Just Cause We Can: Ending At-Will Employment and Avoiding Preemption

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Unlike most European countries, the United States does not generally provide "just-cause" protections for its employees, meaning most workers are employed "at will" and may be terminated for any reason whatsoever. Although federal and state laws shield many workers from discriminatory and retaliatory firings, these protections are not enough. States and municipalities can and should legislate additional safeguards, especially in low-wage industries most affected by employee turnover.

This Note argues that federal labor law does not preempt state laws and city ordinances that provide just-cause protections to workers. The Note begins by reviewing at-will employment in the United States and Machinists *preemption, a doctrine that precludes state and local regulation of those aspects of labor-management relations that Congress intended to be regulated by market forces. After analyzing the circuits' differing applications of the* Machinists *preemption doctrine, this Note argues that just-cause laws are best understood as setting permissible, minimum labor standards rather than as impermissibly interfering in the collective-bargaining process. Under such an interpretation, it follows then, that state and local just-cause laws should not be preempted by the federal National Labor Relations Act. The Note concludes by providing recommendations to states and municipalities on how best to structure their just-cause legislation, leveraging lessons learned from recent and decades-old statutes and case law.*

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"No worker should be left jobless for unjust reasons—especially not in the middle of a pandemic and after all the risks they have borne on behalf of all of us."[1]

INTRODUCTION

On January 5, 2021, then-New York City Mayor Bill de Blasio signed into law two bills protecting nearly 70,000 local, fast-food workers.[2] The laws enacted a major shield for workers in an industry marred by unexpected terminations and intolerable working conditions.[3] These bills—Introduction 1396-A and Introduction 1415-A—provide that certain fast-food employers may not discharge employees or reduce their average hours by more than fifteen percent without "just cause."[4] Employers with bona fide economic reasons may lay off otherwise covered employees so long as they do so in reverse order of seniority, support the decisions with business records, and reinstate those employees before new ones are hired.[5] In the words of then-Mayor de Blasio, "[t]hese bills will provide crucial job stability and protections for fast food workers on the front lines."[6]

These just-cause protections are not, however, guaranteed. Already, the laws have found themselves in the crosshairs: in June

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1. *Mayor de Blasio Signs "Just Cause" Worker Protection Bills for Fast Food Employees*, NYC.GOV (Jan. 5, 2021), https://www1.nyc.gov/office-of-the-mayor/news/005-21/mayor-de-blasio-signs-just-cause-worker-protection-bills-fast-food-employees [https://perma.cc/25X4-U9PT] (quoting New York City Department of Consumer and Worker Protection Commissioner, Lorelei Salas).

2. *Id.*

3. A 2019 survey of New York City's fast-food workers found that fifty percent had been "fired, laid off, or compelled to quit a fast-food job due to intolerable working conditions." Sixty-five percent of the fast-food workers surveyed, indicated that their employers had terminated them without providing a reason for doing so. *See* CTR. FOR POPULAR DEMOCRACY, FIRED ON A WHIM: THE PRECARIOUS EXISTENCE OF NYC FAST-FOOD WORKERS 1 (Feb. 2019), https://s27147.pcdn.co/wp-content/uploads/Just-Cause-February-2019.pdf [https://perma.cc/LZ2D-92U3].

4. The legislation applies to fast-food chains with thirty or more establishments nationally and protects all employees after a thirty-day probationary period. N.Y.C. Admin. Code § 20-1201 (effective July 4, 2021). "Just cause" includes both the failure to satisfactorily perform one's job duties or the engagement in misconduct harmful to the employer's legitimate business interests. Before firing a covered employee, the employer must first have consistently utilized a progressive disciplinary policy in an effort to correct whatever employee behavior is harming the business. N.Y.C. Admin. Code §§ 20-1201; 20-1271–20-1275 (effective July 4, 2021).

5. N.Y.C. Admin. Code § 20-1272 (effective July 4, 2021).

6. *Mayor de Blasio Signs "Just Cause" Worker Protection Bills for Fast Food Employees*, *supra* note 1.

