the concept of a "sovereign union of sovereign states" as "the most original contribution of the United States to the history and technique of human liberty."²⁴⁹ This Part examines the broader federalism/preemption debate from three perspectives: (1) the political, or pragmatic, (2) the normative, or policy-making, and (3) the interpretive, or institutional. It suggests that current preemption doctrine inadequately separates these three distinct aspects of the federalism debate.²⁵⁰

A. Federalism as a Political or Pragmatic Question

From the New Deal-era to the 1970s, liberals often trumpeted the virtues of uniform federal standards, while conservatives often invoked the values of local autonomy and control.²⁵¹ But, as then-Professor Scalia pointed out in 1982, federalism "is a stick that can be used to beat either dog."²⁵² For Scalia, conservatives "simply [had] been out-gunned at the federal level for half a century" and the "trick" was not to shun the federal government but "to use [regulation] wisely."²⁵³ Gradually, many interest groups and conservatives embraced federal regulation as a shelter from state regulatory initiatives.²⁵⁴ It often was argued that "in an increasingly global economy, the specter of diverse and stringent regulation will weaken United States competitiveness."²⁵⁵

²⁵¹. As Professor Foote observed in 1984 in her leading article on administrative preemption, "[t]he past two decades have witnessed shifting political allegiances on regulatory issues. In the 1970's consumers, workers, and environmentalists sought federal protection, while businesses sang the praises of state autonomy. Today, businesses seek federal laws and regulations that will preempt state laws." Susan Bartlett Foote, Administrative Preemption: An Experiment in Regulatory Federalism, 70 Va. L. Rev. 1429, 1466 (1984).
²⁵². Scalia, supra note 248, at 19.
In due course, the sword of federal regulation evolved into the shield of federal preemption. From federal regulation of cigarettes, pestsicides, water quality, seat belts, airfares, and nuclear safety, to name but a few, grew preemption defenses to ban or limit regulations at the local and state level. In the meantime, political progressives began to see state and local politics as bastions for innovative regulatory initiatives, and academics warned against the "capture" of Washington-based regulatory bureaucracies by the interest groups they regulated.

The political ambivalence of federalism also was reflected in workplace disputes. Proponents of the New Deal collective bargaining system, such as Archibald Cox, once favored broad preemption of state laws touching labor relations because they feared interference with federal labor policy. But the rise of a jurisprudence of individual workplace rights,

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262. See Hoke, supra note 254, at 687.

263. See, e.g., David Morris, You Can Fight City Hall, Ute Reader, Nov./Dec. 1991, at 89 (1991) ("[L]ocal politics, unlike national politics, can truly be empowering for every- day citizens.")

264. See, e.g., Foote, supra note 251, at 1431 ("[B]usinesses have begun to lobby for uniform federal regulations that would preempt more protective state laws."). See generally Hoke, supra note 254 (arguing that it is more difficult to capture fifty-state legislatures and bureaucracies than to master one in Washington).

265. See, e.g., Archibald Cox & Marshall J. Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 245 (1950) [hereinafter Cox & Seidman] ("We have argued for a large area of exclusive federal authority in order to permit the development of a unified
based to a great extent on state law, soon caused employers—and their legal counsel—to invoke the preemptive shield of federal employment enactments. Predictably, employee-plaintiff attorneys often became the guardians of state regulatory prerogatives in the workplace. As with much environmental and consumer regulation, preemption disputes often dominate employment law litigation. In practical terms, these disputes concerned not only what conduct was regulated, but also what remedies were available for violations of federal and state law.

Labor relations program, not only by the NLRB in administering the present statute but also by the Congress in improving the law. Cox received recognition in both scholarly and judicial circles as a leading labor law authority. See, e.g., Gottesman, supra note 7, at 389. ("[A] new school of scholars . . . championed a more activist judicial role enlarging federal power at the expense of the states. Prominent among these was Archibald Cox, who, in a series of brilliant articles that profoundly influenced the Court's labor preemption jurisprudence, advocated [a] presumption in favor of NLRA preemption. His argument was a clarion call for judicial knitting of federal labor policy that preempted without authorization from Congress, indeed in open defiance of what Cox assumed was the mind-set of the legislators who had enacted the statute."). The Supreme Court not only adopted many of Cox's ideas, but approvingly cited his scholarship in numerous decisions. See, e.g., Wisconsin Dep't of Indus., Labor, & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986); Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 753 n.30 (1985); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 n.6 (1985); Humphrey v. Moore, 375 U.S. 335, 344 n. 5 (1964). Cox's other preemption works include: Archibald Cox, Labor Decisions of the Supreme Court at the October Term, 1957, 44 Va. L. Rev. 1057 (1958) [hereinafter Cox, Labor Decisions]; Archibald Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972) [hereinafter Cox, Preemption Revisited]; Archibald Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio State L.J. 277 (1980) [hereinafter Cox, Developments]; Archibald Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1954) [hereinafter Cox, Federalism]; Archibald Cox, The Right to Engage in Concerted Activities, 26 Ind. L.J. 319 (1951) [hereinafter Cox, Concerted Activities]. See also Cox, Labor Law, supra note 39, at 956-1039.


267. The Supreme Court, for example, has addressed § 301 preemption questions five times since in 1985, while hundreds of federal appeals court and state appellate court decisions have considered this perplexing doctrine in the last ten years. Yet, § 301 preemption is merely one preemption doctrine in employment law; there are many others. For example, Justice Stevens has stated that lower federal courts are flooded with some 2,800 ERISA preemption cases. See District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580, 586 n.3 (1992) (Stevens, J., dissenting).

268. For example, in Allis-Chalmers, 471 U.S. at 220, the Supreme Court held that LMRA § 301 preempted a worker's state law claim alleging bad faith processing of medical insurance and disability claims.

269. In Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), the Supreme Court held that ERISA preempted an employee's state law wrongful discharge claim where he alleged his discharge was an attempt to prevent vesting of his pension benefits. According to the Court, ERISA § 514 (interference provision) made the defendant's alleged conduct actionable under ERISA, but only for equitable relief. See id. at 143.
Until the Civil Rights Act of 1991, jury trials, compensatory damages (including emotional distress), and punitive damages were more likely to be available to employees asserting state law rights than to those bringing suit under federal statutes. The switch of sides by management and employee lawyers on federalism issues is thus predictable.

B. Federalism as a Normative or Policy Question

As important as politics may be to an understanding of the forces driving the explosion of preemption claims during the 1980s and 1990s, the doctrine raises questions far more profound than a mere tactical shift between market and regulatory enthusiasts reflecting control, or the lack of control, over the federal government. A debate continues across ideological lines between proponents of regulatory centralism and uniformity and those who favor Brandeisian decentralization. Thus, as Professor Fried puts it, beyond the pragmatic aspect of federalism lies "a concern for the deeper, more intrinsic values"—the belief that "one's particular hobby horse [might] be ridden harder and more successfully by the federal government" does not justify "immediately switch[ing] from advocating federalism to advocating centralism."

Although Congress possesses broad authority under the modern Commerce Clause, Spending Clause, and Civil War Amendments to preempt state decision-making, what principled considerations, besides politics, might guide Congress in deciding whether to make federal regulation

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271. Even with the passage of the 1991 Civil Rights Act, state law causes of action often continue to offer additional remedies. Federal discrimination claims for damages are still capped, while many state discrimination statutes do not limit damages. For a discussion, see supra part II.B.1. Moreover, state common law causes of action, such as defamation, violation of privacy, and outrageous conduct, often permit the recovery of damages. For a discussion, see supra part II.B.1. No analogous body of federal common law exists. Finally, even for claims under the Civil Rights Act of 1991, the circuit courts differ about whether the statute, including its damages provisions, should be applied retroactively. See supra note 155 and accompanying text.


The economic and social sciences are largely uncharted seas.... [Humans are] weak and [their] judgment is at best fallible.... There must be power in the States.... to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.... It is one of the happy incidents of the federal system that 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.


exclusive? The next sections examine arguments against and for preemption.

1. Arguments Against Preemption

Arguments for state-level decision-making may be divided into four categories: (a) experimentation, (b) context or “shaping,” (c) power-diffusion, and (d) civic autonomy and participation.

a. Experimentation

Louis Brandeis’ classic argument for state-level decision-making still rings true. Although largely rejected by the New Dealers, and even today sometimes considered an “old chestnut,” the “laboratories for experiment” argument carries renewed force for two reasons. First, many now appreciate more clearly that wisdom in policy often eludes even the best and the brightest. Consequently, federal decision-makers, less confident that federal law strikes the optimal mix of free market and regulatory intervention, may be more reluctant to impose a federal orthodoxy on the states. Second, “disaggregation of governmental power... may [provide] an impetus toward innovation, toward experimentation.” Experiments conducted locally, if unsuccessful, will have effects that are largely local. If successful, they can be adopted by other states or the central political authority itself. Thus, though the

274. See supra note 272 and accompanying text.
275. See, e.g., Arnold, supra note 272, at 93. Arnold comments that:

We cite a column from one of the most learned economic pundits of the time, Walter Lippmann. He had an emotional bias against the exercise of national power to solve national problems. He converted that emotional leaning into certainty by pretending that the separate states were like physical or chemical laboratories, dealing with economic problems as a scientist deals with physical experiments. The notion that our checker squares of states were economic units or that they had the power to conduct experiments or that the experiments they conducted could be utilized by other states is of course pure daydreaming.

Id.
276. See Fried, supra note 273, at 2.
277. I borrow from David Halberstam’s classic work, The Best and The Brightest (1972).
Commenting on the New Dealers’ mind set, Cass Sunstein writes that “[a] critical feature of the learning of the New Deal period... is that the original constitutional structure of dual sovereignty was a large mistake, allied with anachronistic goals of limited government and inconsistent with the need for continuing national intervention into marketplaces.” Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1578 (1988).
278. Fried, supra note 273, at 2. Fried, however, adds a caveat:

that local governments not be allowed to enjoy monopoly power... The industry that is overburdened by environmental regulations, featherbedding labor practices or by an excessively generous social welfare program, must be able to pick up, without penalty, and move across the border. If that is not possible, then the virtue of innovation disappears and what remain[s] are fifty petty and stultifying tyrannies, rather than fifty laboratories of experimentation.

Id. at 2-3.
"laboratories" rationale may not be a controlling criterion, it remains an important consideration.

Consider workplace safety. Notwithstanding OSHA standard-setting, the states pioneered the use of the criminal law in cases involving serious wrongdoing. And even a spokesperson for the national AFL-CIO, long a proponent of uniform national workplace health and safety standards, recently conceded that concurrent state regulatory authority provides "some advantages" over exclusive federal regulation.

Or, take another example, health-care. The national government is currently debating a national health-care plan. Oregon already has developed an employer-mandate plan that also prioritizes medical services. Indeed, some aspects of the Clinton Administration's plan appear to have been modelled after health-care programs developed in Oregon and other states.

b. Context or "Shaping"

OSHA's legislative history reflects Congress' dissatisfaction with the effectiveness of state regulation of workplace safety. Twenty years later, federal regulation of workplace safety has received similar

284. See Rothstein, supra note 88, at 601.
criticism. In fact, in 1985, a congressional agency attributed a decrease in national injury rates during a three-year period to slow-downs in business activity, not OSHA safety regulations. For decades, OSHA struggled to promulgate revised regulations on toxic exposure. Many preliminary OSHA standards, however, were based on 1960s science and, not until 1989, were obsolete exposure levels revised for many standards. Some remain outdated. In large part, these problems occurred because OSHA required the United States Department of Labor to issue standards for millions of American workplaces. Aside from inadequate staffing and funding, comprehensive federal regulation,

285. See, e.g., Cass R. Sunstein, After the Rights Revolution 82 (1990) ("[M]uch of the work of the Occupational Safety and Health Administration has also been ineffective."); Stone, supra note 7, at 637-38 (commenting that OSHA standard-setting "project is so vast, and the interests affected so varied, that today, twenty years after the enactment of the legislation, standards have only been set for a small number of the tens of thousands of industrial chemicals in common use").


288. See Finkin, supra note 40, at 368 ("In the first fifteen years of the [OSHA] statute only two new health standards as contrasted to safety standards were promulgated, with procedures taking up to ten years from the time a standard was proposed until it was upheld by a court of appeals."); Grace E. Ziem & Barry I. Castleman, Threshold Limit Values: Historical Perspectives and Current Practice, 31 J. Occupational Med. 910, 914 (1989) (claiming that OSHA occupational exposure limits are poorly supported by scientific evidence and recommending greater use of industrial medicine in identifying health effects of exposures).

289. Of course, OSHA excludes certain classes of employers, such as the federal government and state and local governments. See OSHA § 3(5), 29 U.S.C. § 652(5).

290. OSHA employs between 1,000 and 1,500 federal inspectors who are responsible for inspecting five million workplaces. See Rothstein, supra note 88, at 628. Using the lower figure, an OSHA inspector is required to inspect 5,000 workplaces per year. See id. In his budget proposal, President Clinton requested $294 million for OSHA and the hiring of an additional 2,311 full-time employees. See House Appropriations Chops $1.8 Billion from President's Job Training Request, Daily Lab. Rep. (BNA) 121 (June 25, 1993). See also Weiler, supra note 10, at 157 ("OSHA has always suffered from the inability of a comparative handful of inspectors to monitor hundreds of thousands of workplaces in this country in order to ensure even a modest level of ongoing compliance with legally mandated standards.").
though industry-specific, may be less flexible than state standard-setting in shaping regulation to local conditions.\textsuperscript{291}

Let us take an additional example—minimum wage and overtime hours laws. The Fair Labor Standards Act\textsuperscript{292} (the “FLSA”) authorizes states to establish minimum wage and overtime standards that are higher than the federal mandate.\textsuperscript{293} The law’s flexibility reflects a concern that a single minimum wage or overtime standard may not be appropriate in all local economies in the country. Here, the balance of authority traditionally has been struck in favor of minimum national standards, leaving the states free to adapt the standard to meet local economic conditions.

In sum, state decision-making often “appears superior to uniform national standards.”\textsuperscript{294} As Professor Sunstein argues, “‘Reconstitutive law’—reforms that allow state and local flexibility by restructuring markets rather than imposing inflexible national commands—should be viewed hospitably.”\textsuperscript{295}

\textbf{c. Power-Diffusion}

The Federalist Papers reflect a belief that the people’s liberties and interests might receive “double protection” through power-sharing between the branches of the federal government and a division of power between the states and the federal government.\textsuperscript{296} This power-diffusion

\begin{itemize}
\item \textsuperscript{291} Accordingly, under OSHA’s reverse preemption provision see OSHA § 18(b), 29 U.S.C. § 667(b), about half the states have promulgated state level regulations that have been approved by the United States Department of Labor. \textit{See supra} note 133 and accompanying text.
\item \textsuperscript{294} Sunstein, \textit{supra} note 277, at 1578.
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} James Madison, for example, argued that a federalist structure combined with the separation of powers between the executive, legislative, and judicial branches, created: a double security . . . to the rights of the people. The different governments will control each other. . . . Whilst all authority in [the federal republic] will be derived from and dependent on the society, the society itself will be broken into so many parts . . . that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. The Federalist No. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961).
\end{itemize}
rationale often has been thought to spring from a conservative, anti-statist ideology—"more power in local government will likely mean less total government. . . . [L]ocal government makes the cost of government programs more relevant, and the greater the relevance of costs, the fewer the government programs." 297 More progressive voices, too, have embraced power-diffusion rationales— "One may posit that it is more difficult to capture fifty state legislatures and bureaucracies than to master one in Washington." 298 Moreover, twice during the past two Supreme Court terms, strong majorities of the Court expressly invoked power diffusion as an animating concern of our federal system. 299

d. Civic Autonomy and Participation

State-level regulation also offers greater civic autonomy and participation than federal-level regulation. While it may be true, as recently

Madison's power-diffusion rationale for federalism received explicit approval from six Supreme Court Justices in *New York v. United States*, 112 S. Ct. 2408, (1992) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoting Colman v. Thompson, 111 S. Ct. 2546, 2570 (1991)); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991) ("Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."). Not all proponents of the Constitution were so sanguine about the retention of state powers, however. Alexander Hamilton argued:

> If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government. . . . The people of America may be warmly attached to the government of the Union, at times when the particular rulers of particular States, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States, may be in a very opposite temper.


298. Hoke, *supra* note 254, at 693. *But see*, e.g., Crain, *Images of Power*, *supra* note 83, at 512-17. According to Professor Crain, feminist jurisprudential theory emphasizes "power to" rather than "power over." *See id.* at 511.

299. *See, e.g.*, *New York*, 112 S. Ct. at 2431 (holding that “take title” provision of Low Level Radioactive Waste Policy Amendments invalid under 10th Amendment). The Court stated that:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. . . . [T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Id.* at 2431 (quoting Colman v. Thompson, 111 S. Ct. 2546, 2570 (1991); *see also Ashcroft*, 111 S. Ct. at 2399 ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").
suggested by Professor Crain, that civic republicanism currently enjoys a somewhat "trendy" revival, this may reflect its appeal from both the instrumentalist and intrinsic good perspectives. "A central lesson of the republican revival is the need to provide outlets for self-determination in the public and private spheres." While some scholars question whether "a celebration of local autonomy" truly supports "individual liberty," Professor Graglia's pragmatic analysis seems compelling:

Localism means greater respect for individual preferences, not simply as a matter of theory, but as a matter of fact . . . indeed, even as a matter of arithmetic.

As an issue is decided by larger units . . . the likelihood increases that fewer people will obtain their preference and more will be disappointed.

More fundamentally, whether one's preferences are implemented or not, participation increases individuals' acceptance of policy as well as their sense of connection to the political process.

2. Arguments for Preemption

Arguments for federal preemption of state law fall into three categories: (a) uniformity and efficiency, (b) uniformity and fairness, and (c) avoidance of parochialism.

a. Uniformity and Efficiency

Of course, not all values point to a preference for state, rather than federal, law-making. Efficiency counts as well, and uniformity may contribute to efficiency in various contexts. In employment law, ERISA's preemption of state regulation of pension and fringe benefit plans

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303. See Fried, *supra* note 273, at 2. Fried states that:

It seems to me that, with respect to individual liberty, the choice between centralism and localism is at best a standoff. It is not at all clear that localism necessarily fosters the liberty of the moderns—the kind of liberty which is important to me—because small towns and small units can be as tyrannical as larger political institutions.


305. See generally Hoke, *supra* note 254, at 689-90 nn.18-19 (discussing participation).

reflects the uniformity/efficiency rationale. As Congressman Dent, a
sponsor of the ERISA legislation, explained:

[T]he "crowning achievement" of [ERISA] was the "reservation to
Federal authority [of] the sole power to regulate the field of employee
benefit plans. With the preemption of the field, we round out the pro-
tection afforded participants by eliminating the threat of conflicting
and inconsistent State and local regulation."\textsuperscript{307}

Because the federal government long ago assumed responsibility for re-
tired individuals' social security, and the private pension system is often
integrated with, or complementary to, the national social security sys-
tem, arguments for uniform national standards carry much weight. Fur-
ther, many pension plans cover workforces across state lines and their
investment programs largely occur on national securities exchanges.
But, as the reductions in coverage in workplace medical insurance plans
for AIDS patients illustrates,\textsuperscript{308} the reach of ERISA's preemption provi-
sion sometimes exceeds the policy rationale for uniform standards.\textsuperscript{309}

b. Uniformity and Fairness

The uniformity rationale has a fairness component as well. Notions of
fairness between employers and employees in state "X" and employers
and employees in state "Y" may suggest that federal law-making should
be exclusive.

Consider one example in employment law—the 1978 Pregnancy Dis-
crimination Act.\textsuperscript{310} After the Supreme Court declared in 1976 that dis-
crimination on the basis of pregnancy did not involve gender
discrimination,\textsuperscript{311} many states, as Title VII expressly allows,\textsuperscript{312} amended

(Stevens, J., dissenting) (quoting 120 Cong. Rec. 29,197 (1974)) (arguing ERISA does not
preempt District of Columbia law mandating that employers provide workers' compensa-
tion beneficiaries with continuation of medical insurance benefits for twelve months).

The ERISA preemption provision provides: "Except as provided in subsection (b) of
this section, the provisions of this subchapter . . . shall supersede any and all State laws
insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C.
§ 1144(a). The Supreme Court has construed the term "relate" to mean "connection" or
"reference." See, e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (stat-
ing that a state law " 'relates to' an employee [pension or] benefit plan, . . . if it has a
connection with or reference to such a plan.") (quoting Shaw v. Delta Air Lines, Inc., 463
U.S. 85, 96-97 (1983)).

\textsuperscript{308} See supra part III.

\textsuperscript{309} In the past eleven years, the Supreme Court has decided eleven ERISA preemp-
tion cases. See Greater Wash. Bd. of Trade, 113 S. Ct. at 580; Ingersoll-Rand Co., 498
U.S. at 133; FMC Corp. v. Holliday, 498 U.S. 52 (1990); Massachusetts v. Morash, 490
U.S. 107 (1989); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988);
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Pilot Life Ins. Co. v. Dedeaux, 481
U.S. 41 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Metropolitan
Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw, 463 U.S. at 85; Alessi v.


\textsuperscript{311} General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); cf. Nashville Gas Co. v. Satty,
434 U.S. 136 (1977) (holding that a policy of denying accumulated seniority to employees
or construed their state sex discrimination laws to cover pregnancy. Later, Congress adopted a uniform federal standard recognizing pregnancy as related to gender and requiring that pregnancy be treated the same as any other disability. Uniformity also may avoid the "race to the bottom" as states scramble to create an attractive business climate. Or, conversely, uniform federal standards may avoid the "race to the top" as states, in a time of chronic labor shortages, such as is predicted for the next century, compete for high-skilled employees.

c. *Avoidance of Parochial Interests*

Avoiding local parochialism constitutes a third argument for exclusive federal regulation. In the employment law context, proposals to protect sexual orientation under status discrimination laws may be feasible politically in large cities and in some states, but not in smaller towns and other states. Federal regulation avoids such problems.

C. *The Institutional or Interpretive Aspects of Federalism*

As discussed above, the decision for or against exclusive federal law-making, or the preemption of state law, raises problematic policy and normative issues. Who should decide these questions? The answer is, of course, Congress.