2021, a restaurant advocacy group challenged the laws on a number of grounds, chief among them that the just-cause protections they afford are preempted by the National Labor Relations Act (NLRA).[7] Although the district court initially upheld the laws in February 2022,[8] the case is on appeal before the Second Circuit.[9]

As this battle winds its way through the federal courts, the implications go beyond just one city, one industry, and one federal judicial district. Philadelphia, for example, passed a law in 2019 providing just-cause protections to roughly 1,000 parking lot attendants after seven workers were fired in the preceding ten months for speaking out against poor working conditions and low pay.[10] Illinois, spurred on by a coalition of unions and policy organizations, is also contemplating a just-cause law.[11] Given the significant political barriers to labor law reform at the federal level, just-cause reform, like most labor law reform, has only been successful at the state and local levels.[12] Future just-cause reform will likely occur on these same battlegrounds, as employers and industry groups continue to challenge just-cause laws primarily on the basis that they are preempted by the NLRA.

This Note argues that federal labor law does not preempt state and local just-cause protections for workers. Part I of this Note describes the landscape of at-will employment in the United States and scholars' discussions of the problem of labor law reform and NLRA preemption. Part II examines the various labor law preemption doctrines under the NLRA. Part III looks at how different circuits have applied the Supreme Court cases interpreting the NLRA and labor law preemption with a focus on

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7. Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022).

8. *See id.* at 377 (finding New York City's just-cause laws were not preempted by the NLRA).

9. *See* Brief for Appellant, Rest. L. Ctr. v. City of New York (No. 22-491) (2d Cir. June 22, 2022).

10. Juliana Feliciano Reyes, *City Council Approves 'Just-Cause,' a Cutting-Edge Worker Protection Law, for the Parking Industry*, INQUIRER (May 16, 2019), https://www.inquirer.com/news/just-cause-firing-bill-philadelphia-parking-lot-workers-seiu-32bj-20190516.html [https://perma.cc/L8K4-LBEB].

11. *See* Jeff Schuhrke, *The Movement to End At-Will Employment Is Getting Serious*, IN THESE TIMES (Apr. 6, 2021), https://inthesetimes.com/article/at-will-just-cause-employment-union-labor-illinois [https://perma.cc/3UCQ-QV2X].

12. *See* Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1155 (2011) ("[W]hile preemption prevents states and cities from enacting labor law through traditional channels, it has not stopped state and local reconstruction of the federal rules through alternative means.").

Machinists and minimum labor standards. Part IV reconciles these different interpretations and concludes that just-cause laws should not be preempted under *Machinists* or other labor law preemption doctrines and should instead be understood as permissible protective minimum labor standards. This Note then closes in Part V with recommendations on how best to structure just-cause legislation at the state and local levels to avoid preemption, while also protecting the workers most in need.

I. AT-WILL EMPLOYMENT EXPLAINED

The legality of at-will employment stretches back to before the automobile,[13] when a Tennessee state court held in 1884 that a railroad employer had the right to fire its employees for any reason whatsoever, even for merely buying goods from an out-of-favor merchant.[14] The rule is based on liberty and mutuality of obligation: if the employee is free to quit at any time for any reason, then the employer is also free to discharge its employees.[15] Logically, then, an employer may dismiss an employee at any time "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."[16]

The at-will employment rule is now well-entrenched in American common law; however, the United States is one of only a few Western nations that sanctions it as the default paradigm.[17] Thirty-six countries have ratified Article 4 to the International Labour Organization Convention 158, which provides that "[t]he employment of a worker shall not be terminated unless there is a

13. *The First Automobile*, THE MERCEDES-BENZ GRP., https://group.mercedes-benz.com/company/tradition/company-history/1885-1886.html [https://perma.cc/7JG9-QZJJ] ("On January 29, 1886, Carl Benz applied for a patent for his 'vehicle powered by a gas engine.' The patent—number 37435—may be regarded as the birth certificate of the automobile. In July 1886 the newspapers reported on the first public outing of the three-wheeled Benz Patent Motor Car, model no. 1.").

14. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507 (1884).

15. *See id.* at 520 ("Trade is free; so is employment. The law leaves employer and employe to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employe may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty.").

16. *Id.* at 519–20.

17. *See* Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 311 (1985) ("We seem to stand virtually alone among the nations of the Western industrialized world in not providing general protection against unjust discharge for private-sector employees who either cannot or do not choose unionism.").

valid reason for such termination."[18] Additionally, Australia, Canada, Germany, the Netherlands, Sweden, and the United Kingdom all have their own just-cause provisions shielding employees from arbitrary dismissals,[19] which has led to reduced firings and better recruitment—at least in the United Kingdom.[20]

This arrangement does not mean that U.S. workers are completely without protection—many federal laws exist to prevent employees from being fired on account of their sex, race, ethnicity, age, whistleblower, or disability status.[21] Courts have also recognized limited exceptions to the at-will relationship in the form of both implied contracts[22] and implied covenants of good faith and fair dealing,[23] or when the public policy so requires.[24] The development of these exceptions occurred primarily through state law.[25] Still, the exceptions have remained narrow, and while courts could create further carve-outs through the common law, state and municipal legislation has historically been more successful in creating greater protections for workers whose

18. KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 7 (Jan. 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/KK2V-4MGX]; ILO Convention 158 art. IV (effective Nov. 23, 1985). *See* INT'L LAB. ORG., *Ratifications of C158—Termination of Employment Convention, 1982 (No. 158)*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 [https://perma.cc/SMR8-K4LN] (listing the ratifying and denouncing countries).

19. *See* ANDRIAS & HERTEL-FERNANDEZ, *supra* note 18, at 49. Of these six countries, Australia and Sweden have also ratified Article 4 to ILO Convention 158. Only Brazil has denounced the provision. *See* INT'L LAB. ORG., *supra* note 18.

20. *See* Ioana Marinescu, *Job Security Legislation and Job Duration: Evidence from the United Kingdom*, 27 J. LAB. ECON. 465, 467 (2009). In the UK, a 1999 reform lowered the tenure necessary to qualify for protection against unfair dismissal from twenty-four months to twelve months. *Id.* at 466. Marinescu's study of the U.K. labor market revealed that this policy significantly decreased the incidence of termination by nineteen percent for employees with less than a year of tenure, and twenty-six percent for employees with twelve to twenty-three months' tenure. *Id.* at 467. Marinescu further found that the decrease in terminations of employees with less than a year of tenure was due to an increase in the quality of new hires and improved recruitment practices after the policy change. *Id.*

21. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000; Age Discrimination in Employment Act, 29 U.S.C. § 621; Whistleblower Protection Act, 15 U.S.C. § 2087; Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

22. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981).

23. *See, e.g.*, Khanna v. Microdata Corp., 215 Cal. Rptr. 860 (Cal. Ct. App. 1985).

24. *See, e.g.*, Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806 (Va. 1996).

25. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 162 (2009); *see also* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719 (1991) (noting that increasing exceptions to the employment-at-will doctrine came through state supreme courts in the 1980s).

employment statuses would otherwise be left to the whims of their employers.

Just-cause legislation at the state and local level is not new.[26] Montana's Wrongful Dismissal From Employment Act (WDFEA) has been on the books for thirty-five years, though no other state has followed suit.[27] Montana's WDFEA provides that a discharge is wrongful if (1) done in response to an employee's unwillingness to violate public policy or for reporting such a violation; (2) it was not for good cause and the employee completed the requisite probationary period; or (3) the employer violated its own written personnel policy.[28] A wrongfully discharged employee may recover up to four years of lost wages and fringe benefits,[29] as well as punitive damages in appropriate circumstances where the employer "engaged in actual fraud or malice in the discharge."[30] Similarly, both Puerto Rico and the Virgin Islands, two U.S. territories, have long-standing just-cause laws barring employee dismissals without cause, though they have distinct descriptions of what constitutes a just-cause discharge.[31] Many public sector

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26. Clyde Summers argued nearly fifty years ago for the abandonment of the anachronistic legal rule of at-will employment and in favor of extended protection via arbitration against unjust dismissal for employees not covered by collective agreements. *See* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484 (1976).

27. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to 39-2-915. Montana's WDFEA was amended in 2021 to be (even) more employer-friendly, increasing the default probationary period by six months and limiting damages by deducting unemployment benefits, early retirement pay, and other setoffs. *See* Act of Mar. 31, 2021, 2021 Mont. Laws ch.117, at 319 (amending the WDFEA).

28. MONT. CODE ANN. §§ 39-2-901–15.

29. *Id.* at § 39-2-903(4) ("'Fringe benefits' means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.").

30. *Id.*

31. The Puerto Rico statute does not contain a specific definition of "just-cause discharge," but explains that just cause exists where: the employee engages in a pattern of improper or disorderly conduct; the employee incurs a performance pattern that is deficient, inefficient, unsatisfactory, poor, tardy, or negligent; and the employee repeatedly violates reasonable rules and regulations set forth by the employer of which (s)he has timely received a written copy. P.R. LAWS ANN. tit. 29, §§ 185a–m. The Virgin Islands statute states an employer may dismiss any employee: who engages in a business which conflicts with his duties to his or her employer; whose offensive conduct toward a customer injures the employer's business; whose use of intoxicants or controlled substances interferes with his or her duties; who willfully and intentionally disobeys reasonable and lawful orders; who performs his or her work negligently, or whose continuous absences affect his or her employer; who is incompetent, inefficient, or dishonest. V.I. CODE ANN. tit. 24, §§ 76–79. Both laws still permit employers to terminate employees as a result of cessations of business operations or general cutbacks due to economic hardship. V.I. CODE ANN. tit. 24, §§ 76(c); P.R. LAWS ANN. tit. 29, §§ 185(b).

employees also enjoy just-cause protections; these workers are expressly excluded from the NLRA.[32]

State law has historically led the way for federal labor and employment law reform in the areas of status discrimination, wage and hour regulation, workplace safety, family leave, privacy, and more.[33] This trend has continued, as states again acted first to prohibit employment discrimination on the basis of sexual orientation, years before the Supreme Court decided *Bostock v. Clayton County* in 2020.[34] State wage and hour regulation preceded federal legislation by a quarter century, and states today make the decision whether to go above the federal minimum wage.[35] The field of employment law shows the effectiveness of shared state and federal policymaking.[36]

In contrast to states' past pioneering reforms, commentators like Professor Jeffrey Hirsch argue that states should not be given more power to govern the workplace. Hirsch believes that exclusive, federal regulation would eliminate problems of enforcement, reduce compliance costs, and produce a more effective and economically competitive workplace governance regimes—reasons grounded in principles of policy and preemption.[37] Others, like Professor David Gregory, believe that the labor preemption doctrine has already been eroded—weakening federal labor policy. Without the NLRA's

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32. 29 U.S.C. § 152 ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . .").

33. *See* Drummonds, *supra* note 25, at 154–63. For example, Minnesota's anti-discrimination statute, the Minnesota Human Rights Act, which dates back to 1955, prohibits discrimination in employment based on race, gender, religion, or national origin. 1955 Minn. Laws Ch. 516, § 1, at 803 (current version codified at MINN STAT. § 363A.02). States also provided common law damages, remedies, and jury trials for sexual harassment both before and after the 1991 Civil Rights Act did so under federal anti-discrimination law. *See* Drummonds, *supra* note 25, at 155–56.