A major problem with discussions of preemption doctrine arises from

upon return from pregnancy/maternity leave violates Title VII if policy not applied to other types of disability leaves).
317. In *Law and the Shaping of the American Labor Movement*, Professor William Forbath points out that the Framers "created a constitutional scheme that treated the sphere of common law rights of contract and property as a suprapolitical realm of private right. . . [so that] . . . class relations were presumptively matters of law and not politics, matters for courts, not legislatures." Forbath, *supra* note 40, at 27. But, for labor unions, "[t]he federal structure of government meant that American labor reformers had to contend with multiple and competing tiers of policy-making authority. This structural exigency raised the costs and reduced the efficacy of labor reforms. So doing, it strengthened the case for voluntarism." *Id.* at 28.
the failure to distinguish the normative/policy aspects from the institutional/interpretive aspects of the problem. The Constitution eschews neutrality on questions of federalism. Rather, it affirmatively establishes a system of dual sovereigns. Even with the expansion of congressional powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments, the sister sovereigns retain broad authority in most areas of economic, environmental, consumer, and workplace life. Unless, and until, Congress exercises its authority, not only to regulate, but to regulate exclusively, the states retain their constitutionally conferred powers. Two major considerations support this view.

First, affirmative congressional action to displace state power provides a political safeguard for federalism: "[I]n areas where the states may legislate, the Constitution intends that Congress weigh and consider carefully any displacement of state authority." Members of Congress themselves are representatives of their states, and their districts within their states, in a way that appointed judges and Executive branch officials

318. See, e.g., New York v. United States, 112 S. Ct. 2408, 2414 (1992) (concluding that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel states to do so"); Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991) (stating that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government").

319. U.S. Const. art. I, § 8, cl.3.
321. U.S. Const. amends. XIII, XIV, & XV; see also Wolfson, supra note 247, at 93-94.
323. See generally Tribe, supra note 2, at 378-97, 479-511 (discussing state sovereignty as a limit on congressional power and federal preemption of state law).
324. Wolfson, supra note 247, at 102. Wolfson argues that courts should require Congress to state expressly its intent to preempt state regulation in a "clear statement." Id. at 111-14. Several recent Supreme Court opinions suggest acceptance of this "clear statement" approach by a majority of the court. See, e.g., Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991) ("Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the states. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the [Congress] has in fact faced [the federalism issues].") (citations omitted)).
are not.\textsuperscript{325}

Second, absent congressional action pursuant to its powers under the Supremacy Clause\textsuperscript{326} to divest the states of their constitutionally retained powers\textsuperscript{327} the constitutional predicate for divesting the dual sovereign's authority simply is not present.\textsuperscript{328} Unless the exercise of state authority implicates a provision of the Constitution other than the Supremacy Clause,\textsuperscript{329} only Congress may displace state law. When, absent congressional intent,\textsuperscript{330} the judiciary or the Executive Branch\textsuperscript{331} cloaks a decision concerning the proper division of authority between the states and the federal government in the language of congressional intent, more than a mere error in statutory construction occurs. Rather, the

\textsuperscript{325} See, e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 64-65 (1989) (holding that a state is not a "person" within the meaning of § 1983 because Congress did not clearly and manifestly demonstrate its intent to include in definition); Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 550 (1985) (stating that federal authority is inherently limited by the delegated nature of Congress' Article I powers); United States v. Bass, 404 U.S. 336, 349 (1971) (noting that Congress is presumed not to intend to upset the federal-state balance of power).

\textsuperscript{326} "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

\textsuperscript{327} "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

\textsuperscript{328} For a general discussion of the interpretive perspective, see Martin H. Redish, \textit{Federal Common Law, Political Legitimacy and the Interpretive Process: An 'Institutionalist' Perspective}, 893 N.W. U. L. Rev. 761 (1989). It should be noted, however, that Professor Redish's powerful arguments focus on interpretive issues in a jurisdictional context arising from federal statutes.

\textsuperscript{329} See text accompanying \textit{supra} note 322 and cases cited therein.

\textsuperscript{330} As Archibald Cox and Marshall Seidman commented in 1950:

Ideally . . . Congress should draw the lines between (1) matters which are to be subjects of exclusive national regulation; [and] (2) matters which are to be regulated by the Federal Government but are also open to state regulation and (3) matters which are to be left to state regulation. Yet it is the practice for Congress to avoid the decision, thus leaving the problems to the Supreme Court. And the Court, paradoxically, then draws the necessary lines by asking—in form, if not in actuality—where Congress drew them.

Cox & Seidman, \textit{supra} note 265, at 212. Similarly, Chief Justice Rehnquist observed in a 1986 labor preemption case:

The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.


\textsuperscript{331} Administrative preemption also presents delegation problems. "Although the Supreme Court has almost always upheld the constitutionality of broad delegations to executive agencies, the Court has occasionally construed such delegations narrowly to avoid the problem of overdelegation. Overdelegation is of particular concern in the context of the agency's responsibility for preempting state law." Foote, \textit{supra} note 251, at 1440.
constitutional allocation of power between the federal government and the states is disturbed. Although correctable by Congress, the error thus is of a constitutional dimension.\textsuperscript{332}

V. PREEMPTION IN PRACTICE: RECENT DEVELOPMENTS IN SUPREME COURT PREEMPTION DOCTRINE

Part V examines preemption doctrine generally as it has emerged from recent Supreme Court decisions.

A. The "Clear Statement" Doctrine

The Supreme Court recently has declared that if Congress seeks to alter the existing "constitutional balance between the states and the Federal Government," it must make its intention "unmistakenly clear."\textsuperscript{333} At times, the Court has appeared to require a "clear statement."\textsuperscript{334}

This clear statement approach applies to legislation "affecting the federal balance."\textsuperscript{335} Consequently, "Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the states."\textsuperscript{336} In this manner, according to Judge Easterbrook, the Court is "groping for a way to merge federalism instincts with the plain meaning doctrine of statutory interpretation."\textsuperscript{337} Regrettably, much

\textsuperscript{332} But see Freeman, supra note 247, at 638 (arguing that "the framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the line to be drawn" and that "the Supreme Court abdicates its duty as arbiter of the federal system when it makes the test of preemption the intent of Congress.").

\textsuperscript{333} See, e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (holding police officer's state court action against state agency for denial of promotion due to brother's "student activist" activities not maintainable because Congress did not indicate clearly that state agency or state "person" under § 1983); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 ("Congress may abrogate the States' constitutionally secured immunity from suit in Federal court only by making its intention unmistakenly clear in the language of the statute.").


\textsuperscript{335} Will, 491 U.S. at 65 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).


\textsuperscript{337} Constitutional Law Conference, 61 U.S.L.W. 2237, 2248 (Oct. 27, 1992). Judge Easterbrook reached this conclusion after reading Gade v. National Solid Wastes Manage-
traditional preemption doctrine has strayed from the law as now clarified.

B. The Traditional Framework for Analyzing Preemption Issues

Traditionally, the Court applied a three-part analysis to preemption questions. First, the Court asked whether Congress expressly had declared an intent to preempt (or not to preempt). Second, the Court examined whether, absent express intent, Congress nonetheless had occupied the field. And, third, absent express or field preemption, the Court inquired whether state law conflicted with federal law and thus was preempted.

These categories of express, field, and conflicts preemption, however, confuse rather than aid analysis. Field preemption, for example, can be either express or implied. And, express preemption simply is a subcategory of conflicts preemption. Even though Congress expressly states a preemptive intent, it will not always, or even often, eliminate arguments about the scope of the intended preemption. Even where Congress expressly intends not to preempt, as in Title VII, implied


339. See English, 496 U.S. at 78.
340. See id. at 79.
341. See id.
342. The Supreme Court acknowledged as much in English, 496 U.S. at 79-80 n.5. Interestingly, several recent preemption cases do not refer to the traditional three part analysis. See, e.g., FMC Corp. v. Holliday, 498 U.S. 52 (1990); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).
344. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). See generally, Tribe, supra note 2, at 498 ("[M]ultiplicity of federal statutes or regulations ... will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter."). The cases Professor Tribe has cited, however, better illustrate conflicts, rather than field, preemption.
345. See English 496 U.S. at 79-80 n.5 (stating that "field pre-emption may be understood as a species of conflict pre-emption").
conflict preemption issues arise.  

C. An Emerging Framework for Deciding When Congress Affirmatively Has Exercised Its Power to Preempt and When Joint State-Federal Authority Remains Undisturbed

A presumption against preemption emerges from the Court's preemption decisions between 1990 and 1992.  

This presumption applies in both express and implied preemption cases.


348. In Cipollone, seven Justices held that the 1965 Federal Cigarette Labeling and Advertising Act (the "1965 Act") did not preempt state common law products liability claims. See 112 S. Ct. at 2619. Even though the 1965 Act contained an express preemption provision stating that "[n]o statement relating to smoking and health other than [the Surgeon General's warning] shall be required on any cigarette package . . . . [o]r in the advertising of any cigarettes . . . .," id. at 2616. Justice Stevens' opinion, in which Chief Justice Rehnquist and Justices White and O'Connor joined, invoked the "presumption against the preemption of state police power regulations." Id. at 2618. Justice Scalia and Thomas decried the application of the presumption in an express preemption case as "an extraordinary and unprecedented principle of federal statutory construction." Id. at 2632 (Scalia, J., concurring in the judgment in part and dissenting in part). Conversely, Justice Blackmun, with whom Justices Kennedy and Souter joined, concurred in the plurality's opinion regarding the 1965 Act and applauded their application of a presumption against preemption in express preemption cases. See id. at 2626 ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find preemption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.") (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

It is unclear, however, whether the plurality applied the presumption in its holdings concerning the 1969 amendments to the cigarette labeling and advertising statute. In this portion of the opinion, the plurality held that the amended preemption provision, which stated that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act," id. at 2617, preempted some, but not all, common law products liability and fraud claims. See id. at 2620. Justice Blackmun believed that this portion of the plurality opinion was nothing more than "a compromise" that was "baffling" since the 1969 amendment "no more 'clearly' or 'manifestly' exhibits an intent to preempt state common-law damages actions than did the language of its predecessor in the 1965 Act." Id. at 2627. (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Scalia and Thomas agreed with the plurality's holding that the 1969 amendment preempted many common law claims, but argued that all common law claims should have been preempted under either version of the statute. See id. at 2632 (Scalia, J., concurring in the judgment in part and dissenting in part). But, Justice Scalia's opinion agreed with Justice Blackmun that the plurality inconsistently had applied the purported presumption against preemption. See id. at 2631 (Scalia, J., concurring in the judgment in part and dissenting in part); see also Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724,
Considerations of federalism dictate that congressional intent to pre-empt must be "clear and manifest" or "clear and unambiguous." Accordingly, the concept of field preemption should be discarded. As traditionally stated, field preemption arises when "the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" A reasonable inference about congressional intent is not the same as a "clear and manifest" or "clear and unambiguous" intent. Though an extensive federal scheme of regulation conceivably may compel an inference that Congress intended to regulate exclusively, formulating the test in terms of "a," or one, reasonable inference violates the presumption against preemption adopted by an emerging liberal-conservative consensus.

Similarly, the doctrine of conflicts preemption requires revision. Traditionally, conflicts preemption occurred in two separate situations: (1) "where compliance with both federal and state regulations is a physical impossibility," and (2) "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" The first prong of this conflicts doctrine raises few problems, but the second prong needs refinement.

Where simultaneous compliance with federal statutes and state law is

740 (1985) (holding that ERISA does not preempt state mandated-benefits legislation as applied to insured employer medical plans).

349. Despite the "clear statement" doctrine, congressional displacement of traditional state powers need not be express. See Gregory v. Ashcroft, 111 S. Ct. 2395, 2404 (1991) ("We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly . . . . Rather, it must be plain to anyone reading the Act that it covers judges.") (emphasis in original). According to the Court, to discern congressional intent, courts must "examine the explicit statutory language and the structure and purpose of the statute." Gade, 112 S. Ct. at 2382 (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990)). The presumption against preemption in implied, as opposed to express, preemption cases follows a long history. See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-152 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236-237 (1947).


351. Id. at 2625 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).


353. The application of the presumption continues to cause disagreements. See supra text accompanying note 348 (discussing Cipollone); see also Morales v. TWA, Inc., 112 S. Ct. 2031 (1992). Increasingly, such disagreements cut across the Supreme Court's perceived "liberal-conservative" cleavage. Thus, in Morales, "liberal" Justices Blackmun and Stevens joined "conservative" Chief Justice Rehnquist in dissenting from the majority's holding that the Airline Deregulation Act preempted state regulation of deceptive airline fare advertising practices. See id. at 2054-59 (Stevens, J., dissenting).


impossible, conflicts preemption presents few problems conceptually. Even where Congress remains silent on the question of preemption, the inference is compelling that Congress intended to displace state authority in light of Congress' presumed awareness of the Supremacy Clause. Otherwise, the federal law would apply unevenly in the several states, an intent that should not be attributed to Congress unless expressly stated.356

To illustrate, consider one example from labor relations—the perennial right-to-work controversy.357 Suppose, as is common, the employer agrees to a union demand for a union security clause. These clauses typically require employees in the bargaining unit represented by the union to become members of the union or to pay union dues and initiation fees.358 Under the original 1935 Wagner Act, involuntary union membership or financial payments were lawful and fully enforceable.359 State law, however, frequently made involuntary union membership or financial payments illegal.360 The employer, not to mention the dissident and union employee, thus faced a dilemma—compliance with both state and federal law was impossible. In those circumstances, federal law prevailed under the Supremacy Clause.361 Accordingly, the impossibility of simultaneous compliance with both federal and state requirements presents the strongest case for implied preemption.

The second prong of traditional conflicts preemption doctrine, however, is more problematic. When does state law "stand as an obstacle to

356. Congress sometimes does authorize the uneven application of federal requirements. Consider two examples—compulsory dues payments to unions, see infra notes 359-63 and accompanying text, and OSHA's reverse preemption provision. See Gade, 112 S. Ct. at 2383. In the case of reverse preemption, however, the United States Secretary of Labor must approve the state plan. See OSHA § 18(c), 29 U.S.C. § 667(c).


358. The membership obligation, however, may not extend beyond payment of regular union dues and initiation fees. See General Motors, 373 U.S. at 743. In the public sector, this financial core obligation is termed an agency or service fee.


360. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 34 (1947) (providing legislative history of 1947 Taft Hartley Act) (“At least twelve states... have laws forbidding compulsory unionism.”)

361. This conflict evaporated in 1947 with enactment of Section 14-B of the Taft-Hartley Act of 1947. This so-called “right to work” amendment illustrates an early reverse preemption provision. It states that “[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State... in which such execution or application is prohibited by State... law.” 29 U.S.C. § 164(b) (1988).
the accomplishment and execution of the full purposes and objectives of Congress?"\textsuperscript{362} Initially, the Court's presumption against preemption suggests that, if compliance with both federal and state law is not impossible and if Congress fails to indicate expressly\textsuperscript{363} an intent to preempt, then such an intent is neither "clear and manifest" nor "clear and unambiguous." In fact, many current anomalies in employment law preemption arise from this branch of the conflicts doctrine. Too often, the courts use the rubric of fidelity to the "full purposes and objectives" of Congress to justify judicial activism in the preemption field.\textsuperscript{364} Such judicial policy-making violates both the presumption against preemption and the constitutional scheme of federalism that gives rise to that presumption.

Yet, to argue for abrogation of this prong of traditional conflicts preemption would be too simple a solution. Again, an example from the New Deal collective bargaining statutes illustrates the point. Suppose state law forbids unions from picketing on an employer's property, while federal law protects such picketing.\textsuperscript{365} With two exceptions, the Labor Management Relations Act (the "LMRA") does not speak about preemption.\textsuperscript{366} Strictly speaking, the prong of conflicts preemption concerning impossibility of compliance with both federal and state law does not apply. Unions are not compelled to picket on an employer's property under federal law, and employers are not compelled to stop such picketing under state law. But, as the Supreme Court declared long ago, the federal policy conferring a right to picket necessarily conflicts with any state policy to deny that right.\textsuperscript{367} Thus, a state may not prohibit or

\textsuperscript{362} See supra note 355 and accompanying text.

\textsuperscript{363} Congress conceivably could state such an intent in the statute itself or its legislative history. See Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2629-31 (1992) (Blackmun, J., concurring).

\textsuperscript{364} See text accompanying supra note 330 (discussing views of Archibald Cox and Chief Justice Rehnquist concerning Supreme Court policy-making in the name of congressional intent).

\textsuperscript{365} See, e.g., Sears, Roebuck, & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (holding that National Labor Relations Act does not deprive a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing). Although Justice Thomas' majority opinion in Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), severely restricted non-employee rights of access for picketing and hand-billing purposes under federal law, some rights of access remain. Presumably, employee organizers, in contrast to non-employee union organizers, continue to have access rights. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (holding that employer's prohibition against employee distribution of union literature on their own time constituted an unfair labor practice).

\textsuperscript{366} One exception is the state option to adopt a "right to work" statute under Taft-Hartley Act § 14-B, 29 U.S.C. § 164(b). The other is the "no person's land" provision in Section 14-C-(2) of the National Labor Relations Act, 29 U.S.C. § 164(c)(2), which states that: "[n]othing in this subchapter shall be deemed to prevent or bar . . . any State . . . from assuming and asserting jurisdiction over labor disputes over which the [National Labor Relations] Board declines . . . to assert jurisdiction." Id.

\textsuperscript{367} See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act . . . due regard for the
restrict that which is federally protected. Conversely, a state may not require that which is federally prohibited. The conflict arises not from the impossibility of simultaneous compliance with federal and state law, but because congressional conferral of a right is inconsistent with state-imposed limitations on that right unless Congress indicates otherwise. Similarly, a federal prohibition of conduct is inconsistent with a state law requiring or permitting the prohibited conduct. Thus, a congressional intent to preempt state law may be "clear and manifest" or "clear and unambiguous" — notwithstanding congressional silence.

VI. Applying the General Framework—Preemption in Employment Law

This Article now applies the framework developed in Parts IV and V to preemption under federal labor and employment law statutes. Though preemption questions arise under dozens of federal statutes, a clear federal enactment requires that state jurisdiction must yield.”). For a critique of Garmon, see infra part VII.

368. The converse also is true: what is federally prohibited, such as secondary boycotts under NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4), cannot be made lawful by state law.

369. One could reason that, if Congress did not intend some preemptive effect in the collective bargaining statutes, it would not have provided for the express non-preemption of state "right-to-work" laws and the "no person's land" provision for state authority when the NLRB declines jurisdiction. See supra note 366 and accompanying text. In this sense, there is an express, or "clear and manifest," indication of congressional intent to preempt state law.

Some leading scholars seem to characterize preemption under the New Deal-era collective bargaining statutes as a species of field preemption. See, e.g., Getman & Pogrebin, supra note 39, at 333 ("The question is how much of the field did Congress intend to preempt."); Silverstein, supra note 7, at 2 ("Federal regulation ousts state jurisdiction if Congress intends to occupy the field as it did in regulating labor-management relations through the NLRA."). But since even these authorities concede that the question is really "how much of the previous patchwork of state laws" were "to co-exist" with the federal labor relations statutes, the concept of field preemption is not particularly helpful. Thus, Professor Getman's and Professor Pogrebin's formulation of the issue is just another way of asking "when does state law conflict with federal law?" Many cases and other authorities view preemption under the New Deal collective bargaining statutes as a species of conflicts rather than field preemption. See, e.g., Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212-13 (1985) (refusing to extend the preemptive effect of the Labor Relations Management Act "so as to pre-empt state rules that prescribe conduct ... independent of a labor contract."); Garner v. Teamsters, Local No. 776, 346 U.S. 485, 488 (1953) ("The national Labor Management Relations Act ... leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.").

370. Preemption claims in employment law arise under a plethora of federal statutes. The volume of preemption litigation is staggering. Justice Stevens, for example, recently complained that some 2,800 ERISA preemption matters had already flowed from the federal and state courts. See District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 586 n.3 (1992) (Stevens, J., dissenting). In some large firms, my employment law colleagues tell me, some attorneys now work full time on ERISA preemption cases. The Supreme Court alone has found it necessary to decide, on average, one ERISA preemption case a year, for more than a decade. In the burgeoning field of § 301 preemption under the New Deal-era collective bargaining statutes, the Supreme Court
pattern emerges in two respects: (1) in most employment statutes Congress addresses the preemption question expressly, and (2) federal regulation is rarely exclusive. Moreover, though preemption doctrine remains a quagmire in many respects, the Supreme Court's employment law preemption jurisprudence generally fits within the simplified interpretational framework that recently has emerged from the Court in the broader preemption context.

Incongruities, however, do emerge. First, under some statutes (such as ERISA), judicial preemption decisions generally follow the interpretational principles urged in this Article, but the reach of these decisions exceeds the policy rationale for preemption. Second, a few preemption doctrines conflict with these interpretational principles. These doctrines include preemption under the Federal Arbitration Act ("FAA") and preemption under the New Deal collective bargaining statutes. Moreover, while policy arguments can be made on either side of the preemption debate, this Article urges that, looking at the complex legal system for governing the workplace as a whole, joint regulation by the sister sovereigns often offers advantages over exclusive reliance on federal regulation. This conclusion is reinforced by the globalization of labor

decided five cases in five years, starting in 1985. The result has been to thoroughly confuse and confound both the practicing bar and the lower courts. A Westlaw search reveals hundreds of lower federal and state appellate court § 301 preemption cases in the past decade, and thousands of other disputes turn on § 301 issues. See infra parts VII.C.3, VII.D.2.

Though most preemption cases arise under such federal employment and labor law statutes, almost any federal statute carries potential for a preemption claim. Thus preemption claims have arisen under the Energy Reorganization Act and its predecessors. See English v. General Elec. Co., 496 U.S. 72, 90 (1990) (no preemption); the Financial Institutions Reform, Recovery and Enforcement Act, see FDIC v. Canfield, 967 F.2d 443 (10th Cir.), cert. dismissed, 113 S. Ct. 516 (1992); the Federal Surface Transportation Act, see Parten v. Consolidated Freightways Corp., 923 F.2d 580 (8th Cir. 1991); Todd v. Frank's Tong Serv., Inc., 784 P.2d 47, 50 (Okla. 1989) (no preemption); the Civil Service Reform Act, see Saul v. United States, 928 F.2d 829, 840-43 (9th Cir. 1991) (preemption); the Mine Safety Act, see Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (preemption); the National Bank Act, see Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 526 (9th Cir. 1989) (preemption); Aalgaard v. Merchants Nat'l Bank, 274 Cal. Rptr. 81 (Cal. Ct. App. 1990), cert. denied, 112 S. Ct. 278 (1991); the Federal Reserve Act, see Leon v. Federal Reserve Bank, 823 F.2d 928, 931 (6th Cir.) (preemption), cert. denied, 484 U.S. 945 (1987); Bollow v. Federal Reserve Bank, 650 F.2d 1093 (9th Cir. 1981) (preemption), cert. denied, 455 U.S. 948 (1982); the Home Loan Bank Act, see Inglis v. Feinerman, 701 F.2d 97 (9th Cir. 1983) (preemption), cert. denied, 464 U.S. 1040 (1984); and the Railway Labor Act, see Melanson v. United Air Lines, Inc., 931 F.2d 558, 561-62 (9th Cir.) (preemption), cert. denied, 112 S. Ct. 189 (1991); Air Line Pilots Ass'n Int'l v. UAL Corp., Int'l Ass'n of Machinists, 874 F.2d 439 (7th Cir. 1989) (no preemption).

371. See infra notes 506-13 and accompanying text.

372. See infra part VI.B.


374. See infra part VII.

375. See infra parts VI.B.1-3, VI.D, VII.D.
markets, and the emergence of the post-industrial economy. 376

A. The Baseline Model: Explicit Non-Preemption Unless State Law Directly Conflicts With Federal Rights or Prohibitions

Congress has broad constitutional authority to preempt state authority over all aspects of the employment relationship. But Congress has never done so, despite the now pervasive scheme of federal regulation. 377 "Federal [employment] law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal [enactment]." 378 Federal employment law preemption, instead, consists of a patchwork of specific areas of preemption. This evolving patchwork of preemption doctrine must be viewed, not as a series of ad hoc answers derived in isolation from the terms of each particular statute, but rather as part of a larger system by which the division of authority over workplace issues between the states and the federal government continues to be elucidated. Shared authority between the federal government and the sister sovereign states emerges as the general rule under the New Deal-era labor standards legislation, under the 1960s and 1970s status discrimination statutes, and under more recent enactments on issues such as plant closure, privacy, and family leave.

This shared authority originated in the 1938 New Deal labor standards legislation. 379 The federal minimum wage, overtime, and child labor legislation expressly allows state standards that exceed federal standards. 380

376. See infra notes 408-410 and accompanying text.

377. See, e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (rejecting contention that ERISA and LMRA both preempted generally applicable state minimum labor standards and mandated benefit statutes). In Metropolitan Life, the Court stated:

The States traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’ ‘States possess broad authority . . . to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.’ State laws requiring that employers contribute to unemployment and workmen’s [sic] compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny.

Id. at 756 (citations omitted); see also Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (holding that the NLRA does not preempt Maine’s severance pay statute).

378. Metropolitan Life, 471 U.S. at 756 (explaining the Court’s hesitance to infer preemption because the establishment of labor standards falls within the traditional police power of the state).


380. Section 18(a) of the FLSA provides:

(a) No provision of this chapter or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment
In fact, the states have traditionally regulated a broad range of labor standards issues.\textsuperscript{381} By express language in the FLSA and longtime practice under that Act, the states retain broad authority over minimum wages, overtime standards, wage claim procedures, rest and lunch breaks, and a broad range of traditional "labor standards" issues.

The FLSA supplants state authority only when state law purports to require or permit an act made unlawful by the FLSA—for example, a state law purporting to establish a legal minimum wage lower than the federal mandate. The converse, however, is not necessarily true—a state law that forbids that which the FLSA permits, for example, late payment of wages upon termination or employment of school age children during the school year, is not preempted by the FLSA.\textsuperscript{382} Only if a state purports to make unlawful an act \textit{required} by federal law, or to make lawful an act prohibited by federal law, does an unavoidable inference of conflicts preemption arise.\textsuperscript{383}

Similarly, under the FLSA's narrow version of strict conflicts preemption, the state may impose greater penalties or create more powerful remedies for conduct made unlawful by the federal FLSA. Though at least one writer disputes this point,\textsuperscript{384} it is certainly a reasonable inference that, if Congress meant to allow the states to substantively regulate both labor standards covered by the FLSA and labor standards that are not, then Congress must have also intended to allow the states to create remedy schemes different from those of the FLSA. Certainly Congress has not "clearly and manifestly" required preemption of supplemental state remedies in the labor standards area.

Starting with Title VII of the 1964 Civil Rights Act,\textsuperscript{385} this pattern of confining the preemptive effect of federal employment legislation to a narrow version of conflicts preemption continued. Under Title VII, preemption occurs only when state law purports to "require or permit" an act made "unlawful" by Title VII.\textsuperscript{386} Therefore, Title VII erects no bar

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\textsuperscript{381} This state regulation includes both issues regulated by the FLSA, for example, state law establishing higher minimum wage and child labor standards, and issues untouched by the FLSA regulatory scheme, such as state laws mandating lunch and rest breaks, or time and manner of wage payments, including penalties for late payment or improper deductions. \textit{See} Rothstein, \textit{supra} note 88, at 395-402.

\textsuperscript{382} Recently, the Ninth Circuit held that California's failure to make timely wage payments to state employees violated the FLSA. \textit{See} Biggs v. Wilson, 1 F.3d 1537, 1539-40 (9th Cir. 1993).

\textsuperscript{383} For example, suppose state law purported to forbid the payment of overtime pay. The FLSA would, clearly and manifestly, preempt this law because simultaneous compliance would be impossible.

\textsuperscript{384} \textit{See} Moberly, \textit{supra} note 293.


\textsuperscript{386} Section 708 of Title VII provides:

\begin{quote}
Nothing in this subchapter shall be deemed to exempt or relieve any person
to state regulation in areas untouched by federal law—for example, Title VII leaves state and local governments free to adopt prohibitions on sexual orientation discrimination. Nor does Title VII bar more stringent state regulation of conduct regulated by Title VII. The states, for example, may impose vicarious liability on employers for supervisory sexual harassment in situations where federal law would not impose liability. The states retain authority to provide greater remedies for regulated conduct than Title VII provides. For example, a state may allow tort remedies for sexual harassment or other forms of discrimination. Only when state and federal law actually conflict, for example when a state law mandates maternity leave beyond the period of disability protected under the Pregnancy Discrimination Act, does Title VII preempt state law.

Moreover, Title VII represents a version of conflicts preemption considerably more narrow than the traditional conflicts preemption doctrine. Under the second prong of the traditional formulation, a court may declare a state law preempted if it “stands as an obstacle to the full purposes and objectives of Congress.” Under Title VII, application of state law is preempted only if it results in a violation of federal law.

Because Congress chose to confine narrowly Title VII, its strict conflict preemption creates far fewer cases than does, for example, ERISA’s broad field preemption. Yet issues arise even under Title VII’s “strict conflict preemption model as illustrated by the two examples below.

First, some affirmative action/reverse discrimination cases involving public employers—those raising issues under Title VII rather than the Equal Protection clause of the Fourteenth Amendment—rest on preemption doctrine. Thus, if a state or local government’s affirmative action

from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.


387. See, e.g., Rothstein, supra note 88, at 342 n.4 (citing statutes in Massachusetts, Wisconsin, and the District of Columbia and referring to “about 50 cities [that] have enacted laws prohibiting discrimination in private employment on the basis of sexual orientation”).


391. See supra notes 356, 362-67 and accompanying text.

392. See supra note 355 and accompanying text.

393. In Johnson v. Transportation Agency, 480 U.S. 616 (1987), the Supreme Court considered whether Title VII preempted a local affirmative action plan. See id. at 626-40. The Court held that the plan was fully consistent with Title VII. See id. In a dissenting opinion, Justice Scalia argued that the purpose of Title VII was “inverted” by the decision. See id. at 677 (Scalia, J., dissenting). But see Wygant v. Jackson Bd. of Educ., 476
plan violates the non-discrimination principles of Title VII, the state law authorizing the affirmative action plan faces preemption. Second, the Pregnancy Discrimination Act not only guarantees that pregnancy-related conditions will receive equal treatment with other forms of "disability," but also effectively operates to limit state authority to grant preferential treatment for pregnancy. Both of these examples demonstrate that federal "rights" legislation can, even under the narrowest conflicts model of preemption, displace state authority—a result that supporters of the legislation sometimes may not intend.

One complication in Title VII preemption analysis, however, arises from the broader preemption provisions of Title XI of the 1964 Civil Rights Act. Title XI is a miscellaneous section of the 1964 enactment U.S. 267 (1986) (holding that affirmative action layoff provision in collective bargaining agreement violates Equal Protection Clause). For current standards under the constitutional analysis, see City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The current Title VII standard for allowable affirmative action is more permissive than the constitutional standard, a matter disputed by some of the Justices in the Johnson case.

395. See, e.g., California Fed'l Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). In Guerra, California mandated pregnancy leave in excess of what the savings and loan employer provided for other disabilities. The employer challenged the California statute on the grounds of "conflict" with the Pregnancy Discrimination Act's ("PDA") command that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1988) (emphasis added). Justice Marshall's plurality opinion upheld application of the California statute to allow "preferential" treatment of maternity leave—as opposed, say, to a disability caused by a heart attack. See Guerra, 479 U.S. at 290-92 & n.32. Justice Marshall, however, argued that "preferential" treatment is not required because an employee may extend the same leave benefit commanded by the California statute for pregnancy disability to employees suffering other forms of disability. See id. at 291. As Justice Stevens acknowledged in his concurrence, however, the Guerra holding "allows some preferential treatment of pregnancy." Id. at 294 (Stevens, J., concurring). Guerra effectively read the PDA "same as" language to mean "at least the same as," a reading of the case made explicit by the dissenters. See id. at 297-304 (White, J., Rehnquist, C.J., and Powell, J., dissenting). Though distasteful as a policy matter, the opposite conclusion may be more defensible. That is, the PDA's standard—treating pregnancy "the same as" other disabilities—meant just that. See id. at 297-304 (White, J., dissenting). Even Justice Marshall's opinion carefully limited the holding—such "preferential" treatment is allowable under the PDA only so long as the affected woman remains "disabled." See id. at 290; see also EEOC Policy Guidance on Parental Leave, 224 Daily Lab. Rep. (BNA) Fl (Nov. 20, 1990) (outlining "Safe Harbor" rules in this area). For example, a state law which mandated a year's leave for new female, but not male, parents would clearly violate Title VII, and thus be preempted.

Regardless of the merits of this argument, Guerra was, in another sense, less a preemption case than one interpreting allowable conduct under Title VII. Guerra's holding, that an employer does not violate the PDA by granting preferential treatment for pregnancy disability, applies not only to employers acting under the commands of state law, but also to an employer who adopts such preferential treatment as a matter of self interest and accommodation to the needs of today's workforce. See EEOC Policy Guidance on Parental Leave, 224 Daily Lab. Rep. (BNA) Fl, pt. (b) & (c) (Nov. 20, 1990).

396. Title XI, § 1104 of the Civil Rights Act of 1964 provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title oper-
generally applicable to all of the 1964 Act's titles, such as the public accommodation provisions, and not merely to the employment discrimination provisions of Title VII. Under Title XI’s preemption provision, Congress preempted state laws “inconsistent with any of the purposes . . . or any provision” of the 1964 Civil Rights Act. If this provision applies to Title VII, then the broader form of conflicts preemption traditionally stated by the courts—preemption based on state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of Congress—applies after all. That is, under the broader language of Title XI, state law might conflict with Title VII even though it did not require or permit an act violative of Title VII, and thus did not qualify for preemption under section 708 of Title VII. Although Guerra leaves this issue unsettled, the general non-preemption language of Title XI must yield to the narrower express non-preemption language of Title VII. First, to the extent these two provisions create an ambiguity as to congressional intent, the interpretation narrowing the range of preemption must be adopted. The strong, constitutionally-based presumption against preemption requires a “clear and manifest” indication of congressional intent to overcome the presumption and preempt state law. Second, even if preemption did not implicate the constitutional division of powers, normal principles of statutory construction require that Title XI, the more general provision, yield to

397. See id. (emphasis added).
399. See supra note 386 and accompanying text.
400. See California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987). Justice Marshall’s plurality opinion in Guerra, in rejecting the preemption challenge to a California pregnancy disability leave statute, invoked both preemption clauses. However, the dissenters who argued for preemption in the case, omitted any reference to Title XI’s broader preemption potential. See id. at 297-304 (White, J., Rehnquist, C.J., and Powell, J., dissenting). And Justice Stevens’ concurring opinion expressly reserved the question whether Title XI’s broader language applies in Title VII cases. See id. at 292-95 (Stevens, J., concurring). Moreover, Justice Scalia’s concurrence specifically stated: “The only provision of the Civil Rights Act of 1964 whose effect on pre-emption need be considered . . . is § 708 of Title VII . . . .” See id. at 295 (Scalia, J., concurring).
401. See supra part V. Justice Marshall’s opinion in Guerra, however, failed to invoke the presumption clearly. “[P]re-emption is not to be lightly presumed.” Guerra, 479 U.S. at 281. The opinion, however, later notes that Congress failed to evince “clearly and manifest[ly]” an intent to supersede state enactments granting preferential treatment for pregnancy-related disabilities. See id. at 288. Moreover, as Justice Stevens noted in his concurrence, the PDA’s explicit solicitude for pregnancy-related disability also supports the holding that the California statute was not preempted. See id. at 292 (Stevens, J., concurring).
Title VII, the more specific provision.\textsuperscript{402}

Other status preemption statutes also contain Title VII's narrow version of "strict conflicts" preemption. The 1967 Federal Age Discrimination in Employment Act contains an express non-preemption provision. However, under this provision, a claimant is required to elect remedies and "commencement of action" under the federal act divests the state of jurisdiction.\textsuperscript{403} Similarly, the Americans With Disabilities Act contains an express non-preemption provision.\textsuperscript{404}

The pattern of the New Deal labor standards and the status discrimination statutes manifests itself in other statutes enacted during the 1980's and 1990's. The 1988 Polygraph Protection Act provides that "this chapter shall not preempt any provision of any state or local law . . . more restrictive" than the federal statute.\textsuperscript{405} The 1988 plant closure and layoff enactment provides that its 60-day notice requirement and remedies "are in addition to, and not in lieu of, any other contractual or statutory right and remedies."\textsuperscript{406} The 1993 Family and Medical Leave Act also contains express non-preemption language.\textsuperscript{407}

Cumulatively, these enactments, stretching over a half-century, reflect a long tradition of state and local police power regulation of the employment relationship. As shown by the above examples, Congress repeatedly rejected the notion that federal employment standards were maximum rather than minimum standards. Thus, even without the aid of the strong constitutionally-based presumption against preemption, shared regulatory authority between the sister sovereign states and the federal government has been the "baseline" rule in the American law of the workplace. When "direct conflicts" preemption issues arise—as in the Guerra maternity leave case—the presumption against preemption may prove decisive.

Aside from the interpretational perspective, a perspective that confines the proper institutional role of courts in deciding issues of preemption, what normative and policy considerations support this pattern of shared federal-state authority? And how does the emergence of international


\textsuperscript{404} ADA § 501 provides: "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection [for the disabled than federal law]." 42 U.S.C. § 12201(b) (Supp. IV 1992).


labor markets—reflected in, for example, the North American Free Trade Agreement—affect the normative desirability of the traditional federalist scheme?

It could be argued that the emerging global trading and information-based economy requires uniform standards to promote efficiency and competitiveness. In order to remain competitive with foreign competitors, this argument goes, an American company should be required to comply with only one set of regulatory requirements, rather than fifty-one, in its relationships with its employees. Or, in the more precise terminology of Robert Reich, if companies (whether Toyota or GM) that operate and employ workers in the United States must comply with widely varying state law requirements, they will be at a disadvantage to competitors (whether Airbus or Nike) that produce outside the United States. On closer analysis, however, it is evident that just the opposite is true—the emergence of international labor markets provides an argument for maintaining the traditional American system of federal minimums with authority in the states to regulate further as local conditions and preferences warrant.

Continued decentralization of regulatory authority over the employment relationship allows flexibility, autonomy, and experimentation values to be maximized as the process of adjustment inherent in the emerging global economy continues. First, for the near future, nations like Mexico, Indonesia and Vietnam are not likely to adopt employment standards equal to those at either the federal or the state level in the United States. The market for labor in such settings is simply cheaper than labor markets in the United States—production workers in the developing countries willingly sell their labor for far less than the level of compensation American workers demand and expect. Further, American consumers, who are most often other American workers, want cheaper prices, or higher product quality, which the lower labor costs in these countries sometimes permit. The question of how far and how fast American wages must fall to meet the rising wage level in the developing world—and thus “level the playing field”—is avoided by politicians, and skirted by many academic and policy commentators who insist, somewhat unrealistically, that a high-wage, high-skill American labor force can overcome the fundamental imbalance which now exists in the international labor markets.

Given this imbalance, a structure that allows Americans to shape legal protections for the employment relationship at the state, rather than federal, level makes sense along two lines of analysis. If enactment of family-oriented legislation—for example, paid maternity leave for mothers, or a child-care subsidy, or protections for flexible or part-time work schedules—raises the cost of labor in State X beyond the level where companies will want to operate in State X, the citizens of State X can

408. See Reich, supra note 12, at 110-35.
repeal the offending legislation, or elect to suffer the consequences in decreased demand for employment of its citizens. The threat of job losses in, for example, the wood products industry in Oregon need not affect labor standards in the oil industry in Texas. Maine may elect "high" standards with little job loss, while Arkansas may be forced to accept lower standards because of a concern that chicken patties now produced in Arkansas will be produced in Mexico.

A second line of analysis supports the thesis that the emergence of global markets supports the traditional American system of shared state-federal authority. Some of the competition faced by firms operating in the United States and employing American workers arises not in the developing nations, but rather in highly industrialized areas like the European Community. Indeed, the legislated standards for labor in the European Community countries often exceed those in the United States. 409 Though the European Community structure envisions some adoption of uniform labor standards in the European Community countries, these "Social Europe" provisions remain highly controversial and their implementation is problematical. 410 Thus, competitors across the Atlantic operate under different national labor standards analogous to the different labor standards in the American states.

In summary, consideration of the now-emerging global economy counsels maintenance of the traditional American system of decentralized governmental authority over the employment relationship. But not every federal intervention in the labor markets fits this baseline model.

B. The ERISA Model of Optimum and Exclusive Federal Standards

As noted above, ERISA preemption claims perhaps constitute the most common type of employment law preemption. ERISA preemption cases involve such diverse state law claims as wrongful discharge, bad faith handling of medical insurance claims, exclusion of AIDS and other catastrophic illnesses from employer medical plans, denial of family leave, denial of state spousal community property rights in pension benefits, and denial of state-mandated workers' compensation benefits, among many other issues. The frequency and breadth of these ERISA

409. See generally Frank Bajak, Germans Must Work More, Play Less, Government Says, Oregonian, Sept. 4, 1993, at A-11 (Associated Press article listing legislated benefits in Germany as follows: (1) paid six to seven weeks vacation, (2) protections against firings, (3) "common" thirty-eight and one half hour work week, (4) financial benefits for having and raising children, (5) subsidized housing for employees, (6) common yearly bonus of one month's pay (60 percent mandatory), (7) pay for days lost to weather (for construction workers), and (8) a comprehensive health care system); Bok, supra note 43; Donald C. Dowling, Worker Rights In The Post-1992 European Communities: What "Social Europe" Means To United States-Based Multinational Employers, 11 Nw. J. Int'l L. & Bus. 564 (1991) (discussing how stringent EEC labor laws may prove to be a detriment to United States companies operating in Europe).

preemption claims reflect the high stakes. Plaintiffs' lawyers frequently invoke state law rights and remedies even when lesser federal law remedies may also be available, and defense counsel seek to defeat these state claims without reaching the merits.

Beneath these pragmatic concerns, however, federalism policy issues are presented. Sound, perhaps even compelling, arguments exist for uniform national standards regarding ERISA's primary concern—private pensions. The proliferation of multiple-employer and multiple-state pension plans undermines arguments for state-level flexibility and experimentation, and heightens those for uniform standards for reasons of both fairness and efficiency. Moreover, the retirement security of American workers has been a matter of paramount federal concern since the Social Security Act of 1935.411 As with the federal social security system, the private pension system, backed by the financial and funding guarantees of the federal Pension Benefit Guarantee Corporation, presents a unique case for exclusive federal standards.412 Additionally, ERISA's regulation of the private pension system follows the "detailed standards" rather than the "minimum national standards" model. When the federal government promulgates detailed regulations rather than minimum standard regulations, the case for exclusive federal regulation is stronger.

However, as shown below, Congress not only provided for broadly preemption federal regulation in the field of private pensions, but also chose to preempt state regulation of the broader category of employee benefit plans, which include medical insurance and disability plans. Moreover, Congress expressly carved out exceptions to preemption for such things as state insurance regulation, state domestic relations orders affecting pensions, and the state workers' compensation laws. Anomalous applications have arisen from each of these exceptions as shown below.

From an institutional perspective, the Supreme Court generally has been true to its proper role, following the "clearly and manifestly" expressed preemption policies of Congress rather than those of judges. For example, as the Supreme Court properly perceived, ERISA's preemption language "clearly and manifestly" overcomes the presumption against preemption. ERISA broadly preempts state regulation in the field of pension and other fringe benefit plans. ERISA generally preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."413 Although there are certain expressly

enumerated exceptions, the general preemption provision uses "'deliberately expansive' language . . . 'designed to "establish [employee benefit] plan regulation as exclusively a federal concern.'" Moreover, the legislative history establishes that Congress rejected attempts to limit the preemptive effect to "state laws relating to the specific subjects covered by ERISA." Thus, any state law that "relates to" an ERISA-covered plan, in a "plain meaning" sense, and that is not subject to an express exception, falls under the ERISA preemption axe. This is so even though the state law is "consistent with ERISA's substantive requirements." Further, ERISA broadly preempts state regulation of non-pension plans, such as medical plans, even though ERISA contains only minimal regulation, or no regulation, of these plans.