34. *See, e.g.*, HAW. REV. STAT. § 378-2 (outlawing employment discrimination on the basis of sexual orientation in 1991—nearly three decades before *Bostock*); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

35. *History of the Minimum Wage*, RAISE THE MINIMUM WAGE, https://raisetheminimumwage.com/history/ [https://perma.cc/WS9L-BWDY] ("The first minimum wage law in the United States was established in 1912 in the state of Massachusetts. . . . [I]n 1938—at the height of the Great Depression—Congress established the first federal minimum wage as part of the Fair Labor Standards Act. . . . Today . . . 29 states plus D.C. have wage rates higher than the federal minimum wage.").

36. *See* Drummonds, *supra* note 25, at 162–63.

37. *See* Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225, 225–28 (2008).

centralization of labor policy, "state courts will yield a volatile checkerboard of inconsistent decisions, and labor law practice will disintegrate into raw forum shopping."[38]

Professor Michael Gottesman provides a different perspective, arguing that "the NLRA does not wholly preempt the states' ability to adopt laws facilitating unionization and enhancing employee leverage in collective bargaining with employers."[39] He argues that the Supreme Court in *Garmon*[40] and *Machinists*[41] adopted preemption rules that correctly struck down the challenged state laws in those cases, but that the cases' rules are overbroad and invalidate other state laws that are consistent with the NLRA's collective bargaining regime.[42] Professor Gottesman identifies, for example, the danger inherent in *Machinists* jurisprudence as inferring preemption based on court-discerned rights that are not expressed in the NLRA, leaving lower courts to resolve these questions.[43] A presumption against preemption is therefore both proper and constitutionally favored,[44] an analytical perspective that is key in understanding just-cause legislation as setting permissible, minimum labor standards, as explained in Part III, *infra*.

Although some commentators to address the relationship between wrongful discharge actions and federal labor law preemption have suggested that statutes banning all terminations without just cause should avoid preemption,[45] others have feared

38. David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 509 (1986).

39. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 355 (1990).

40. San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236 (1959).

41. Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976).

42. Gottesman, *supra* note 39, at 356.

43. *Id.* at 381.

44. *See id.* at 391–94 (arguing that constitutional interests such as federalism and the proper roles of the legislative and judicial branches of the federal government dictate that a presumption against preemption is proper and faithful to the Court's understanding when the Wagner and Taft-Hartley Acts were passed); *see also* Cal. v. Arc Am. Corp., 400 U.S. 93, 101 (1989) (noting a "presumption against finding preemption of state law in areas traditionally regulated by the States").

45. *See* 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, 638 (1987). Focusing squarely on preemption under Section 301 of the Labor Management Relations Act, Herman argues that if a state were to promulgate a nonwaivable, non-negotiable cause of action—written without consideration of any existing labor agreement and not rooted in a contract—proscribing all terminations without just

that states' and localities' conferral of too many significant benefits on behalf of one party may unsettle the labor-management balance contemplated by Congress and reduce the use of arbitration in resolving employment disputes.[46] However, these scholars' limited discussions—which were likely motivated by the then-recent Supreme Court decisions concerning *Machinists* preemption in *Metropolitan Life Ins. Co. v. Massachusetts* (1985) and *Fort Halifax Packing v. Coyne* (1987)—are now over three decades old. In the meantime, circuit courts have developed their own definitions of what a "minimum labor standard" means, arguably straying from the Court's guidance without new binding precedent to correct their course.[47] This Note goes beyond any scholarship on the topic, delving into recent case law to explore the circuit split as to what qualifies as a valid minimum labor standard under *Machinists* and to offer recommendations for how to structure just-cause statutes to avoid preemption.