In traditional doctrinal terms, ERISA represents an express congressional choice for broad field preemption. Thus ERISA preempts: (1) when any state law actually conflicts with the requirements of the federal enactment; (2) when a state tries to impose greater sanctions or remedies for ERISA-covered conduct; (3) when the state law attempts to regulate ERISA-covered conduct more stringently in a substantive sense, for example by imposing tighter vesting and break-in service rules than those set forth by ERISA; and (4) even when state law attempts to regulate employee benefit plans in areas not regulated or covered by ERISA at all,


416. Id.
417. A state law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) (citations omitted). As Professor Gregory has noted "various theories of interpretations of the 'relate to' " phrase have been suggested. See Gregory, supra note 234, at 457 n.102. Shaw and the 1992 decision in District of Columbia v. Greater Washington Board of Trade, 113 S. Ct. 580 (1992), however, settled the issue in favor of the "plain meaning" approach. Indeed, the majority opinion in Greater Washington invalidated a workers' compensation benefit, otherwise exempt from ERISA preemption, because the benefit referred to the employers' ERISA-covered medical benefits as the measure of the state law workers' compensation "continuation" benefit. See id. at 583-84.
418. See Greater Washington, 113 S. Ct. at 583-84 (holding that ERISA preempts a District of Columbia law mandating continuation of medical insurance coverage for employees on workers' compensation benefits).
for example by state law regulation of medical insurance provided through self-insured employer plans.

While some commentators and judges argue that the courts should reinterpret ERISA to mitigate these anomalous results, fidelity to the principle that Congress alone is constitutionally authorized to displace state law requires, instead, reform by the Congress. For if courts should decline, for reasons of federalism, to find preemption in the absence of a "clear and manifest" congressional intent, the reverse must also be true; that is, courts must abide by the intent clearly manifested by Congress, even where the court's own view of the policy aspects of federalism differ from that expressed by Congress. Yet the Supreme Court's very fidelity to its proper institutional role in the ERISA preemption cases leads to anomalous results supported by neither the general policies of ERISA nor the policies of the exceptions to ERISA preemption articulated by Congress. To these anomalies this Article now turns.

1. The Distinction Between Self-Insured and Insured Employer-Provided Medical Plans

Although ERISA chiefly regulates pension plans, its definitional section and broad preemption provisions apply to all "employee benefit plans." "Employee benefit plans" include not only pension plans but also employer-provided medical plans. Thus, absent an applicable exception, ERISA's preemption provision includes state laws regulating employer-provided medical plans. And this is so even though ERISA provides little actual regulation of medical and other "welfare benefit" (as opposed to pension) plans.

These employer medical plans are the primary vehicle for medical insurance for most Americans. Further, the states traditionally regulate medical insurance plans—requiring coverage for such things as prenatal care and injuries, mental health coverage, breast implant removal and mastectomy reconstruction, and drug and alcohol treatment coverage.
MINDFUL of the historic role of the states in regulating insurance, Con-
gress, in enacting ERISA, specifically exempted state insurance regula-
tion from ERISA's otherwise all-encompassing preemption provision.428

And here the plot thickens. In adopting this "savings clause" for
traditional state insurance regulation, Congress also qualified it. Thus
ERISA section 514(b)(2) provides that "an employee benefit plan" [i.e.,
including medical insurance plans] "shall [not] be deemed to be an in-
surance company or other insurer . . . or to be engaged in the business of
insurance . . . for purposes of any law of any State purporting to regulate
insurance companies."429 This clause frequently is designated the
"deemer clause."430

Almost immediately, employers with self-funded medical plans—as
opposed to those with medical plans provided by insurance companies
like Blue Cross—asserted that they were no longer subject to state insur-
ance regulation of the terms of medical insurance provided to employees.
As it happens, most Fortune 500 companies provided medical insurance
through self-insured plans.431 Recently, smaller companies have rushed
to establish self-insured plans, thus escaping state regulation via ERISA's
preemption provisions, as the famous AIDS case, McGann v. H & H
Music Co.,432 illustrates.434

The Supreme Court has twice considered the ERISA insurance regula-
tion savings clause, and the deemer clause exception to that savings
clause.434 "Liberal," "moderate," and "conservative" Justices alike, with
one exception,435 have concluded that Congress preempted state regula-
tion when an employer provides a medical plan on a self-insured basis,
but not when an employer provides the medical plan through an

v. Massachusetts, 471 U.S. 724, 728-30 nn.6-10 (1985); Wayne Chem. Inc. v. Columbus
Agency Serv. Corp., 426 F. Supp. 316, 325 n.8 (N.D. Ill.), aff'd and modified, 567 F.2d
692 (7th Cir. 1977); Brummond, supra note 420, at 81-84, 101.

428. ERISA Section 514(b)(2)(A) saves from preemption "any law of any State which
text at notes 239-42.


431. See, e.g., AIDS: Health Insurance Caps Primary Concern of Employees With
AIDS, Attorneys Say, 10 Employee Rel. Wkly. (BNA) 1123, 1123 (Oct. 19, 1992)
("[m]ost large employers are self-insured").

432. 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992).

433. Professor Rothstein notes that "many advantages" result from self-insuring not
the least of which is avoiding state mandated coverages. See AIDS: Health Insurance
Caps Primary Concern of Employees With AIDS, Attorneys Say, 10 Employee Rel. Wkly.
(BNA) 1123, 1123 (Oct. 19, 1992). According to testimony at a Congressional hearing in
December 1992, two-thirds of health plans are now self-insured. See ERISA: Congress
Urged To Amend Pension Law To Prevent Health Coverage Reductions, 10 Employee Rel.


435. Justice Stevens dissented in FMC, see 498 U.S. at 65-72 (Stevens, J., dissenting),
but rather curiously joined the majority in Metropolitan Life, see 471 U.S. at 724. Justice
Souter took no part in the FMC case. See 498 U.S. at 65.
insurance carrier. 436

The distinction "clearly and manifestly" drawn by Congress (whether consciously or not) 437 between self-insured and insured medical plans makes no sense as a matter of policy. As Justice Stevens argues in his dissent in the FMC case, the distinction is "illogical," and actually undermines the interest in uniformity as to the applicable law within the states. 438 Both Justice Blackmun, writing for the Court in Metropolitan Life, and Justice O'Connor, writing for the Court in FMC, note that interpreting ERISA to preempt state regulation of self-insured, but no insured medical plans, the Court "merely give[s] life to a distinction created by Congress . . . and one it has chosen not to alter." 439 This view defers to the Court's interpretive, rather than policy making, role in deciding preemption issues that implicate the constitutional division of power between the sister sovereigns and the federal government. Congress, however, should revisit the issue. 440

436. See FMC v. Holliday, 498 U.S. 52, 64-65 (1990); supra notes 244-45.

437. Congress devoted a great deal of time to the pension plan aspects of ERISA. Only a fraction of this time was given to employee welfare [benefit] plans, however, and almost no attention was given to the language of Section 514 [the preemption provision]. In view of the fact that the present language of section 514 was inserted by the Conference Committee at a very late hour, after no congressional hearings, and with little explanatory comment, serious doubts can be raised regarding congressional intent to broadly preempt state laws regulating employee welfare [including medical] plans.


440. Several commentators previously reached the same conclusion, but often they argue judicial rather than legislative correction. See, e.g., Boggess, supra note 421, at 768-72 (arguing for judicial correction or congressional limitation of ERISA preemption of non-pension plans); Brummond, supra note 420, at 99, 118; Levin, supra note 413, at 1545, 1549 (arguing that ERISA preemption provisions should be limited to pension plans, but also proposing judicial interpretation of ERISA preemption be limited to areas ERISA actually regulates). Certainly the current distinction encourages employers to shift to self-insured plans to evade state regulation. See Gregory, supra note 234, at 470; William J. Kilberg & Catherine L. Heron, The Preemption of State Law Under ERISA, 1979 Duke L.J. 383, at 420 (1979) ("[T]he insurance proviso and the deemer clause . . . may raise more questions than they resolve.").

Not only does the distinction undermine the interest in uniformity in legal requirements applicable to employer-provided medical plans, but the definition of "self-insured" includes plans administered by insurance companies, and plans that have "stop loss" protection shielding the employer from liability beyond amounts negotiated with the carrier. See supra note 243.

The American Medical Association House of Delegates recently passed a resolution that the organization will "aggressively" pursue efforts, inter alia, "to ensure that any rules . . . apply equally to self-insured and insured health benefit plans." AMA Pursues Changes In ERISA and Anti-Trust Laws, 141 Lab. Rel. Rep. (BNA) 505 (Dec. 21, 1992). Legislation has in fact been proposed in Congress to revise this aspect of the ERISA preemption clause. See id.
2. ERISA Preemption of State Regulation Relating to Family and Marriage Issues

The distinction between state authority, under ERISA, to regulate insured, but not self-insured, medical plans may affect coverage of the family and other dependents of employees. But ERISA preempts state law affecting the family and marriage relationship in other ways as well.

For example, retirement benefits often constitute a major portion of the marital estate. ERISA, as amended by the federal Retirement Equity Act of 1984 ("REA"), gives spouses a right to automatic survivor benefits in the event of the death of the retired employee. Additionally, in the event of divorce, the REA created an exception to ERISA's generally broad spendthrift or non-alienation provisions. A state divorce court may order a portion of the employee-participant's pension benefit to be paid to the former spouse in a "qualified domestic relations order." But what happens if the undivorced spouse dies before the employee-participant?

Under California community property law, the deceased non-employee spouse's estate includes his or her interest in the pension benefits of the employee. In practical terms, this means the non-employee spouse may control disposition of this asset through his or her will (for example, a bequest to a child of another marriage). But ERISA's broad preemption provisions divest the states of this authority. If the employee-participant...
participant dies first, however, he or she may, under federal law, designate another beneficiary in his or her will.\textsuperscript{446} While the policy issue may be fairly debatable,\textsuperscript{447} the point again is that Congress should revisit ERISA's broad preemption language and the policy issues confronted.

State family and medical leave statutes provide another example.\textsuperscript{448} While the debate over the desirability of federal family leave legislation raged for at least three years,\textsuperscript{449} thirty-two states fulfilled the traditional cutting edge role of the states by enacting these laws. Moreover, state coverages and entitlements can differ from those provided in the federal statutes. If the employer provides family leave through an ERISA-covered plan, the broad statutory language of ERISA's preemption provisions and judicial decisions suggest that such plans may be preempted from state authority.\textsuperscript{450} Once again, Congress should revisit this issue.

3. ERISA and Laws Relating to Worker Injury

The state workers' compensation statutes are generally exempt from ERISA's coverage and preemption provisions.\textsuperscript{451} Under these state laws, when employees suffer work-related injuries,\textsuperscript{452} their injury-related

ISA, and in the legislative history of the REA. See Ablamis, 937 F.2d at 1455; supra part V.

\textsuperscript{446} See Ablamis, 937 F.2d at 1457 n.12.

\textsuperscript{447} See, e.g., id. at 1457 (stating that "[p]ensions are designed for the benefit of the living"). Of course, the children of the deceased spouse in Ablamis were living. See id. at 1452.

\textsuperscript{448} See supra text accompanying notes 186.

\textsuperscript{449} There were two Presidential vetoes, see supra text accompanying note 187, before President Clinton signed the 1993 Act into law, see Pub. L. No. 103-3, 107 Stat. 6, codified at 29 U.S.C. § 2561(b) (West Supp. 1993).


ERISA covers "employee benefit plans" that include both "pension" and "employee welfare benefit plan[s]." See ERISA § 3(3), 29 U.S.C. § 1002(3) (1988). "Employee welfare benefit plans" include any plan established or maintained for the purpose of providing, in addition to medical/hospital benefits, "benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or ... any benefit described" in section 186(c) of Title 29. ERISA § 3(1), 29 U.S.C. § 1002(1) (1988). Section 186(c) benefits are those provided for in the Taft-Hartley Act § 302(c), 29 U.S.C. § 302(c) (1988), and cover a broad range of benefits including "vacation, holiday, severance, or similar benefits." 29 U.S.C. § 186(c)(6) (1988). See District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 584-85 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

\textsuperscript{451} See, e.g., ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3) (1988) (ERISA coverage of plans are not "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws"); ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (ERISA preempts state laws that relate to employee benefit plans provided such plans are "not exempt" from ERISA coverage).

\textsuperscript{452} Many states also provide workers' compensation coverage for occupational dis-
medical expenses and some of their lost time or lost income are compensated through a “no fault” system.

Though the workers’ compensation statutes cover injuries of workers, these statutes do not cover injuries or illnesses of dependents. As Justice Stevens noted in his dissent in *Greater Washington*: “In today’s world the typical employee’s compensation is not just her take-home pay; it often includes fringe benefits such as . . . health insurance.”\(^{453}\) However, because workers’ compensation lost income payments typically amount to about two-thirds of the employee’s normal take-home pay, which does not include fringe benefits like medical insurance,\(^{454}\) employees suffering on-the-job injuries also often suffer a substantial loss in total compensation in the form of lost medical insurance and other fringe benefits.

Like many states, the District of Columbia by statute mandates employer-paid continuation coverage of family medical insurance during the period of the workers’ compensation disability.\(^{455}\) In 1992, however, the Supreme Court held that ERISA preempted this provision.\(^{456}\) Eight members of the Court agreed that, although workers’ compensation laws in general are exempt from both ERISA coverage and preemption,\(^{457}\) the D.C. law nonetheless related to an ERISA-covered plan merely by referring to the employer’s ERISA-covered medical insurance plan as the measure of what medical insurance the disabled employee was entitled to have continued under the workers’ compensation continuation statute.

Again Justice Stevens was the sole dissenter. He argued that because the District of Columbia could raise workers’ compensation benefits by “x” dollars, it made no sense as a policy matter to say the District could not also raise benefits by measuring the entitlement by the amount of medical insurance provided when the employee is not injured.\(^{458}\) Although Justice Stevens may have been right on the policy question, the majority was probably correct in its construction of the ERISA preemption provision as written. The language of ERISA “clearly and manifestly” preempts the broad field of “employee benefit plan” regulation by

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\(^{454}\) See Rothstein, supra note 88, at 739.

\(^{455}\) See *Greater Washington*, 113 S. Ct. at 582.

\(^{456}\) See id.

\(^{457}\) See id. ERISA’s preemption provision, § 514(a), 29 U.S.C. § 1144(a) (1988), applies to all state laws which relate to non-exempt ERISA-covered plans. Workers’ compensation plans are exempt from ERISA coverage, see ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3) (1988), at least insofar as the relevant plan was established “solely” for the purpose of complying with the state workers’ compensation laws. See supra note 417.

\(^{458}\) *Greater Washington*, 113 S. Ct. at 585 (Stevens, J., dissenting).
the states even though this state regulation does not conflict with any substantive provisions or policies of ERISA.\footnote{459}

Here again Congress, rather than the courts, should revisit the issue. Congress surely did not intend, as a policy matter, that state workers' compensation benefits, though generally exempt from ERISA, be preempted from state regulation merely because the state measures these benefits in part by \textit{referring to} the regular medical insurance benefits provided by an employer's ERISA-covered medical insurance plan. Because ERISA neither regulates workers' compensation benefits\footnote{460} nor the level of medical insurance benefits available through employers, no uniformity interest supports ERISA preemption in this situation.\footnote{461}

\section{C. An Intermediate Model: The Scheme of Cooperative Preemption Embodied in OSHA}

Though the federal Occupational Safety and Health Act ("OSHA")\footnote{462} often has been described as "minimum standards" legislation,\footnote{463} \textit{Gade v. National Solid Wastes Management Ass'n}\footnote{464} now establishes that OSHA preempts more stringent state regulation in certain circumstances.\footnote{465}

\footnote{459. One can debate this interpretive conclusion, however, as applied to the facts of \textit{Greater Washington}. Because ERISA expressly exempts workers' compensation plans, and because the "continuation benefits" were merely defined by reference to the general medical plans level of benefits, one could argue that the continuation benefit does not "relate to" the ERISA plan. But the Court's prior pronouncements at least had defined "related to" to include "a reference to" an ERISA plan. \textit{See supra} note 417.

460. \textit{Greater Washington}, however, reinforced the prospect that employers may in due course claim ERISA preemption protection against state workers' compensation laws. \textit{See Greater Washington}, 113 S. Ct. at 583-84. The exclusion for workers' compensation applies to plans "solely" for such purposes. Employers might, for example, soon claim that a "24 hour" medical plan covering on the job and non-job related medical problems falls outside the literal language of this exception.


465. However, the "interpretive" issues under OSHA are, perhaps, more fairly debata-}
Unlike status discrimination statutes like Title VII or labor standards legislation generally, current congressional policy in the field of workplace safety often prevents the states from going beyond national standards, except when specifically approved by federal regulators.\(^{466}\)

OSHA’s preemption provisions uniquely establish a system of cooperative federalism.\(^{467}\) Preliminarily, the statute expressly exempts from preemption workers’ compensation and other state laws providing compensation for occupational injury or disease.\(^{468}\) And, more generally, the statute expressly preserves state law from preemption concerning the many issues over which “no federal standard is in effect.”\(^{469}\) Thus, Congress clearly left state authority intact in many areas of workplace health and safety. In traditional doctrinal terms OSHA preempts a narrow, rather than a broad, field as in ERISA.

In areas governed by federal OSHA regulations, or standards,\(^{470}\) the preemption provisions generate more controversy. OSHA section 18(b)\(^{471}\) allows states to submit their own safety plan for approval by the Secretary of Labor with respect to all safety or health issues over which federal OSHA standards have been promulgated. An approved plan operates as a kind of reverse preemption provision and the state assumes responsibility for enforcement of state and federal standards. The question arose whether states without approved plans, in areas for that OSHA does have standards, may apply state laws which exceed the OSHA standards. In the 1992 \textit{Gade} case,\(^{472}\) a 5-4 majority of the Supreme Court answered “no,” striking down an Illinois statute requiring licensing of workers at a hazardous waste facility—a requirement absent from OSHA regulations applicable to these facilities.\(^{473}\)

\(^{466}\). \textit{See Gade}, 112 S. Ct. at 2383.


\(^{469}\). OSHA § 18(a), 29 U.S.C. § 667(a) (1988). As Professor Weiler pointed out in his leading theoretical review of employment law issues, eighty percent of all workplace injuries occur in areas without any OSHA standard. \textit{See Weiler, supra} note 10, at 155.

\(^{470}\). \textit{See supra} text at notes 133-36.

\(^{471}\). OSHA § 18(b) provides: “Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and their enforcement.” OSHA § 18(b), 29 U.S.C. § 667(b) (1988).


\(^{474}\). Another key issue in the case was whether the Illinois statute, requiring licensing of employees at hazardous waste facilities, avoided preemption because in addition to protecting employees, it protected the public. Apparently every member of the Court
Gade illustrates how the traditional framework for analyzing preemption issues is virtually meaningless. A four-Justice plurality, led by Justice O'Connor, thought the case was an implied conflicts case. Concurring, Justice Kennedy considered Gade an express preemption case. Justice Souter, dissenting and joined by Justices Blackmun, Stevens, and Thomas, thought the plurality's approach amounted to both "purpose-conflict" preemption and "federal occupation of a field preemption"—a field defined by areas for which OSHA standards exist. As Justice Souter and the dissenters argued, the question, however characterized, turned on whether the statute manifested a purpose, sufficiently "clear and manifest" to overcome the general presumption against preemption, to preempt more stringent state regulation.

Although the interpretive issue may be debated, the majority's common sense reasoning that OSHA's preemption and related provisions, taken together, constitute a "clear manifestation" of congressional intent to preempt state law seems sound. First, to conclude that there is no preemption where there is no OSHA standard implies that preemption arises when there is a federal OSHA standard. Moreover, to provide for reverse preemption by a state plan, subject to approval of federal


474. See Gade, 112 S. Ct. at 2386 n.2.
475. See id. at 2388-91.
476. See id. at 2392. Justice O'Connor's plurality opinion conceded that the case could be analyzed as either an express, field, or conflicts preemption case. See id. at 2386 n.2
477. See id. at 2392-93 (Souter, J., dissenting) (quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)); see also id. at 2386 n.2 (O'Connor, J., writing for a four-Justice plurality) ("whether the OSH Act's pre-emptive effect is labelled 'express' or 'implied' is less important than our agreement that the implications of the text of the statute evince a congressional intent to pre-empt").

It is interesting that Justice Thomas joined in Justice Souter's dissenting opinion, which states that the presumption against preemption applied. Just six days later, Justice Thomas joined Justice Scalia's dissent in the cigarette preemption case, which argued that the presumption against preemption did not apply in a case where Congress had addressed (although ambiguously) the question of preemption. See Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2634 (1992) (Scalia, J., dissenting).

478. Justice Souter argues somewhat convincingly, for example, that the provision expressly preserving state authority in areas without OSHA standards does not necessarily mean that Congress intended preemption (in the absence of an approved plan) where there are OSHA standards; as Justice Souter points out, the provision could mean, instead, that OSHA standards only sometimes preempt (that is, when the state regulation actually conflicts). See Gade, 112 S. Ct. at 2393 (Souter, J., dissenting).

Even where the preemption framework demands an analysis in terms of whether Congress demonstrates a "clear and manifest" purpose to overcome the presumption against preemption, lawyers and judges may still disagree about what constitutes a "clear and manifest" intent. At least all will be starting with a proper recognition of the constitutional role of the sister states, absent affirmative action by Congress, not only to regulate, but to regulate exclusively.
regulators, raises the inference that, absent such approval, OSHA and not state standards continues exclusively in effect. Third, nothing prevents the federal OSHA regulators from approving state workplace health and safety standards that exceed national standards. Finally, as Justice O'Connor's plurality opinion notes, "[e]very other federal and state court confronted with an OSH Act pre-emption challenge [had] reached the same conclusion." Such unanimity of the opinions of lawyer-judges surely provides at least some indication of a "clearly and manifestly" expressed congressional intent. Reform, if warranted, should come from Congress.

Thus, such divergent preemption schemes as the baseline, ERISA, and OSHA preemption models primarily present policy, as opposed to interpretive, issues. However, in two areas, judicial decisions clearly have gone awry: (1) preemption under the Federal Arbitration Act, and (2) preemption under the New Deal collective bargaining statutes. This Article now addresses these issues in turn.

D. Preemption Under the Federal Arbitration Act

As shown above, state wage and hour, status discrimination, privacy, and family leave legislation remain proper exercises of state authority under the dominant baseline model of narrow conflicts preemption. Anomalously, however, remedies under such state enactments may be preempted by another statute, the Federal Arbitration Act ("FAA"). This provides a classic example of judicial policy-making that ignores both the interpretive or institutional constraints of federalism and the strong presumption against preemption that emanates from the constitutional division of powers. Moreover, current doctrine under the FAA fails to connect the particular application of preemption doctrine under that statute to the larger complex system of law which now governs the workplace.

In Perry v. Thomas, the Court held that the FAA preempted a security salesman's California wage claim action for disputed commissions. When applying for employment, the salesman was required to execute a form agreeing to arbitrate any employment dispute that might

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479. Id. at 2382. Many knowledgeable academic authorities also reached the same conclusion. See, e.g., Stephen A. Bokat & Horace A. Thompson III, Occupational Safety and Health Law 680 & n.4 (1988) (ABA Section of Labor and Employment Law—sponsored treatise expressing authors' own views); Finkin, supra note 40, at 369 (noting that "[s]ection 18 generally preempts ... where any federal standard is in effect").

480. Insofar as OSHA, under Gade, preempts more stringent state regulation where there is no approved state "plan" and where OSHA standards apply, a policy argument can be made that Congress should "correct" this holding. As long as the sister sovereigns remain primarily responsible for compensation for workplace injury and occupational disease (through the workers' compensation statutes) they should retain ultimate authority over the prevention of such injury and disease. See Gade, 112 S. Ct. at 2391-95 (Souter, J., dissenting); supra note 478.


subsequently arise. California law made such agreements ineffective as a bar to the employee's right to pursue statutory wage claim remedies. But Justice Marshall's opinion for the majority held that the FAA preempted California's ban on pre-dispute waivers of statutory wage claim remedies. According to the majority, a textual analysis of the FAA supports the view that the FAA displaces not only state-created remedies, but also state bans on prospective waivers of those remedies. Thus, the FAA covers "contract[s] . . . involving commerce to settle by arbitration a controversy thereafter arising out of such contract[s]." The Act further provides that such arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." And in a series of cases during the past fifteen years, the Court applied the FAA to a broad range of federal statutory claims.

In Perry v. Thomas, however, application of the FAA to preempt wage claims under state law was improper for several reasons. Justice Marshall's opinion omits any discussion of the requirement for a "clear and manifest" indication of congressional intent to preempt, sufficient to overcome the strong, constitutionally-based presumption against preemption. While Justice Marshall's broad reading of the statute in Perry is reasonable, this reading is hardly compelled. As Justice Stevens remarked rather acidly in dissent:

Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.

In addition, as Justice O'Connor argued in her separate dissent, because the FAA does not prevent Congress from limiting waiver of federal statutory rights by arbitration agreements, the inference, if any, is that the

483. See id. at 485.
484. See id. at 486 & n.2.
485. See id. at 489-91.
487. Id.
489. 482 U.S. 483, 493 (1987) (Stevens, J., dissenting). The reference in the quotation to the year 1973 is to Merrill Lynch, Pierce, Fenner, & Smith Inc. v. Ware, 414 U.S. 117 (1973), which the dissenters argued had effectively decided the same question against preemption. See id. at 135 n.15.
FAA similarly intended to allow the states to limit waiver of state-created statutory rights.\textsuperscript{490} Moreover, far from being "clear and unambiguous," for many years the FAA was widely thought not to address statutory claims at all.\textsuperscript{491} In strict statutory language terms, the FAA applies to arbitration agreements for "a controversy . . . arising out of . . . [a] contract or transaction" evidenced by the contract.\textsuperscript{492} Thus, one reasonable interpretation is that the FAA covers only contractual as distinct from statutory claims. Although the Court may reasonably interpret the FAA's language to cover statutory claims that arise out of "contracts" or "transactions," as well as contract claims,\textsuperscript{493} that is not so when preemption of state authority in a traditional area of state regulation becomes the issue. A "clear and manifest" intent, not merely a reasonably inferable intent, is necessary to displace the authority of the sister sovereigns under the Constitution. The FAA simply fails to evidence clearly and manifestly such a congressional purpose.

The error of Perry, however, is compounded by the fact that it is not only a preemption case, but an employment law preemption case. What further light is shed on the preemption issue by looking at the larger context of the American law of the workplace? First, a question exists regarding whether Congress intended the FAA to apply to employment contracts as distinct from commercial arbitration over matters of commerce. As originally enacted in 1924, the FAA was primarily designed to make lawful and enforceable commercial contract provisions for arbitration, reversing "centuries of judicial hostility to arbitration agreements."\textsuperscript{494} As shown below, the FAA's reference to "transaction involving commerce" might not have been understood in 1924 as including employment contracts for two reasons.

First, section 1 of the FAA expressly excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\textsuperscript{495} While this could be construed to refer only to employees engaged in instrumentalities of transportation for goods in commerce, it is not readily apparent why the 1924 Congress would exclude employment contracts manifestly within its power to regulate, and not those thought at the time to be beyond

\textsuperscript{490} See Perry, 482 U.S. at 494-95 (O'Connor, J., dissenting).
\textsuperscript{495} FAA, § 1, 9 U.S.C. § 1 (1988).
congressional power under the Commerce Clause. Indeed, congressional regulation of labor relations, even in the interstate railroad industry, was not upheld by the Supreme Court until 1930, and congressional power to regulate labor relations more broadly was not recognized until the post Adair-Lochner cases beginning with NLRB v. Jones & Laughlin Steel in 1937. The 1924 Congress, therefore, may well have framed the express exclusion for employment contracts in terms of the types of employment contracts then thought to be within Congress’ power to regulate commerce—employment contracts for seamen, railroad employees, and the like.

A second reason exists for believing that the 1924 Congress did not seek to cover the typical employment contract. The FAA’s reference to contracts “involving commerce” must be understood in the context of the Clayton Act of 1914, at the time thought to represent labor’s most important legislative victory in Congress. Section 6 of the Clayton Act provided that “[t]he labor of a human being is not a commodity or article of commerce.” Although this proved a futile attempt to avoid application of the anti-trust statutes to labor activities, the populist language of section 6, still part of the United States Code, clearly establishes that Congress in the first third of this century deemed “commerce” to be different from “the labor of a human being.” There is therefore an inference that the FAA was not understood by the 1924 Congress to include employment contracts generally, because these contracts were not thought generally to be contracts in commerce. Although labor contracts for transportation workers were thought to involve interstate commerce, Congress expressly excluded even those labor contracts from the embrace of the FAA.

Even assuming that the FAA was intended to apply to employment contracts, there are still other reasons for rejecting an interpretation

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497. 301 U.S. 1 (1937).
498. See generally Frankfurter & Greene, supra note 39 (discussing constitutional considerations affecting labor legislation in the late 1920s).
504. The Supreme Court reserved this question in Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651, n.2 (1991). Several Circuit Courts of Appeal have held that the FAA does apply to Title VII claims. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698,
that the FAA "clearly and manifestly" evidences a congressional intent
to preempt state individual rights law. The FAA is a general commercial
statute, not tailored to the employment contract setting, if indeed it cov-
ers employment contracts. Congress, however, has spoken expressly
about many areas of the employment relationship, for example, in Title
VII (discrimination) and the FLSA (labor standards). As shown in the
preceding discussion,505 these more specific employment laws establish
congressional intent to leave broad authority to the states. From the
broader perspective of the whole scheme of federal and state employment
statutes, it is untenable to say that Congress meant to preserve broad
state authority over labor standards and discrimination in statutes like
the FLSA and Title VII, but that Congress, in an earlier-enacted general
arbitration statute, authorized private agreements to remove state au-
thority over remedies for these same state labor standards or state dis-
crimination law violations. At the least, the FLSA's adoption of the
narrow conflicts type of preemption for labor standards legislation de-
serves discussion when a statute like the FAA is interpreted to obliterate
the state authority over wage claims seemingly preserved by the FLSA.
Yet Perry does not mention either the FLSA, or the larger framework of
American employment law.

Similarly, there is no discussion in Perry of whether, in the larger con-
text of the American law of the workplace, the FAA should properly be
interpreted to allow boilerplate pre-dispute "agreements to arbitrate"
signed when applying for employment. As the early labor standards
cases well established, the 1938 FLSA and 1935 New Deal collective bar-
gaining statutes were premised on the assumption that individual em-
ployment bargains lacked legitimacy because of bargaining power
parities.506 Yet the FAA, adopted a decade before, makes an agree-
ment to arbitrate revocable only when difficult common law standards
for revocation of commercial contracts are met. By ignoring such per-
plexing ironies—viewing the scheme of statutes as a whole—decisions
like Perry v. Thomas fail even to come close to demonstrating a clear and
manifest purpose by Congress to divest state authority over boilerplate
waivers of state law individual employment rights and remedies. And
when considered in light of the shared state and federal authority over
the workplace repeatedly approved and adopted by Congress, the Perry

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505. See supra text at notes 380-407 and accompanying text.
506. See, e.g., 1935 Wagner Act (codified at NLRA § 1, 29 U.S.C. § 151 (1988)) ("The
inequality of bargaining power between employees who do not possess . . . actual liberty
of contract, and employers who are organized in the corporate or other forms of owner-
ship association substantially burdens . . . commerce . . . by depressing wage rates . . . and
by preventing the stabilization of . . . working conditions within and between industries.").
preemption doctrine makes little sense as a matter of policy.\textsuperscript{507}

\section*{VII. State Law and the New Deal-Era Collective Bargaining Statutes}

The New Deal-era collective bargaining statutes provide still another basis for preemption of the state law of the workplace.\textsuperscript{508} As with ERISA preemption, the collective bargaining statutes often have raised preemption issues. The Supreme Court has decided dozens of these cases over the past fifty years.\textsuperscript{509} And as with the FAA, and in contrast to federal individual rights statutes like ERISA, OSHA, Title VII, and the FLSA, two aspects of preemption doctrine under the collective bargaining statutes are evident: (1) Congress generally has remained silent about its preemptive intent,\textsuperscript{510} and (2) the Court has often ignored the

\textsuperscript{507} This Article does not challenge the popular belief that alternative dispute resolution, including arbitration, presents an attractive alternative to more formal judicial litigation. \textit{But see} Edward Brunet, \textit{Arbitration and Constitutional Rights}, 71 N.C. L. Rev. 81, 88-101 (1992) (discussing the lack of protection for constitutional rights in arbitration). Under the federalist scheme of workplace regulation for state law rights, this is an appropriate issue for state legislatures and judges applying state law. However, given that the states remain free to ban conduct such as sexual orientation discrimination or to grant paid leave to new parents, and to provide remedies and restrictions on waivers for these and other labor standards, under the federal statutes it makes little sense for Congress to legislate these same remedy and waiver issues at the federal level indirectly through the FAA.


\textsuperscript{509} According to a Westlaw search, more than ninety Supreme Court cases in the past fifty years include substantial discussions of "preemption" under the Wagner, Taft-Hartley, and/or the combined Labor Management Relations Acts. In short, the Court has averaged nearly two "labor law" preemption cases per year for a half-century. Only a few dozen of these can be discussed in this Article.

\textsuperscript{510} "The national [sic] Labor Management Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner v. Teamsters Local 776, 346 U.S. 485, 488 (1953); \textit{see also} Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) ("[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent."). While congressional silence about labor law preemption is the rule, there are exceptions. NLRA § 14(c), 29 U.S.C. § 164(c) (1988) preserves state jurisdiction over the labor relations of small employers when the NLRB declines jurisdiction under its jurisdictional standards. Section 14(b), 29 U.S.C. § 164(b) (1988), preserves state "right to work" laws; indeed, section 14(b) allows a form of "reverse preemption" since a "right to work" state may enforce its prohibition on compulsory union membership or agency shop arrangements, even though such are generally authorized by the NLRA. \textit{See} Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 102 (1963). Finally, the federal statute regulating the internal
presumption against preemption. An elaborate\textsuperscript{511} and confusing\textsuperscript{512} body of preemption doctrine arose from the case law pronouncements of judges.\textsuperscript{513} To paraphrase Chief Justice Rehnquist, from the "sensible acorn" of implied conflicts preemption grew the "mighty oak" of the Supreme Court's labor law preemption jurisprudence.\textsuperscript{514}

This Article proposes a fundamental revision of this jurisprudence. As Michael Gottesman stated in his leading article, rethinking this area of the labor law, "I want to travel against the flow of traffic... contrary to [the] prevailing wisdom."\textsuperscript{515} But unlike Professor Gottesman, this

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\textsuperscript{511} Labor law preemption is "one of the more intricate structures of legal theory." Gregory, supra note 508, at 514 (citations omitted). Felix Frankfurter once remarked that labor law preemption involved a more "complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of the legislature.'" See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, at 239-40 (1959).

\textsuperscript{512} "No legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently in the past thirty years than that of the preemption of state law, and perhaps no other legal issue has been left in quite as much confusion." Cox, Labor Law, supra note 39, at 959.

\textsuperscript{513} "The core reality in [labor law] preemption doctrine is judicial policymaking in the face of congressional silence, disguised by the cosmetic judicial 'divination of congressional purpose' and 'fabrication of intent.'" Gregory, supra note 508, at 516-17 (citations omitted).


\textsuperscript{515} Gottesman, supra note 7, at 355. Gottesman's article argues that through the 1935 Wagner Act, Congress limited National Labor Relations Board remedies to equitable relief because it wished to "commit [the Act's] enforcement to an administrative agency that could bring specialized expertise to the eradication" of anti-union practices; by so doing, Gottesman points out, Congress laid the groundwork for NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937), upholding the constitutionality of the Wagner Act against, among others, a Seventh Amendment attack. Gottesman, supra note 7, at 408. Thus, Gottesman argues, the decision to limit the National Labor Relation Board to equitable relief "furnishes no justification for inferring an intent to preclude stronger remedies in court actions under state law." Id. at 408-09. At least one other author has acknowledged the great "analytical power" of Gottesman's article. See Matthew W. Finkin, Back to the Future of Labor Law, 32 Wm. & Mary L. Rev. 1005, 1018 (1991) [hereinafter Finkin, Back to the Future]; Matthew W. Finkin, Reflections on Labor Law Scholarship and its Discontents: The Reveries of Monsieur Verog, 46 U. Miami L. Rev. 1101, 1112-13, 1116-17 (1992) [hereinafter Finkin, Reflections].
Article addresses labor law preemption doctrine in all its aspects—not just those that may adversely affect unions.

A. The Politics and Pragmatic Aspects of Labor Law Preemption

The 1935 Wagner Act provided affirmative federal protection for labor union activities, and quite naturally, early preemption cases often involved attempted state restrictions on activities protected by the new federal law.\textsuperscript{516} Even after passage of the Taft-Hartley Act in 1947, which forbids unfair labor practices by unions and recognizes the right of employees to refrain from concerted activities, unions continued to seek the preemption shield against state regulation less hospitable to their activities than the now neutral federal labor laws. Leading academic voices—among them Archibald Cox—called for a broad implied preemption doctrine lest federal policies fostering and protecting collective bargaining be undercut by state-level enactments.\textsuperscript{517} In the Warren Court years, these predilections dominated the Supreme Court's labor law preemption jurisprudence.\textsuperscript{518} The constellation of labor unions, academic writers, and

\begin{footnotesize}
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\item[517.] Over a period of thirty years, Archibald Cox wrote a series of articles on labor law preemption. As Professor Gottesman noted in his own plea for "rethinking" some parts of the doctrine, Professor Cox's writings "heavily influenced the Court's labor preemption jurisprudence." Gottesman, \textit{supra} note 7, at 355 n.2. For a list of Cox's writings on preemption, see \textit{supra} note 265. Cox's work, as Professor Gottesman notes, appears to have directly influenced several of the leading labor law preemption rulings. See Gottesman, \textit{supra}, note 7, at 389 n.140. Other writers have acknowledged Cox's huge impact on labor law in general. See Stoughton Lynd, \textit{Government Without Rights: The Labor Law Vision of Archibald Cox}, 4 Indus. Rel. L.J. 483, 487-93 (1981). Cox has frequently been cited on labor law issues by the Supreme Court. See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 n.6 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 405-06 & n. 16 (1952).
\item[518.] During this period, the Court asserted federal preemption over a variety of state laws directed at collective bargaining relationships. See, e.g., Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274, 282-85 (1971) (state law claim for discharge for failure to pay union dues preempted although union failed to provide employee with grace period required by union's own bylaws and employee's breach of bylaw claim did not state unfair labor practices under federal labor law); Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 695-98 (1963) (preemption of state claim for union's alleged arbitrary refusal to refer employee for job preempted); Local No. 207, \textit{Int'l Ass'n of Bridge Workers v. Perko}, 373 U.S. 701 (1963) (preemption of state claim for conspiracy to deprive employee of foreman's job); San Diego Bldg. Trades Council v. Garmon,
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activist jurists who supported a broad preemptive reach for the federal labor laws has had its effect.\footnote{519}

As time passed, however, the politics of preemption under the NLRA grew less clear. The Nixon-Burger and Reagan-Rehnquist years saw the reemergence of several versions of a "New Federalism,"\footnote{520} and a Court less inclined to infer exclusive federal regulation from congressional silence. As might be expected, the Court's labor law preemption decisions in the 1970s tolerated more state regulation in labor disputes.\footnote{521}

As the 1980s unfolded, the individual rights revolution caused many business interests and employee advocates to switch sides. Employees now argued for narrow preemption so that state individual rights claims could go forward, while employers argued for sanctuary behind the preemptive shield.\footnote{522} The preemption doctrine grew more and more layered, straining under the political stresses.\footnote{523} Increasingly, employees

\footnote{519. \textit{See} Gottesman, supra note 7, at 390-91 ("There can be little doubt as to the persuasiveness of Cox' thinking to the Court."); \textit{see also} Stone, supra note 79, at 1515-16.}


\footnote{521. \textit{See}, e.g., \textit{Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters}, 436 U.S. 180, 198, 202-07 (1978) (state trespass claim against union's organizational picketing which is arguably protected and/or prohibited by NLRA was not preempted); \textit{Farmer v. United Bhd. of Carpenters & Joiners, Local 25}, 430 U.S. 290, 302-06 (1977) (dissident union members' state law claim against union for intentional infliction of emotional distress, which included alleged discrimination in referrals from hiring hall, not preempted).}

\footnote{522. \textit{See}, e.g., \textit{Lingle v. Norge Div. of Magic Chef, Inc.}, 486 U.S. 399, 406-10 (1988) (employee's state law tort claim of retaliatory discharge for filing workers' compensation claim can be resolved without interpreting the collective bargaining agreement, and thus is not preempted by § 301); \textit{Allis-Chalmers Corp. v. Lueck}, 471 U.S. 202, 206-08 (1985) (considering employer's argument that § 301 of the LMRA preempts employee's state-law tort action for bad faith delay in making disability benefit payments).}

\footnote{523. In 1980, Professor Cox described the preemption cases of the 1970s: "One perceives little interest in logical consistency and less interest in building a coherent and continuing body of law... [The] Justices... are primarily pragmatists more concerned with the immediate outcome than with building a coherent body of law." \textit{Cox, Develop-
and unions have stood on opposite sides of the preemption divide.\textsuperscript{524} Now both employers and unions sometimes favor broad labor law preemption, and individual rights claimants who are dependent on state law remedies dissent.\textsuperscript{525}

B. Three Blind Mice: A Summary of the Existing Doctrines

Traditional labor law preemption doctrine includes three distinct strands: (1) the Garmon doctrine,\textsuperscript{526} (2) the Machinists doctrine,\textsuperscript{527} and the section 301 preemption doctrine.\textsuperscript{528} Under Garmon's primary agency jurisdiction rationale,\textsuperscript{529} the NLRA preempts state regulation, subject to exceptions,\textsuperscript{530} when the conduct is arguably protected or


\textsuperscript{525} For example, in the landmark section 301 preemption case, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), separate briefs filed by the United States Chamber of Commerce and AFL-CIO both supported the employer's preemption claim against the employee. See 85 L. Ed. 2d 896 (1985).

\textsuperscript{526} See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Garmon discusses preemption of state law regulation of conduct arguably protected or arguably prohibited by the NLRB. See id. at 244-45. However, later cases substantially qualified the doctrine and appear to have interposed a number of additional tests, including a "balancing" test. See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205-07 (1978); Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 290-97 (1977).

\textsuperscript{527} See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). Machinists discusses preemption of state law when Congress, though neither protecting nor prohibiting the conduct involved, intended to allow the "free play of economic forces" without state regulation. See id. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

\textsuperscript{528} See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). Lucas Flour discusses preemption of a state law claim arising out of a collective bargaining agreement. See id. at 101-03.

\textsuperscript{529} See Garmon, 359 U.S. at 243.

\textsuperscript{530} Under Garmon, no preemption occurred, even for conduct arguably protected or prohibited by the NLRA, if it involved "interests so deeply rooted in local feeling," id. at 244, or if the matter was "merely a peripheral concern" of the federal labor law. Id. at 243. The classic example of a "deeply rooted local concern" is the regulation of violence. See International Union, UAW v. Russell, 356 U.S. 634, 640 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 657 (1954). The "peripheral concern" exception applies to the regulation of certain internal union conflicts such as the expulsion of members. See Machinists, 356 U.S. at 621-23; see also Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971) (employee removed from job for failure to pay union dues). However, the Garmon exceptions do not apply when the conduct is actually protected by the Act. See, e.g., Brown v. Hotel & Restaurant Employees Local 54, 468 U.S. 491, 503 (1984) (no preemption of New Jersey statute requiring registration of unions representing casino employees, and disqualifying union officers with certain types of criminal records).
prohibited by the NLRA.\textsuperscript{531} Even when conduct is neither arguably prohibited nor protected by the NLRA, state regulation may nevertheless suffer preemption under the second strand of labor law preemption, the \textit{Machinists} doctrine. This is because Congress in many instances affirmatively intended that private actors be left to the "free play of economic forces" without state intervention.\textsuperscript{532} Finally, section 301 of the LMRA preempts state law claims whenever resolution of the claim requires interpretation of a collective bargaining agreement.\textsuperscript{533}

Although this scheme may seem coherent to the uninitiated, application of the Garmon, \textit{Machinists}, and section 301 tests for preemption in fact have resulted in a morass of exceptions, limitations, refinements, and qualifications.\textsuperscript{534} Thus, under the now-modified Garmon doctrine, even where conduct is arguably protected or prohibited by the NLRA, state law claims may survive to regulate violence and mass picketing,\textsuperscript{535} malicious defamation,\textsuperscript{536} fraud and misrepresentation,\textsuperscript{537} trespass,\textsuperscript{538} and the intentional infliction of emotional distress.\textsuperscript{539} As a result, the rule in Garmon "can now only be described by reference to its exceptions."\textsuperscript{540} Although, under \textit{Machinists}, states cannot "interfere" with the "free play
of economic forces," which operates as the NLRA's fundamental pro-
cedural mechanism for resolving bargaining disputes, the states may 
substantively command that state labor standards be met, thus effectively 
limiting the area for bargaining. Moreover, the states may influence 
bargaining relationships by such devices as providing unemployment 
benefits to strikers. The third type of labor law preemption, section 
301 preemption, suffers both from doctrinal inadequacies and from the 
mass confusion suffered by lower court judges forced to apply it to state 
law individual rights claims. All three strands of labor law 
federal interests that has traditionally marked labor, if not all, preemption adjudication." 
Modjeska, supra, note 533, at 506. 

Doctrinally, two additional tests now lie superimposed on Garmon's original "arguably prohibited/arguably protected" formulation. First, where conduct is "arguably prohibited" by the NLRA, preemption arises only where the state and NLRB proceedings address the "identical controversy." Thus in Sears, Roebuck the court acknowledged that a state trespass action over union picketing was arguably violative of the limitations on recognitional picketing in NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (1988), but nonetheless was not preempted because the state action focused on the location rather than the purpose of the union's picketing. See Sears, Roebuck, 436 U.S. at 198 & n.28; Gregory, supra note 508, at 543. Second, the Court now apparently also balances the relative importance of federal and state interests ad hoc, thus further obliterating any possibility of meaningful results. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 214 n.9 (1985); Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 297 (1977). In distinguishing Garmon preemption doctrine, the Court in Lueck notes that the latter doctrine now "requires a balancing of state and federal interests." Lueck, 471 U.S. at 214 n.9; cf Building and Constr. Trades Council v. Associated Builders and Contractors, 113 S. Ct. 1190, 1194-95 (1993) (the Court's most recent pronouncement on labor law preemption wherein Justice Blackmun, for a unanimous Court, spends two paragraphs summarizing Garmon preemption without making any mention of a balancing test superimposed on the traditional Garmon formulation).

541. See, e.g., Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) (city preempted from conditioning renewal of taxi franchise as settlement of employer's dispute with drivers union); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140-41 & 140 n.4 (1976) (state preempted from punishing a union's concerted refusal to work overtime even though slowdown strikes are unprotected by federal labor law).


543. See New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 545-46 (1979) (no preemption of New York statute allowing unemployment benefits to strikers); cf. Baker v. General Motors Corp., 478 U.S. 621, 638 (1986) (Michigan statute which denies unemployment benefits to strikers who finance strike fund benefits through means other than dues not preempted). Both these cases, however, rely largely on indications in the Social Security Act that Congress intended to allow the states to grant or deny unemployment benefits to strikers as a matter of state policy. See Baker, 478 U.S. at 632-33; New York Tel., 440 U.S. at 537. Thus, although these cases provide precedent for the view argued herein that in deciding labor preemption issues more generally, the Court should consider the entire now-evolved complex system of federal statutes regulating the employment relationship, rather than merely the narrower policies of the federal statutes regulating labor management relations.

544. See Anthony Herman, Wrongful Discharge Actions After Lueck and Metropolitan
preemption continue to confound academic writers, judges, and lawyers alike, and the individual rights revolution in employment law has greatly exacerbated this situation. Not only are the federal collective bargaining statutes conventionally thought to displace much state regulation of the relationships between employers, unions, and employees but they are now routinely invoked to displace state individual rights law as well.

As previously noted, the New Deal-era collective bargaining statutes are silent as to whether federal labor relations rules are to be exclusive, or should constitute an exercise of authority to be shared with the sister sovereign states. The strong constitutionally-based presumption against preemption suggests a regime of shared federal and state authority.

C. The Interpretational Perspective

1. The Garmon Doctrine—Arguably Protected or Arguably Prohibited—Federal Remedy Scheme and Primary Agency Jurisdiction

The Garmon doctrine, however, far exceeds the necessary preemptive inference that arises from the protections or prohibitions of federal labor laws. It exceeds the necessary preemptive inference in several distinct ways: (1) state laws that supplement federal protections are preempted; (2) state regulation of conduct that is only "arguably" protected by federal law is preempted; (3) state regulation of conduct prohibited by federal labor law is also preempted (even if the regulation complements rather than conflicts with the federal legislation); and (4) state regulation of conduct only arguably prohibited by federal labor law also stands preempted. The basis for Garmon's broad preemptive sweep beyond the narrow confines of strict conflict preemption rests upon two notions: (1) that the federal labor laws embody carefully balanced policies that include carefully considered remedies, and (2) that the NLRB applies special administrative expertise to questions that arise under the labor relations statutes. As shown below, however, the statutory scheme as it has evolved does not necessarily compel either of these rationales for broad Garmon preemption.

The question of supplementing NLRB remedies with more stringent state remedies for conduct prohibited by federal law, or for conduct that interferes with federally protected rights, must first be considered. Under the interpretational approach urged here, the states would be free to supplement NLRB remedies for conduct prohibited or protected by federal labor law. For example, a person fired for reasons of anti-union discrimination, like persons fired for reasons of handicap, gender, age, race, or other reasons violative of public policy, could pursue damages remedies under state law. Similarly, a union that violates the secondary boycott provisions of the Taft-Hartley Act could be made to pay damages under state law.

In fact, a majority of the Supreme Court, in the years before Justice Frankfurter's Garmon opinion, interpreted the New Deal labor legislation in precisely this manner. In 1958, the year before Garmon, every participating jurist, except Chief Justice Warren and Justice Douglas, declared that "[t]here is nothing inconsistent in holding that an employee may recover . . . damages in a tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act." Nor was this an aberrant ruling. In 1954, the Court allowed an employer to recover state law compensatory and punitive damages against a union whose conduct was also assumed to have violated the unfair labor practice provisions of the federal labor relations law. Garmon accommodated these holdings through Justice Frankfurter's devise of an exception, from the general Garmon rule of preemption, for interests "deeply rooted" in local feeling (i.e., violence). During the pre-Garmon 1950s, however, a majority of the Court based these earlier holdings on the principle that the limitation to equitable relief under NLRB administrative procedures "does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern" of relief. The Court stated that the federal labor relations statute was "far from being an express grant of exclusive jurisdiction superseding common-law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union."

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549. Id. at 642; see also Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957) (affirming state court injunction of union's violence provoking picket line activities); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 274 (1956) (upholding state au-
Even in *Garmon*, no fewer than four Justices, led by Justice Harlan, refused to join Justice Frankfurter's expansive formula for preemption. These Justices, instead, concurred on the narrow ground that the union picketing involved "may fairly be considered protected under the Taft-Hartley Act, and that therefore state action is precluded . . . . Because conflict is the touchstone of [labor law] preemption, such [protected picketing] activity is obviously beyond the reach of all state power." These four Justices also complained that Frankfurter's opinion "cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be . . . federally prohibited." Moreover, they specifically rejected the attempt to rationalize the aforementioned pre-*Garmon* cases as depending on the fact or threat of violence.

Thus, both *Garmon*'s antecedents and a near-majority of the *Garmon* Court itself found no preemption of state damages remedies merely because conduct was prohibited (much less arguably prohibited) and reme- diable through the NLRA's scheme of administrative enforcement and equitable remedies. Given the widespread allowance of co-existing state law and federal administrative remedies in other areas of employment law since *Garmon*, the Court's continued lip-service to its now outdated rationale is puzzling, particularly given the newly revitalized presumption against preemption.

Furthermore, apart from the question of whether states may supplement NLRB remedies for conduct prohibited by the New Deal-era collective bargaining statutes, under the interpretational approach urged herein, the NLRB would be displaced as the exclusive forum for resolving disputes over whether conduct fell within the protections or prohibitions of federal law. While notions of primary agency jurisdiction might still result in deferral of state jurisdiction pending the outcome of NLRB proceedings, the time has passed when distrust of courts, even state law courts, justifies a judicially-created preemption doctrine. Moreover, in the larger context of federal labor law, it is evident that state court judges already are swimming in federal labor law: (1) state courts have concurrent jurisdiction to interpret and enforce collective bargaining agreements under federal law; (2) state court judges must apply

551. *Id.* at 253.
552. See *id.* at 250-52.
553. See *supra* parts IV.C, V.
554. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508-09 (1962); Local 174,
“one of the most intricate structures of legal theory” in deciding ques-
tions of preemption,555 (3) state courts have concurrent jurisdiction to
decide claims that the union has breached its duty of fair representation
to employees under the federal labor laws,556 and (4) state courts decide
questions of arbitrability and enforcement of arbitration awards under
the federal labor law.557 It is merely an illusion to think that federal
labor law questions arise exclusively before the NLRB. In the absence
of more explicit congressional action, the Garmon doctrine should be
discarded.

Of course, to say that the sister sovereigns retain jurisdiction in labor
relations except when state regulation actually conflicts with federal
rights or prohibitions will merely redirect the judicial inquiry in many
cases. The courts and the NLRB must continue to elucidate what con-
duct is protected or condemned by federal labor law in order to know
whether specific state regulation is preempted. For example, Brown v.
Hotel & Restaurant Employees & Bartenders International Union Local
54558 raised the question of whether the employees’ right to form and
join organizations “of their own choosing” under section 7 of the
NLRA559 preempted a New Jersey statute that required unions repre-
senting casino employees to register with the state and submit to state
requirements for eligibility for office in such unions such as a ban on
certain felons.560 Thus the case presented the question of how far section
7 rights extended to preempt state regulation of corrupt practices.

Justice O’Connor’s opinion in Brown provides a model for the type of
analysis urged in this Article. Rather than mechanically repeating the
mantra of traditional labor law doctrine broadly construing employees’
section 7 rights under federal law,561 Justice O’Connor looked outside
the collective bargaining statutes to the broader landscape of other fed-
eral statutes regulating unions. Because the 1959 Landrum-Griffin
Act562 affirmatively regulated internal union affairs previously unregu-
lated by federal law, and because that Act also disqualified certain felons
from holding union office, the majority opinion563 found obsolete the

555. See supra notes 511-12.
557. See infra note 696 and cases cited therein.
560. See Brown, 468 U.S. at 494. Forty years earlier the Court had invalidated a Flor-
ida licensing statute for union business agent. See Hill v. Florida ex rel. Watson, 325 U.S.
538, 541-43 (1945).
561. For example, the section 7 right to select a collective bargaining agent includes
the right to select an individual rather than merely a union. See 29 U.S.C. § 152(4)
(1988); See Brown, 468 U.S. at 515 n.4 (White, J., dissenting).
562. Most of the Landrum-Griffin Act is more formally known as the Labor-Manage-
563. However, only three Justices joined Justice O’Connor’s opinion. Three justices
dissented, and two others took no part in the decision on the case. Additionally, even the
notion that employee section 7 rights were absolute. Further, the Court noted that the Landrum-Griffin Act expressly disclaimed general preemption of state regulation over internal union affairs and answered the NLRA preemption question in light of the policy of non-preemption announced in Landrum-Griffin. Justice O'Connor's opinion therefore looked at the precise issue presented—whether all state regulation of corruption in labor organizations representing casino employees was clearly and manifestly preempted by section 7—in light of the overall system manifested in all federal labor relations statutes, not just the one being narrowly construed. This Article argues for an even broader inquiry into the entire complex system of the American law of the workplace as manifested in federal employment law statutes and traditional state regulation taken as a whole.

2. Machinists Preemption

This branch of current Supreme Court labor law preemption doctrine, unlike the Garmon doctrine, rests on a sound interpretational footing. The substantive policies of federal labor law extend beyond outlawing certain private conduct, or affirmatively protecting other conduct from interference by private parties. In addition, "the NLRA prevents a State from regulating within a protected zone... [including] a zone protected and reserved for market freedom."

The New Deal labor relations statutes leave a great deal to "self-help" by the parties—a union may resort to unprotected slowdown strikes, for example, and an employer may counter with firings of the slowdown strikers—all without violation by either party of the NLRA. Under current law an employer may permanently replace economic strikers, but a union can properly insist on reinstatement of the strikers as a condition of settlement even though the employer promised the permanent

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564. See 468 U.S. at 505-06. LMRDA, § 603(a) provides: "Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer... under any... laws of any State..." 29 U.S.C. § 523 (1988).

565. It is striking that the FAA case, Perry v. Thomas, 482 U.S. 483 (1987), held that a federal law, which upheld arbitration clauses, preempted a state law that allowed judicial remedy even under a contract containing an arbitration clause. The case does not even discuss the historic role of the states in the regulation of such claims, or the explicit policy of the Fair Labor Standards Act not to preempt state law in this aspect of the employment relationship. The approach followed in Brown, 468 U.S. 491 (1984), is a superior means for ascertaining any "clear and manifest" intent to preempt.


replacements jobs beyond the strike. Similarly, after bargaining in good faith to impasse, an employer may unilaterally implement changes in wages, hours, and working conditions that had been rejected by the union, or lockout employees to force a settlement in many disputes. These “free play” rights rest upon a familiar view of labor relations:

One of the eternal conflicts out of which life is made up is that between the effort of every [person] to get the most he [or she] can for his [or her] services, and that of society, disguised under the name of capital, to get his [or her] services for the least possible return.

The New Deal-era labor relations statutes took this premise and made the “free play of economic forces” an integral part of the statutory scheme.

Whether one agrees or disagrees with any particular application of the “free play of economic forces” doctrine, some conduct not remedial through NLRB unfair labor practice procedures nonetheless finds protection under the NLRA. This conduct falls within a zone of self-help rights affirmatively left to the parties. Perhaps, as many argue, the New Deal statutes, as interpreted by the courts, leave more self-help remedies in the hands of employers than employees and unions. But given the permissible range of self-help remedies left to labor and management, preemption necessarily follows as a matter of conflicts doctrine whenever a state attempts to restrict such self-help options affirmatively guaranteed under the Act.

572. “The Court . . . recognized in pre-emption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces.” Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 144 (1976).
574. Machinists, 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)). This premise of the New Deal collective bargaining statutes is, however, under attack. See, e.g., Crain, Images of Power, supra note 83, at 487-89, 498-510 (attacking “patriarchal visions of power” as domination and contraband adversarial assumptions of NLRA and proposing a communitarian model of power dispersion); Stone, supra note 7, at 641-42 (suggesting a “nexus of contracts” model of expanded collected bargaining with labor and employees viewed as one stakeholder in the corporate enterprise along with customers, lenders, investors and managers); Christopher T. Wonnell, The Influen
tial Myth of a Generalized Conflict of Interests Between Labor and Management, 81 Geo. L.J. 39, 56-67, 70-76 (1992) (using microeconomic analysis to attack New Deal assumption of inherent conflict between labor and management, and suggesting that the model of inherent conflict applies primarily in industries and settings with high fixed costs wherein organized labor “confiscates” a portion of fixed cost investments, to the detriment of unorganized members of the working class, or “ex ante workers,” not working in high profit/high fixed cost plants).
575. See Lesnick, supra note 508, at 480 & n.53.
576. See James B. Atleson, Values and Assumptions in American Labor Law 35-43 (1983); Klare, supra note 77, at 266-67; Stone, supra note 79, at 1548-52; see generally Weiler, supra note 10.
The question in Machinists preemption cases therefore turns less on preemption doctrine *per se* and more on the question of what range of activity Congress meant to protect within the Act's "self-help" premises. Like the Title VII preemption case, *California Federal Savings & Loan Ass'n v. Guerra*, the preemption issue in this context essentially turns on the question of how properly to construe the substantive commands of the federal statute, rather than any complex question revolving around whether Congress meant such commands to be exclusive. If a federal statute commands a particular self-help remedy under the NLRA, a particular standard for pregnancy-related leave under Title VII and the Pregnancy Discrimination Act, or a particular minimum wage under the FLSA, state commands to the contrary necessarily and "manifestly" conflict with the federal enactment. Properly viewed, these cases are preemption cases only in the sense that judicial delineation of the commands expressed in the positive law created by Congress necessarily also define the point at which the constitutionally sound doctrine of "actual conflicts" preemption triggers.

Applying this analysis to the Court's Machinists preemption jurisprudence explains the cases. In the recent *Boston Harbor* case, the Court held that an agency charged with cleaning up Boston Harbor could properly contract with "union only" contractors because the Act allows such arrangements in the construction industry, and more generally allows any buyer of labor to freely choose union labor. In the *Boston Harbor* case the Water Resources Authority acted as a proprietor and market participant. However, when the City of Los Angeles attempted to condition renewal of a taxicab license/franchise on settlement of a labor dispute between the cab company and the union representing the cab company's employees, the Court held that the city acted as a regulator, and its exercise of its otherwise valid governmental powers interfered with the free play of market forces in resolving a particular labor dispute. Note that the right to resort to market forces under the New Deal labor relations statutes does not carry immunity from traditional


578. In *Guerra*, for example, the same issue would have arisen from purely private, as opposed to state-commanded action. That is, if a private employer voluntarily granted preferential treatment for maternity as opposed to other disabilities, the same question of interpretation under the PDA's "same as" language would have arisen.

579. The constitutionally based presumption against preemption is clearly and manifestly overcome when state regulation conflicts with rights, be they self-help rights or other rights, protected by federal law.


581. See *id.* at 1196.

general police power regulation of the substantive terms and conditions of employment. The history of the New Deal labor legislation, and reference to the larger system of law governing the workplace, indicate that Congress did not intend to restrict such state regulation. In any event, the presumption against preemption defeats such a claim.\footnote{583}

The application of this analysis does change the outcome of one decision. \textit{Wisconsin Department of Industry, Labor, & Human Relations v. Gould Inc.}\footnote{584} involved a state law "debarring" recidivist unfair labor practice offenders \textit{from doing business with the state}.\footnote{585} The Court held that the prohibited prong of the \textit{Garmon} preemption doctrine preempted the state statute, and rejected the argument that Wisconsin was acting as a market participant in deciding to refuse state business to a repeat unfair labor practice offender.\footnote{586}

The \textit{Gould} holding was correct under the traditional \textit{Garmon} analysis. The Wisconsin "debarment" statute definitely regulated conduct "arguably prohibited by the NLRA." To the extent the case rests on a \textit{Machinists} "free play of market forces" analysis, however, it makes no sense. As a market participant, a state should be free to choose not to do business with firms that the NLRB finds guilty of multiple unfair labor practices. Private entities, for example, General Motors or Microsoft, could lawfully adopt such a policy. Given \textit{Boston Harbor},\footnote{587} the state of Wisconsin, if it made \textit{ad hoc} decisions against utilizing the offender in deciding upon each state contract, could also adopt this policy.\footnote{588} Certainly, as an interpretive matter, this state participation in the labor market does not "clearly and manifestly" conflict with the NLRA or Congress' intent.

3. Section 301 Preemption

\textit{Section 301}\footnote{589} preemption is the preemption doctrine most in need of


585. The Wisconsin statute barred firms found guilty by the NLRB of three unfair labor practices within a five year period from eligibility for state contracts. \textit{See id.} at 283-84.

586. \textit{See id.} at 289-91.


588. Of course, in addition to \textit{Garmon}, such state decisions, even if made \textit{ad hoc}, might violate other state law requirements, such as statutes requiring contracts to be awarded on the basis of competitive bidding.

589. \textit{Section 301} preemption refers to \textsection{301(a)} of the Labor Management Relations (Taft-Hartley) Act (LMRA), 61 Stat. 156 (1947) (codified at 29 U.S.C. \textsection{185(a)} (1988)). \textsection{Section 301} provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
revision. For twenty years the doctrine, quite properly, limited the application of state law to claims for breach of collective bargaining agreements. A uniform body of federal labor contract law was required to avoid conflicting state and federal rules for the same contracts.\textsuperscript{590} However, this labor law preemption doctrine "says nothing about the substance of what private parties may agree to in a labor contract."\textsuperscript{591}

While there may be instances in which the [New Deal labor relations statute] pre-empts state law on the basis of the subject matter of the law in question, section 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.\textsuperscript{592}

However, in a series of five cases beginning in 1985,\textsuperscript{593} the Supreme Court began applying section 301 preemption doctrine to the many state individual rights claims asserting non-contract rights.

Under now conventional section 301 preemption analysis, state law claims are preempted only if "an application of state law . . . requires the interpretation of a collective-bargaining agreement."\textsuperscript{594} In \textit{Lingle v.}

\begin{itemize}
  \item 590. \textit{See}, e.g., \textit{Avco Corp. v. Aero Lodge No. 735}, 390 U.S. 557, 560 (1968) (holding federal law controls over anything arising from § 301); \textit{Humphrey v. Moore}, 375 U.S. 335, 343-44 (1964) (section 301 suits controlled by federal law even when brought in state court); \textit{Local 174, Teamsters v. Lucas Flour Co.}, 369 U.S. 95, 105 (1962) (Court looked to both federal court holdings and NLRB conclusions to determine federal law); \textit{Charles Dowd Box Co. v. Courtney}, 368 U.S. 502, 514 (1962) (Court accepts that federal courts will differ on this issue).
  \item 591. \textit{Allis-Chalmers Corp. v. Lueck}, 471 U.S. 202, 211 (1985). "Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." \textit{Id.} at 211-12.
  \item 593. \textit{See supra} note 267.
  \item 594. \textit{Lingle}, 486 U.S. at 413. An exception exists where the interpretation of the collective bargaining agreement merely affects the damages or other relief to which an employee may be entitled. \textit{See id.} at 413 n.12.

\end{itemize}

Other cases, and some commentators, occasionally frame the test somewhat differently. \textit{See}, e.g., \textit{Jones v. General Motors Corp.}, 939 F.2d 380, 383 (6th Cir. 1991) (applying § 301 to preempt state claim based on alleged breach of grievance settlement agreement; although asserting that § 301 preemption applies even when labor contract issues are not presented, the court apparently did not realize that grievance settlement agreement between union and employer is a collective bargaining agreement, and that one must interpret and apply it to decide whether a settlement agreement has been breached); \textit{Schlacter-Jones v. General Tel.}, 936 F.2d 435, 442 (9th Cir. 1991) (§ 301 preempted state law claims concerning drug testing; despite dicta, court's holding rests squarely on proposition that in order to determine tort claims, conditions that prevail under CBA must be considered); \textit{Stone}, \textit{supra} note 7, at 605-06, 616-18 (artificially distinguishing between "contract-interpretation issues raised by the employer in defense" and contract issues presented by claims that the collective bargaining agreement contains a waiver of the asserted individual right); \textit{see also} \textit{Stone}, \textit{supra} note 7, at 617-18 (arguing that \textit{Schlacter-Jones} extends § 301 to any "working conditions" that are within the scope of the collective bargaining agreements).
Norge Division of Magic Chef, Inc., the Supreme Court rejected a section 301 preemption attack on a state tort claim for retaliation against a worker who filed a workers' compensation claim for workplace injury; the alleged wrong was grievable to arbitration under a clause requiring "just cause" for discipline in the collective labor contract. In denying the preemption claim, the Court explained that "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for section 301 pre-emption purposes." Lingle generally established symmetry in the law of the workplace at two levels: (1) unionized workers were generally to retain the same status-based rights under state law as non-unionized employees, and (2) state law individual rights and remedies were to co-exist with collectively bargained remedies, just as individual rights claims under federal statutes such as Title VII, the FLSA, the


596. After Lingle, many courts have rejected § 301 preemption claims in the retaliation context. See Stone, supra note 7, at 608 & n.136. However, prior to Lingle some lower courts held such claims preempted under § 301 and commentators divided on the question. Compare Abraham, supra note 544, at 756-62 (arguing that state and federal laws can be applied equally to all employees, without regard to union membership) and Anthony Herman, Wrongful Discharge Actions After Lueck and Metropolitan Life Insurance: The Erosion of Individual Rights and Collective Strength?, 9 Indus. Rel. L.J. 596, 639-58 (1987) (generally arguing against such preemption) with Susan F. Kinyon & Josef Rohlik, "Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees, 30 St. Louis U. L.J. 1, 64 (1985) (arguing that "no identifiable policy reason can be found why state interests should not yield to federal policy favoring arbitration in the area of traditionally arbitrated labor disputes") and Raymond L. Wheeler & Kingsley R. Browne, Federal Preemption of State Wrongful Discharge Actions, 8 Indus. Rel. L.J. 1, 33-43 (1986) (arguing for a balancing of federal and state interests, and non-preemption only where the state acts pursuant to a clearly defined, narrowly tailored public policy).

597. 486 U.S. at 409-10. In Lingle, the Seventh Circuit joined those favoring broad § 301 preemption of state tort claims raising the "same facts" as those that would be presented in a grievance arbitration under a just cause, or other clause of a collective bargaining agreement. See id. at 401, 408-10. Lingle followed the implications of Caterpillar Inc. v. Williams, 482 U.S. 386, 396 (1987), which held that a state law individual contract claim was not removable to federal court, because "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement." Id. at 396; see Lingle, 486 U.S. at 408-10 & n.10.

598. See Lingle, 486 U.S. at 408-10. "For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, § 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." Id. at 408-90.

"This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, [in a collective labor contract], barred from bringing claims under federal statutes. . . . [N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a
FELA, and other federal enactments have long been held to co-exist with remedies provided in collective bargaining contracts.\(^{599}\)

Despite its surface simplicity, the doctrine retains a schizophrenic aspect.\(^{600}\) In the seminal 1985 case, *Allis-Chalmers Corp. v. Lueck*,\(^{601}\) the Supreme Court preempted an action for breach of an insurer's covenant of good faith and fair dealing.\(^{602}\) The employee alleged that his employer and the insurer purposefully, and in bad faith, harassed him by repeated delays in processing his disability claims.\(^{603}\) The Court found that "[i]n extending the pre-emptive effect of section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."\(^{604}\) Consequently, "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements."\(^{605}\) Because the collective bargaining agreement in this case incorporated the disability insurance plan by reference,\(^ {606}\) the state tort claim was "inextricably intertwined" with the terms of the labor contract,\(^ {607}\) and thus preempted

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*statute designed to provide minimum substantive guarantees to individual workers.*

Although our comments in *Buell* . . . referred to independent federal statutory rights, we subsequently rejected a claim that federal labor law pre-empted a state statute . . . .

*Id.* at 411-12 (citations omitted); *see also* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19, 22 (1987) (in the event of a plant closure, state severance pay statute is not preempted by NLRA or ERISA); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985) (state statute mandating that employee health plan include mental health benefits not preempted by New Deal collective bargaining statutes; however, ERISA preempted such state enactments to extent applied to self-insured employees).


\(^ {602}\) *See id.* at 216.

\(^ {603}\) *See id.* at 205.

\(^ {604}\) *Id.* at 212.

\(^ {605}\) *Id.* at 213.

\(^ {606}\) *See id.* at 204.

by federal law.608 This would be the case even if the collective labor agreement governing the claim of a unionized employee provided no relief for actions for which employers of non-unionized employees would be liable under state tort law.609

The tension between Lingle and Lueck confounds lawyers and judges as they struggle to apply the doctrine consistently. In 1991, the American Bar Association's ("ABA") Committee on Labor Arbitration and the Law of Collective Bargaining Agreements reported that the United States courts of appeal often disagree on application of the Lingle-Lueck analysis, and that the existing doctrine "leaves a great deal of room for courts to find preemption whenever they want to find it."610 After reviewing inconsistencies in the federal courts of appeal, the ABA Committee Report noted that the "district courts were no more illuminating than the circuit courts on the issue of how far section 301 preemption reaches."611

The courts have also confessed bewilderment. As the Ninth Circuit began one opinion:

With this case, we revisit the field of labor law by asking a familiar question: Are an employee's claims, in this instance alleging assault and battery and intentional infliction of emotional distress, preempted by Section 301 of the Labor Management Relations Act (LMRA)? Familiarity, however, has not bred facility. There is no sure route through the thicket and, as we face this problem anew, we once again must hack our way through the tangled and confusing interplay between federal and state law.612

In another recent case, the Fourth Circuit split four to three en banc. The dissenting judges "disagree[d] fundamentally with the majority's view of the way in which the preemption effect of section 301 upon state-

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608. See Lueck, 471 U.S. at 218.  
609. See id. at 215-16. Lueck also illustrates how hydra-headed labor law preemption doctrine has become: courts frequently disagree about which doctrine applies to a particular set of facts. Thus, in Lueck, the Wisconsin Court of Appeals held that the employee's state tort claim was preempted under the Garmon prong of labor law preemption for activities arguably prohibited by the NLRA. See id. at 206 & n.3. But the Supreme Court held that the state claim was preempted under section 301. See id. at 220-21.  
611. Id. at 758.  
612. Galvez v. Kuhn, 933 F.2d 773, 774 (9th Cir. 1991); see also Livadas v. Aubry, 943 F.2d 1140, 1149 (9th Cir.) (dissenting judge accuses majority of "divining some preemptive corona around the federal labor laws"), amended, 987 F.2d 552 (9th Cir. 1991); Singh v. Trustees of Estate of Lunalilo, 779 F. Supp. 1265, 1267-68 (D. Haw. 1991) (federal district court judge complains of difficulty in reconciling "dozens, if not hundreds" of § 301 cases).
law tort claims is to be analyzed.\footnote{McCormick v. AT&T Technologies, Inc., 934 F.2d 531, 538 (4th Cir. 1991) (Phillips, J., dissenting), cert. denied, 112 S. Ct. 912 (1992).} This Article now reviews the language of section 301 and the interpretative principles developed earlier.

On its face, section 301 is a jurisdictional statute. Section 301(a) of the LMRA provides:

\begin{quote}
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.\footnote{29 U.S.C. § 185(a) (1988 & Supp. IV 1992).}
\end{quote}

Yet the entire federal common law of labor contracts—from the Steelworkers Trilogy\footnote{See United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The “Trilogy” announced strong presumptions in favor of the arbitrability of collective contract claims, and in favor of the enforcement of arbitration awards. See American Mfg., 363 U.S. at 568; Warrior & Gulf, 363 U.S. at 585; Enterprise Wheel, 363 U.S. at 596.} to the Boys Markets\footnote{Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970). Boys Markets held that “no strike” clauses were specifically enforceable notwithstanding the Norris-La Guardia Act’s broad policy barring injunctions in labor disputes. See id. at 254-55.} rule to the Misco\footnote{United Paperworkers Int’l Union v. Misco, 484 U.S. 29 (1987). In Misco, the Court upheld an arbitrator’s award reinstating an employee who apparently was smoking and dealing marijuana, see id. at 36, but generally confirmed a public policy exception to the enforcement of arbitration awards, see id. at 42-45.} public policy doctrine to section 301 preemption doctrine—sits atop this statute.\footnote{Although the Supreme Court’s 1957 decision in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458-59 (1957) (interpreting § 301 as a substantive grant of authority to the federal courts to fashion a uniform body of federal labor law in construing and applying collective labor contracts), is not the subject of this Article, it is worth noting that this expansive reading was both controversial at the time, and arguably necessary to uphold the constitutionality of the statute. See generally Donald H. Wollett & Harry H. Wellington, Federalism and Breach of the Labor Agreement, 7 Stan. L. Rev. 445 (1955). Felix Frankfurter, dissenting in Lincoln Mills, thought § 301 a “plainly procedural” statute, and declared that the majority was “attributing to the section an occult content” in “transmut[ing it] into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining.” Lincoln Mills, 353 U.S. at 461 (Frankfurter, J., dissenting). Two concurring Justices agreed with Justice Frankfurter that the statute conferred no right to apply substantive federal law. See id. at 459-60 (Burton, J., and Harlan, J., concurring in the result). Because Justice Black took no part in the decision, see id. at 459, a bare majority of the Court adopted the Lincoln Mills doctrine.} Section 301, far from constituting a clear and manifest declaration of congressional intent to displace state authority, was not even an express authorization for the fashioning of federal rules in this area.\footnote{For contemporaneous comment on Lincoln Mills, see Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957).}
In addition, the legislative history of section 301 is devoid of any necessary preemptive intent with respect to non-contract state claims. For example, as the Senate Report states somewhat ambiguously, "the aggrieved party should . . . have a right of action in the Federal courts. . . . The laws of many States make it difficult to sue effectively and to recover a judgement against an unincorporated labor union." 620

As noted previously, however, a preemptive intent need not be expressly stated in the words of a statute or in its legislative history. 621 Implied conflicts preemption theory, upon which labor law preemption rests, assumes preemption whenever state authority conflicts with the substantive commands of the federal statute. 622 In Local 174, Teamsters v. Lucas Flour, 623 the Supreme Court, consistent with its holding in the famous Lincoln Mills case, 624 announced that substantive federal labor law was to be the exclusive body of law applied to collective bargaining agreements. 625 "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 626 A few years later, the Court held that not only does Lincoln Mills control the application of federal law in section 301 suits, but also that a state court suit to enforce a "no strike clause" was removable to federal court. 627 As later cases explained, section 301 had extraordinary "preemptive force . . . so powerful [for removal purposes] as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" 628 But from these sound principles, the law took a wrong turn in the Lingle-Lueck extension of section 301 to contract claim preemption of state law tort and statutory individual rights claims.

The key to understanding the source of this now-obvious interpretational error is to realize that the 1962 Lucas Flour 629 case (upon which the Lingle-Lueck doctrine ultimately rests) did not displace state court authority to decide issues under a collective labor contract. Indeed Lucas Flour concerned a state court proceeding that the Supreme Court

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621. See supra part V.C.
622. See supra notes 516-22, 536-44 and accompanying notes.
624. See supra note 618.
625. See Lucas Flour, 369 U.S. at 103.
626. Id.
629. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); infra notes 630, 696.
That same year, the Court expressly upheld concurrent state court jurisdiction to enforce labor agreements under section 301; when individual rights claims flooded into the courts a generation later, there was thus no problem of institutional competence in allowing state court judges to interpret and apply collective labor agreements. Nor is any issue concerning the primary agency jurisdiction of the NLRB involved in section 301 preemption doctrine. Therefore, the Court needed only to require courts to decide state law individual rights claims in a manner consistent with the federal common law of labor contracts—a body of common law long entrusted to the state courts. However, the Court instead extended traditional section 301 contract claim preemption to state law statutory and tort claims that require the interpretation of collective bargaining contracts.

Quite simply, as has happened before in the field of labor law, the Supreme Court mesmerized itself. The long-shining bright light of grievance-arbitration dazzled the court, perhaps made more blinding by the joint position of the national AFL-CIO and National Chamber of Commerce in Allis-Chalmers. But as Justice Stewart stated in another famous section 301 decision, wisdom need not be rejected "merely because it comes late." A much simpler solution exists to the problems that understandably confounded the court.

Section 301 preemption of state law individual non-contract claims should be abrogated. In its place, the Court, pursuant to its Lincoln Mills authority to fashion a uniform federal law of collective labor contracts, should adopt the following rule: any state individual rights claim asserted by either party which raises issues of collective bargaining agreement interpretation should be submitted to arbitration pendente lite for

630. Lucas Flour involved an employer's Washington state court action for damages after a union struck over a contested firing rather than seek grievance arbitration as provided in the labor agreement. See Lucas Flour, 369 U.S. at 97-98. The state courts awarded damages, though the collective agreement contained no express no-strike clause. See id. The Supreme Court found this proper, under federal Lincoln Mills contract law because a promise to arbitrate disputes necessarily implied an undertaking not to strike over disputes. See id. at 105-06.

631. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962). In Charles Dowd, the Court held that the state courts must apply the federal law of labor contracts developed under Lincoln Mills. See id. at 507-09, 514.


634. In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), the AFL-CIO and the National Chamber of Commerce both filed amicus briefs supporting the claims for pre-emption. See 85 L. Ed. 2d 896 (1985) (listing appearances of counsel); supra note 525 and accompanying text.

resolution of the collective contract issue.\textsuperscript{636} Once the arbitrator resolves interpretational issues, the federal or state court should resolve the state law non-contract individual rights claim based upon the arbitration ruling.

This re-interpretation of section 301 would reconcile its preemption doctrine with the presumption against preemption. It would protect both the state individual rights claims of unionized employees and the rights and interests of employers and unions in having their labor contract interpreted and applied by an experienced labor arbitrator. It would more appropriately preserve the prerogatives of the states to apply their substantive law even-handedly to the claims of unionized and non-unionized employees alike. Such a revision would rationalize this area of labor law within the broader framework of general employment law pre-emption and, indeed, the emerging framework for deciding preemption issues in areas outside labor and employment law.

\textbf{D. The Policy or Normative Perspective on Labor Law Preemption}

This Article argues that current labor law doctrine, particularly the Garmon primary agency jurisdiction doctrine and section 301 preemption as applied to non-contract state claims, violates now generally settled interpretive principles for deciding issues of shared federal-state authority, and represents inappropriate judicial tampering with the constitutionally presumed division of powers. However, this Article now considers whether current doctrine is supportable from a policy, as opposed to an interpretational, perspective. Viewed from this perspective, the question might be asked: Should Congress act to preserve the broad preemptive reach of the labor relations statutes? The policy analysis confirms that current federal preemption doctrine unnecessarily and harmfully restricts the authority of the sister sovereigns.

\textbf{1. The NLRB's Primary Agency Jurisdiction}

Two related policy rationales underlie the Garmon\textsuperscript{637} doctrine's primary agency jurisdiction rationale for federal preemption: (1) the interest in uniformity and (2) the expertise of the National Labor Relations Board in shaping a uniform federal labor relations policy. Neither retains its former force in light of larger developments in the American law of the workplace.

This Article turns first to the expertise argument. The New Deal-era labor legislation, like much New Deal social legislation, placed an

\textsuperscript{636} Not only has the court's authority under Lincoln Mills been utilized to fashion current § 301 preemption doctrine, but Lincoln Mills supported the judicial amendment of the Norris-La Guardia Anti-Injunction Act in Boys Markets and its progeny. The proposed modification of the judge-made Lincoln Mills law of federal labor contracts represents a far less intrusive incursion into prerogatives established in the Constitution and state law.

\textsuperscript{637} San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)
inordinate amount of confidence in an administrative agency, the NLRB, to flesh out and operationalize the general policies of the Wagner Act. But the general faith in administrative agencies, particularly in the "command and control" model, has waned.\textsuperscript{638} Moreover, the courts routinely overrule the NLRB on questions of labor policy.\textsuperscript{639}

For a variety of reasons, the courts have played a far more significant role than the Act’s drafters contemplated. The courts have used the enforcement process to incorporate into the NLRA their own visions of desirable labor relations policies, rejecting with regularity the Board’s legal conclusions, its policy determinations and its findings of fact.\textsuperscript{640}

To a degree, the NLRB, with its constantly shifting doctrines depending on the federal political administration, has fueled this disdain for following the board’s “expertise.”\textsuperscript{641} On many issues the expertise of the NLRB in prior cases can be invoked on both sides of the policy divide.\textsuperscript{642} Moreover, board processes—no right to hearing, limited enforcement staff, no subpoena power or cross-examination unless a hearing is held, limited relief, long delays—severely limit the utility of unfair labor practice proceedings to enforce the Act.\textsuperscript{643} Quite simply, the thrill of a labor relations policy made by the NLRB is gone.

The uniformity rationale fares no better. Preliminarily, there is little “uniformity” in the present system. The NLRB refuses to be bound, other than in the particular case at hand, by the labor law rulings of the lower federal courts. Clients wanting to know what the legal rules are must sometimes be advised that the NLRB has one rule, the relevant federal court of appeal another, and other circuit courts, and perhaps ultimately the Supreme Court, still another.\textsuperscript{644}


\textsuperscript{639.} See, e.g., Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 849-50 (1992) (holding that the NLRB erred in concluding that management’s labor practices were unfair).

\textsuperscript{640.} See Cox, Labor Law, supra note 39, at 112-13 (depending on whether elements of law are involved in the issues under review, the Court has freely exercised its own judgment); Getman & Pogrebin, supra note 39, at 7-8; cf. Ursula M. McDonnell, Note, \textit{Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?}, 58 U. Cinn. L. Rev. 653, 687 (1989) (concluding that the inconsistency in the law of labor-management relations results from both the great degree of court deference to NLRB decisions, and the NLRB’s failure to commit itself to a single position on a given issue through the use of rule-making).


\textsuperscript{642.} See Getman & Pogrebin, supra note 39, at 6-7.


\textsuperscript{644.} The NLRB, of course, honors Court of Appeals decisions in particular cases, but declines to give them controlling precedential effect even in subsequent cases arising in
More fundamentally as a policy issue, the states already retain an important role in many aspects of labor relations under current law. First, under current preemption doctrine, for example, state tort law may be applied to union and management activities involving violence, threats, blockages, trespass, defamation, fraud, the intentional infliction of emotional distress and other tortious conduct in labor disputes. Indeed one reason the courts have struggled to define a consistent and principled basis for preemption doctrine is that many labor relations activities intertwine with such traditional areas of state concern and are not easily separable. Second, the states remain free to legislate substantive standards which labor unions and employers must include in their bargains. For example, a state requirement for medical insurance for all employees or state-mandated severance pay escapes preemption under existing law.

Third, even under the federal labor relations statutes, the states are free to decide upon a basic issue in any labor relations policy—whether membership or financial support of a union bargaining agent may be compelled. Under the “right-to-work” laws authorized by section 14-B of the Taft-Hartley Act, the states may adopt laws that displace the rights that unions would otherwise have against “free riders” under federal labor law. Many of the states in the American South, Southwest, Plains, and Rocky Mountains areas operate under such laws now deeply imbedded in local culture. Not surprisingly, the percentage of unionization in the right-to-work states remains, on average, less than half the percentage of unionization in states that follow the federal rule of compulsory in-lieu-of-dues payments by non-members. Arguments for a uniform federal labor law fashioned with the administrative expertise of the NLRB must confront the reality that the NLRA leaves an issue basic to any regime of collective labor relations to state control.

Finally, in several important areas of labor law, state courts have long enforced important legal obligations. For example, collective bargaining agreements or agreements to arbitrate may be enforced in state courts.

For more than thirty years state courts have applied and followed the same circuit. The United States Circuit Courts of Appeals frequently disagree with each other on NLRA issues. See Cox, Labor Law, supra note 39, at 12-13.

645. See supra note 535-39 and accompanying text.


650. See Freeman & Medoff, supra note 70, at 243; Weiler, supra note 45.

uniform federal labor law of contracts authorized by the Lincoln Mills case. Additionally, state courts, again applying federal labor law, have concurrent jurisdiction with federal courts to hear and decide claims against unions for violating the duty of fair representation to employees. Finally, the states continue to play a role in the regulation of internal union affairs.

These matters of labor relations law extend far beyond the merely peripheral or interstitial aspects of labor relations. Rather these aspects—tort law restrictions on labor activities, regulation of the substantive terms of employment, the "right-to-work" issue, the enforcement of labor contracts, the enforcement of the duty of fair representation, and the regulation of internal union affairs—go to the heart of a system by which employees bargain collectively for the terms of employment with their employers. Claims that delicately balanced federal policies cannot be disturbed by state action, or that the NLRB alone possesses the requisite expertise to construe and elaborate on federal policies, must be weighed in light of this wide-ranging role still given to the states in our federal labor relations scheme.

From a broader perspective, one must consider the normative arguments for exclusive NLRB regulation of labor-management relations in context. Without massive upheaval in the structure of laws governing the workplace, most aspects of employment law outside the labor relations context remain subject to state regulation. This is true throughout the broad range of workplace issues: from status discrimination and sexual harassment, to workplace safety, to child labor and minimum wage legislation, to privacy and family issues. Even in the employee benefit plan area heavily regulated by ERISA, exceptions for domestic relations orders affecting pensions and for state insurance regulation leave a major role for state level policy-making. The regulation of unions and management in collective labor relations no longer dominates as the only source of employee and employer rights and duties. Like the country cottage gradually surrounded by urban development, the federal labor laws are now but a small part of the landscape of employment law.


655. See Silverstein, supra note 7, at 3.

656. See supra parts VI.B.1-2.

657. Even law school curricula, belatedly, are now changing. "Labor Law" courses are giving way to courses in "Employment Law." See, e.g., Estreicher & Harper, supra note 164; Finkin, supra note 40; Rothstein, supra note 88. For a comparison of these
Because employers operating within the United States already must conform their personnel practices to a wide variety of state level requirements, the arguments for strict uniformity in labor relations law are substantially diminished.

Rather than using the NLRB's jurisdiction as a rationale for broad preemption of state laws touching labor relations, a doctrine more suited to the situation would simply be to defer state authority pending NLRB adjudication of a dispute. As Professor Bryson pointed out twenty years ago, as presently applied the NLRB's jurisdiction is not so much "primary," as it is "exclusive." A proper application of the concept of "primary" agency jurisdiction would merely require that disputes be decided in the first instance by the NLRB, and not that the authority of the sister sovereign states be supplanted altogether. Persons who believe federal labor law protects their conduct, or prohibits their adversary's conduct, may of course file a charge under the NLRB's unfair labor practice procedures asserting that claim; where such a charge, or a complaint filed by the NLRB Regional Director formally prosecuting such a charge, is pending, the Act may easily be read, as indeed it is already, as displacing a related state claim temporarily.

Indeed, experimentation at the state level may well be necessary to breathe new life into the moribund condition of private-sector unionization. For example, several writers agree that the states should be given more freedom than has traditionally been the case in providing remedies for anti-union discrimination within the well-established tort of wrongful discharge in violation of public policy. Public sector unionization—


658. See Bryson, supra note 508, at 1039, n.8; 3 Kenneth C. Davis, Administrative Law Treatise, § 19.01 at 2-3 n.7 (1958).

659. This is essentially existing doctrine under Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 192-98 (1978) (holding that union that fails to file unfair labor practice charge asserting that its picketing was protected under the NLRA may not claim Garmon primary agency jurisdiction preemption in defense of state court repass action).

660. One often senses that many employers assume the alternative to collective bargaining is a return to individual employee-employer control of the terms of employment or, in practical terms, control by the employer. However, the individual rights revolution provides another alternative: direct governmental regulation through the political. Presently, the FLSA, Title VII, the ADEA, OSHA, ERISA, the Polygraph Act, WARN, the ADA, etc. exist on the federal level, to say nothing of the far more pervasive system of direct regulation at the state level. Professor Gottesman provides a relatively concise summary of theories and arguments for and against individual contracts, collective contracts, and direct governmental regulation. See Gottesman, supra note 14, at 2771-809. If workers cannot effectively seek protections against sexual harassment, sudden plant closings, or polygraphs, or benefits such as family leave and medical insurance coverage of mental health, through the private-ordering techniques of collective bargaining, then they will band together in voluntary associations not organized around the workplace, and seek such protections and benefits in the political process.

661. See Finkin, Back to the Future, supra note 515 at 1018-19 (1991); Gottesman,
the one area of substantial union growth during the past twenty-five years—falls for the most part under the governance of state, not federal, laws. The public sector experience cautions against any assumption that the states cannot play a helpful role in revitalizing private-sector collective bargaining.\textsuperscript{662}

To be sure, proposals abound for the revitalization of the New Deal collective bargaining system through reform at the federal level.\textsuperscript{663} Regardless of whether any of these proposals are approved by Congress, however, a greater role for labor relations by the states is an option that should not be dismissed lightly. Certainly when viewing the larger evolving legal system that now governs the workplace, and the vital role historically played by the states in that evolution, it is as easy to expect wisdom in labor relations policy to originate at the state level as in Washington, D.C.


\textsuperscript{663}. Again, many voices from both the left and right seek, not the repeal, but the "reform" of the New Deal labor relations statutes. The howls of labor leaders during the early years of the "Reagan Board" still ring in this former union-side labor lawyer's ears. \textit{See generally} Paul Alan Levy, \textit{The Unidimensional Perspective of the Reagan Labor Board,} 16 Rutgers L.J. 269 (1985). As Professor Modjeska described it, the Reagan Board decisions represented "substantial deregulation" of employer conduct. \textit{See Modjeska, supra} note 53, at 131. Writing from the perspective of feminist jurisprudence, in contrast, Professor Crain calls for restructuring

the current republican system of allocation, with its overlay of representation and exclusivity predicated on both internal and external union hierarchies, [which] reinforces and perpetuates the internal division and factionalization of the labor movement[, which Crain would replace with] a communitarian structure, wherein multiple and overlapping communities of workers can cooperate with one another in the process of direct action empowerment.

\textit{Crain, Images of Power, supra} note 83, at 536.

2. Section 301 Preemption of State Statutory and Tort Claims

Unlike the Garmon and Machinists branches of labor law preemption doctrine, section 301 preemption doctrine does not implicate the national labor policy directly. Section 301 "says nothing about the substance of what private parties may agree to in a labor contract." Although the Garmon and Machinists doctrines preempt state law based on the subject matter in question, section 301 preemption ensures only that federal law will be used to interpret collective bargaining agreements. Further, section 301 does not affect the substantive rights that states may provide to workers when adjudication does not depend on the interpretation of collective bargaining agreements.

The desire to protect arbitration as the federally preferred forum for resolving disputes over collective bargaining agreements underlies the extension of traditional section 301 preemption to state law individual rights claims. At the same time, the Supreme Court wanted to preserve, insofar as possible, the individual rights claims of unionized employees on a par with those of non-unionized employees. It would stand the policy of the Wagner Act "on its head," said the Court, to hold that unionized employees with rights under collective labor contracts automatically forfeited individual state law rights enjoyed by their non-union brothers and sisters.

The Supreme Court's solution in the Lingle-Lueck line of section 301 cases suffers both from over-inclusiveness and under-inclusiveness, however. The Lingle-Lueck test makes preemption turn on whether resolution of the state law individual rights claim requires interpretation or application of some term of the collective bargaining agreement. Such issues will typically be relevant in many cases which are commonly thought not to be preempted by section 301.

In Lingle, for example, the state wrongful discharge action, based on alleged retaliation for Ms. Lingle's filing of a workers' compensation claim, ostensibly involved no issue of labor contract interpretation. However, in the absence of a "smoking gun" admission, as any trial lawyer knows, to decide whether employees like Ms. Lingle suffered retaliation, it may well be necessary to consider many issues requiring interpretation of a labor contract—issues such as the normal contract

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664. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-12 (1985) ("Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.").
666. See id.
667. The traditional doctrine simply embodied the common sense notion that in construing labor contracts negotiated under the federal labor laws, one body of contract law, rather than fifty-one, should be applied.
670. See Lingle, 486 U.S. at 408.
practices in assignments, layoffs, and discipline of employees. Yet under *Lingle*, a jury or judge may be called upon to consider the question of motivation, very often proof depending on *circumstantial* evidence, without any expert interpretation or application of the frequently complicated and jargon-laden collective bargaining agreement.

In addition, state law status discrimination claims usually survive section 301 preemption attacks.\(^6\)\(^7\) However, just as deciding the issue of pretext in an alleged retaliation case may involve inquiry into practices under a collective labor agreement, the labor contract may also be relevant in deciding a status discrimination controversy. For example, disabilities discrimination claims typically require reasonable accommodation. In a unionized shop, determining what is reasonable may depend, in part, upon the seniority, job bidding, and assignment rights of the plaintiff and other employees—rights often defined in some way in the union contract.\(^6\)\(^7\) Yet most disabilities claims escape section 301 preemption.\(^6\)\(^7\)

From an employer's standpoint, consider the prospect of facing a state court jury in a case where the employer asserts a particular accommodation is unreasonable based on complicated provisions in the union contract, perhaps interpreted in the light of bargaining history, past practice, the law of the shop, and industry practice.\(^6\)\(^7\) On the other hand, no preemption seems appropriate because labor law section 301 doctrine should not be considered in a vacuum. Congress made clear in the federal employment discrimination statutes that the states retain joint authority in the status discrimination area. Yet, present doctrine amounts to an "all or nothing" approach: either the state claim falls to the preemption axe, or it does not. The doctrine does not simultaneously protect the employee's individual rights claim and the employer's or union's right to have the labor contract interpreted by an arbitrator.\(^6\)\(^7\)

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673. See, e.g., Smolarek v. Chrysler Corp., 879 F.2d 1326, 1335 (6th Cir.) (holding that discrimination and retaliation claims were not preempted by LMRA), *cert. denied*, 493 U.S. 992 (1989); Miller v. AT & T and Network Sys., 850 F.2d 543, 550 (9th Cir. 1988) (holding that no § 301 state law handicap preemption claim under statute which required reasonable accommodation even though assignment rights of employees were governed by CBA). *But see* DesJardins v. Budd Co., 438 N.W.2d 622, 624 (Mich. Ct. App. 1988) (holding that state handicap claim preempted by § 301).

674. On the construction of labor contracts see Cox, Labor Law, *supra* note 39, at 740-75. As the Supreme Court made clear in *Lingle*, a central tenant of the *Lingle-Lueck* preemption analysis is that "it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lingle* v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 (1988).

675. Many other state claims besides status discrimination cases withstand the § 301 preemption analysis, even in unionized workplaces. *See*, e.g., Operating Eng'rs Pension Trust v. Wilson, 915 F.2d 535, 540 (9th Cir. 1990) (holding that fraud in the inducement claim against union not preempted), *cert. denied*, 112 S. Ct. 3013 (1992); Fox v. Parker
Other state cases involving individual rights claims repeat this pattern. For example, state law privacy claims\textsuperscript{676} and intentional infliction of emotional distress claims\textsuperscript{677} appear with increasing frequency in workplace disputes. But when unionized employees bring such claims, at least where a union contract is in effect, section 301 stands in their path; conversely, when such claims escape section 301 preemption, employers find that bargained-for arbitration procedures are ignored. Workplace privacy claims often involve an examination of the reasonableness of the employee’s expectation of privacy.\textsuperscript{678} When those claims—for example, a challenge to a drug testing requirement—are in unionized workplaces governed by the New Deal collective bargaining statutes, the courts usually hold them preempted under section 301.\textsuperscript{679} The Ninth Circuit’s reasoning in \textit{Stikes v. Chevron USA, Inc.}\textsuperscript{680} is typical. Under California law, the right to privacy turns “in major part upon the parties’ reasonable expectations [that], of necessity, involve [an analysis of] the working conditions agreed upon in the collective bargaining agreement.”\textsuperscript{681} Similarly, workplace tort claims for intentional infliction of emotional distress by outrageous conduct often fail to overcome the section 301 preemption hurdle in unionized workplaces.\textsuperscript{682} Again, these courts typically reason


\textsuperscript{679} See Schlacter-Jones v. General Tel., 936 F.2d 435, 442 (9th Cir. 1991); Stikes v. Chevron USA, Inc., 914 F.2d 1265, 1269-70 (9th Cir. 1990), cert. denied, 111 S. Ct. 2015 (1991); Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 120 (1st Cir. 1988), cert. denied, 490 U.S. 1107 (1989); Utility Workers, Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1087 (9th Cir. 1988), cert. denied, 489 U.S. 1078 (1989); Strachan v. Union Oil Co., 768 F.2d 703, 705 (5th Cir. 1985); Stone, \textit{supra} note 7, at 607.

\textsuperscript{680} 914 F.2d 1265 (9th Cir. 1990).

\textsuperscript{681} \textit{Id.} at 1270; \textit{see also} Jackson, 863 F.2d at 117 (“balancing . . . the various factors inherent in the situation” and noting that the employee’s “claimed right to privacy is enmeshed in the collective bargaining pact”).

\textsuperscript{682} \textit{See, e.g.,} Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1088 (9th Cir. 1991) (stating that the portion of claim for refusal of light duty to employee, whose doctor recommended it after she experienced abdominal pain during pregnancy was preempted); Adkins v. General Motors Corp., 946 F.2d 1201, 1208-11 (6th Cir. 1991) (claiming that information was improperly withheld in connection with negotiation of collective bargaining agreement, preempted), cert. denied, 112 S. Ct. 1936 (1992); McCormick v. AT&T Technologies, Inc., 934 F.2d 531, 534-35 (4th Cir. 1991) (alleging careless dispo-
that the "outrageous conduct" element of the tort cannot be determined except by reference to the terms and conditions of employment established in the collective labor agreement.683

The intentional infliction cases, however, go both ways. Several cases hold that such claims can be resolved without reference to the union contract.684 In *Hanks v. General Motors Corp.*,685 for example, the Eighth Circuit found it possible to determine the element of "outrageous conduct" without interpreting the union contract.686 The employee worked under a supervisor who had been arrested for allegedly sexually assaulting the plaintiff's daughter, and the company failed or refused to reassign the employee.687 While the case may have been a sympathetic one, and while the court reached the correct result under the approach suggested in this Article, the *Hanks* case illustrates the inadequacy of the current doctrinal framework. It is simply not true that even such an egregious case can be decided without considering the terms of the labor contract. As the district court held, the contract addressed the assignment rights of Hanks and was at least relevant on the question of whether GM's conduct was outrageous and intended to inflict severe emotional distress.688

The poverty of present section 301 preemption doctrine is further illustrated by *United Steelworkers v. Rawson*.689 The families of miners killed...
in a mine disaster brought negligence claims against a union, but their claims were blocked by section 301. The survivors sued the miners' union for alleged negligence in inspecting the mines as provided in a collective bargaining agreement. The union inspections relied upon by the now-dead miners had allegedly failed to notice that "the self-rescuers were stored in boxes with padlocks or that the activating valves of the oxygen-breathing-apparatuses were corroded shut."\textsuperscript{690} The majority of the Court held that section 301 barred the claim.

If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement. . . . Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law. "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort."\textsuperscript{691}

The reasoning in Rawson, however, is flawed for several reasons.\textsuperscript{692} As the majority acknowledges in a later portion of the opinion, "a labor union . . . may assume a responsibility towards employees by accepting a duty of care through a contractual agreement.'"\textsuperscript{693} The Court then itself construed the agreement, and held that it did not "creat[e] rights directly enforceable by the individual employees against the Union [because] . . . the provisions . . . relied on . . . are not promises by the Union to the employer [but] rather, concessions made by the employer to the Union, a


691. Id. at 371 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985)). However, as the three dissenters pointed out, the Idaho Supreme Court, in upholding the state law negligence claim, did not do so on the basis of any contractual interpretation, but rather on the basis of the duty to inspect that "it is conceded the union undertook." \textit{Id.} at 378 (Kennedy, J., dissenting) (quoting Rawson v. United Steelworkers of America, 770 P.2d 794, 796 (Idaho 1988)). Under the Restatement (Second) of Torts, adopted as the law of Idaho, an undertaking creates a duty to exercise reasonable care to avoid physical harm where reliance has been placed on the undertaking; thus, the miner's families could have proven the negligence claim without reliance on the terms of the labor contract. \textit{See id.} at 377-79. For extensive discussion of the general problem presented in cases like Rawson and Hechler, see Lorraine Schmall, \textit{Workplace Safety and the Union's Duty After Lueck and Hechler}, 38 Kan. L. Rev. 561 (1990).

692. Of course, unions do sometimes face tort liability for physical injuries which occur while business agents and other officers are attempting to carry out their responsibilities. For example, if an employee and business agent get into an altercation over, say, hiring hall practices, and the union officer assaults the employee, the union in certain circumstances may be held liable. Neither unions nor their officers carry a general immunity to tort liability. Nor should they. The same point could be made with respect to strikeline violence cases.

693. Rawson, 495 U.S. at 374 (quoting Electrical Workers v. Hechler, 481 U.S. 851, 860 (1987)).
limited surrender of the employer's exclusive authority over mine safety." This was entirely appropriate, for section 301 expresses a "strong policy favoring judicial enforcement of collective-bargaining contracts."

This raises an interesting question: assuming that the Supreme Court correctly interpreted the parties' intent in the Rawson contract, why was the state tort claim deemed preempted as opposed to merely wrongly decided? After all, state courts retain concurrent jurisdiction to interpret and apply labor contracts under section 301. If the Supreme Court, rather than a labor arbitrator for example, properly construed the Rawson labor contract, applying uniform principles of federal labor law, why then could the Idaho Supreme Court not do the same? To be sure, a state court, or a lower federal court for that matter, might err in its contract interpretation, or ignore applicable principles of the "uniform federal labor law" developed under Lincoln Mills. However, that should logically be an occasion for reversal on the merits, not preemption. Why can state courts construe labor contracts in deciding contract claims, but cannot construe labor contracts in deciding state law tort or statutory claims?

To illustrate this latter point, suppose the Rawson labor contract clearly was intended to create enforceable rights and a union duty to inspect the mines with due care. Would the negligence claim of the miners' families then become "unpreempted?" Nothing in the Lingle-Lueck analysis, whether a labor contract must be interpreted or applied, suggests any such notion.

This illustrates, as well, another problem with the Lingle-Lueck formulation. Employers and unions may claim that the labor contract includes a waiver of the state individual rights claim. Because the union

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694. Id. at 374-75. In this portion of the opinion, the Court addressed an alternative claim under § 301 that the miners and their survivors were third party beneficiaries of the labor agreement.


697. See Lincoln Mills, 353 U.S. at 456.

698. A recent decision by Judge Posner illustrates this point. See Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union Local 705 v. Schneider Tank Lines, Inc., 958 F.2d 171, 173 (7th Cir. 1992) (describing the necessity of a just-cause clause in the collective bargaining agreement to obtain federal court jurisdiction).

699. This is true even if an employee's state law claim arises totally independently of the labor contract, and even if the labor contract is irrelevant as an evidentiary matter to the issues to be decided. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409-10 n.9 (1988); Stone, supra note 7, at 606; Stephanie R. Marcus, Note, The Need for a
contract must be interpreted to determine the issue of waiver, this application of *Lingle-Lueck* threatens to preempt automatically even if in fact a proper construction of the contract results in a finding of non-waiver.700 Ironically, if such an independent state claim were brought in state court, the defense of waiver would not provide a basis for removal to a federal court, and the state court would have to decide the complicated federal law preemption and waiver issues.701

Not only does the *Lingle-Lueck* doctrine fail to preserve, in many situations, the state law individual rights claims of unionized employees on a par with their non-unionized counterparts, the doctrine makes preemption turn on the fortuity of whether the union has a collective bargaining agreement with the employer. This anomaly arises from the fact that section 301 has no application where a union contract expires before agreement on a successor contract, nor in the situation when first contract bargaining continues.702 It does not make sense to say that, for example, a claim of tortious intentional infliction of emotional distress may be heard under state law when it is based on facts that occurred while there was no labor contract, but not if the facts occurred while there was a collective labor contract.

The policy rationales—and the interest of consistency in our employment law—point toward non-preemption. The concern for preserving the primacy of labor arbitrators in construing labor contracts is valid—but that can be accommodated by far less drastic measures than preemption. For example, a simple rule requiring arbitration of all questions and issues arising under a collective bargaining agreement *pendente lite*

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702. See, e.g., *Overby v. Chevron USA, Inc.*, 884 F.2d 470, 474 (9th Cir. 1989) ("[S]tate law claims based on an expired collective bargaining agreement are not preempted by section 301."); *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Admin.*, 783 F.2d 919, 921 (9th Cir. 1986) (holding that district court lacked subject matter jurisdiction based on expired collective bargaining agreement and expired separate trust agreement). In these situations—where there is no collective labor contract in effect—the rationale for § 301 preemption, the availability of arbitration to resolve interpretational issues and the need for "uniform" interpretation of the labor contract under federal law, simply does not exist.

Ironically, a recent Supreme Court decision, *Litton Financial Printing Div. v. NLRB*, 111 S. Ct. 2215 (1991), limits the availability of grievance arbitration in the expired-contract situation. Under *Litton*, the normal "Steelworkers' Trilogy" presumption in favor of grievance arbitration expires with the contract except: (1) when the facts giving rise to the grievance occurred before expiration, or (2) when rights accrued, or vested, during the contract term. *See id.* at 2227; *cf.* *Nolde Bros. Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (presumption that grievance arbitration clause remains in effect upon contract expiration).
would suffice. Under such a rule, the parties to the labor contract would receive the expert opinion for which they contracted, and unionized employees would receive an adjudication on the merits of their state law individual rights claims based on the arbitrator's ruling. Both interests would be served and protected. Unionized employees would not find themselves with fewer individual rights claims than their non-unionized fellow employees, nor fewer rights than other unionized employees working without a labor contract. Whether employees should have so many state law individual rights claims is a normatively debatable question. Whether these rights as exist should apply equally to unionized employees and to non-unionized employees is not.

CONCLUSION

Although initially unnoticed, an overall and complicated system of workplace law has evolved over the decades. Shared state and federal authority is currently the rule. It is time to begin viewing employment law preemption issues from this larger perspective. Moreover, employment law preemption doctrine should fit within the general framework for deciding such issues in other areas of our economic and social life. Lawyers and judges in the hustings can and do apply federal labor and employment law with the same sophistication as lawyers and administrative judges operating out of Washington, D.C. The *New York Times* lands on our doorsteps each morning at 5:00 a.m. Lexis and Westlaw office and home computer terminals give us access to most publications and cases at the same instant as they are available in Washington or New York or Los Angeles. It is time that labor and employment law too, came into the post-modern age. Not all wise decisions emanate from centralized authority; indeed, history teaches that perhaps most do not.

703. Not only has the Court's authority under *Lincoln Mills* been utilized to fashion current section 301 preemption doctrine, see *Lingle v. Norge Div. of Magic Chef, Inc*, 486 U.S. 399, 403 (1988), but *Lincoln Mills* supported the judicial amendment of the Norris-La Guardia Anti-Injunction Act in *Boys Markets*, 398 U.S. 235 (1970), and its progeny. The proposed modification of the judge-made *Lincoln Mills* law of federal labor contracts represents a far less intrusive incursion into prerogatives established in the Constitution or federal statutory law.