II. THE NLRA AND FEDERAL LABOR LAW PREEMPTION

The 1935 passage of the NLRA, also called the "Wagner Act," signaled a fundamental change in national labor policy. Congress recognized that collective labor organization into bargaining units with economic power produces benefits for the entire economy, such as higher wages, increased job security, and improved

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cause, the cause of action would not be preempted. *Id.* at 637–38. Even though the cause of action would overlap with a labor agreement, following the Supreme Court's principles in *Lueck* and *Metropolitan Life*, cognizability under such an agreement is immaterial; rather, the operative test is whether the cause of action would exist but for the agreement, and all derivative claims must be preempted. *See id.* at 634, 638; *see also* William B. Gould IV et al., *When State and Federal Laws Collide: Preemption—Nightmare or Opportunity?*, 9 INDUS. REL. L.J. 4, 29 (1987) (arguing that a wrongful discharge statute with a just-cause standard ought to cover union activity and other activity normally enveloped by a collective bargaining agreement, and would not be preempted by *Machinists* under the "common application theory" recognized in *New York Telephone* and approved by the Supreme Court in *Metropolitan Life Insurance*).

46. *See* Raymond L. Wheeler & Kingsley R. Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1, 40–41 (1986); *see also* John E. Gardner, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491, 554–55 (1989).

47. Despite confusion generated by the Seventh Circuit's decision in *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008), discussed *infra* Part III.B, the Supreme Court denied certiorari. *See also* Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 87 n.8 (2d Cir. 2015) (distinguishing Seventh and Ninth Circuit decisions concerning potential minimum labor standards from a New York total compensation requirement law).

working conditions.[48] Concerned with the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized," the statute protected collective bargaining activities and created a regulatory scheme to be administered by an independent agency, the National Labor Relations Board (NLRB). In addition, the Act granted the NLRB with the exclusive power to implement the legislation's policies.[49] Over time, the Supreme Court made clear that states were without power to enforce overlapping rules.[50] For example, New York[51] and Wisconsin[52] were prohibited from applying provisions of "Little Wagner Acts," and the Court stripped state employment relations boards of any power to grant relief for violations of the NLRA.[53] In order to develop a coherent, national labor policy, the Court also clarified that the NLRB must be the first to consider any issues that fell precisely within its regulatory jurisdiction.[54]

There are three key doctrines of labor law preemption within the context of the NLRA: (1) *Garmon* preemption, (2) *Machinists* preemption, and (3) Labor Management Relations Act (LMRA) Section 301 preemption. These labor law preemption doctrines stretch wide; in the words of Professor Benjamin Sachs, "[i]t would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act."[55] Despite the confusion inherent in such breadth, Congress has stayed largely silent while courts have developed these doctrines of labor

48. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1935) ("It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

49. *Id.*

50. *See* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 191 n.16 (1978) ("We therefore conclude that it is beyond the power of New York State to apply its policy to these appellants as attempted herein." (quoting Bethlehem Steel Co. v. N.Y. Lab. Rels. Bd., 330 U.S. 767, 775–777 (1947))).

51. *Bethlehem Steel Co.*, 330 U.S. at 775–77.

52. La Crosse Tel. Corp. v. Wis. Emp. Rels. Bd., 336 U.S. 18, 24–26 (1949).

53. Plankinton Packing Co. v. Wis. Emp. Rels. Bd., 338 U.S. 953 (1950) (reversing a lower court's finding that the Wisconsin Employment Relations Board had jurisdiction to issue orders holding Plankington Packing guilty of unfair labor practices and requiring the reemployment of a terminated union member in a labor dispute).

54. *See Sears*, 436 U.S. at 191.

55. Sachs, *supra* note 12, at 1154.

preemption. As Justice Rehnquist said notoriously in dissent, "[f]rom the acorns of [two earlier] sensible decisions has grown the mighty oak of this Court's labor preemption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress."[56]

The three main doctrines of preemption in labor law rest on field preemption—the idea that where a state law "stands as an obstacle" to the full realization of court-divined congressional objectives it is preempted.[57] Both *Garmon* and *Machinists* preemption operate as implied field preemption.[58] Section 301 preemption is a form of express field preemption, dealing with federal common law displacing state law interpretation of collective bargaining agreements.[59]

A. *GARMON*: PREEMPTION UNDER SECTIONS 7 AND 8 OF THE NLRA

Garmon preemption precludes state regulation of both activities that clearly are or may be fairly assumed to be protected by Section 7 (which gives employees the right to self-organize or unionize)[60] and activities constituting an unfair labor practice under Section 8 of the NLRA.[61] Put prophylactically by the Supreme Court, "[w]hen an activity is arguably subject to [Section]

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56. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting). *See* Drummonds, *supra* note 25, at 164 (noting that judges, not Congress, have created and extended labor preemption doctrine).

57. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141–43 (1963).

58. *See id.*; *see also* Farmer v. United Bhd. of Carpenters & Joiners of Am. Loc. 25, 430 U.S. 290, 295 n.5 (1977) (discussing the NLRB's primary jurisdiction under *Garmon*); Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976) (specifying the general contours of *Machinists* preemption); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (specifying the general contours of *Garmon* preemption); Garner v. Teamsters Union, 346 U.S. 485, 490 (1953) ("Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").

59. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 559–62 (1968).

60. 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.").

61. San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236 (1959).

7 or [Section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[62] The *Garmon* doctrine rests on two policy concerns. First, *Garmon* "seeks to prevent conflicts between state and local regulation and . . . [federal] regulation embodied in Sections 7 and 8 of the NLRA."[63] Second, "*Garmon* preemption further seeks to protect the NLRB's primary jurisdiction in cases involving [S]ections 7 and 8 of the NLRA."[64] *Garmon* preemption bars conduct that is actually or arguably protected by Section 7 and conduct that is actually or arguably prohibited by Section 8 as an unfair labor practice.[65]

Garmon preemption is not without exceptions.[66] Plaintiffs may bring state law claims for, *inter alia*, fraud, defamation, trespass, and intentional infliction of emotional distress, even for conduct that appears to fit within Sections 7 or 8.[67] When "the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme," courts should be flexible in

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62. *Id.* at 245.

63. 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1125 (7th Cir. 2008).

64. *Id. See* Drummonds, *supra* note 25, at 167.

65. *See* Ryan Walters, *Provoking Preemption: Why State Laws Protecting the Right to a Union Secret Ballot Election Are Preempted by the NLRA*, 52 SANTA CLARA L. REV. 1031, 1069 (2012).

66. *See* David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 527 (1986) ("The litany of exceptions to *Garmon*, in areas wholly removed from the well-established violence and local concerns exceptions, threatens to swallow the doctrine, and has compromised the practicality of its application.").

67. *See* Henry H. Drummonds, *The Sister Sovereign States*, 62 FORDHAM L. REV. 469, 565 nn.535–39 (1993) (collecting cases); *see also* Int'l Union, UAW v. Russell, 356 U.S. 634, 640 (1958) (allowing state, common law tort claim where respondent alleged that picketing-related violence constituted malicious interference with his lawful occupation); Linn v. United Plant Guard Workers, Loc. 114, 383 U.S. 53, 61–62 (1966) (recognizing state libel claims and overriding interest in protecting citizens from malicious defamation); Belknap, Inc. v. Hale, 463 U.S. 491, 510–12 (1983) (allowing state law claims for misrepresentation and breach of contract in case involving permanent replacement of strikers where the NLRB's focus—the rights of strikers under federal law—would differ from the state court's focus—the rights of replacement employees under state law—and where the state had an overriding interest in protecting citizens from harms of misrepresentation); Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 200 (1978) (finding that under the circumstances of the picketing at issue, the NLRB did not have primary jurisdiction to regulate the alleged trespass and that the state law claim could proceed); Farmer v. United Bhd. of Carpenters, Loc. 25, 430 U.S. 290, 302 (1977) (allowing emotional distress claim based on alleged outrageous conduct, threats, and intimidations by union officials directed towards a unionized employee).

their *Garmon* application.[68] In deciding if the preemption doctrine applies, courts consider whether the underlying conduct is protected under the NLRA, whether there is an "overriding state interest . . . deeply rooted in local feeling and responsibility,"[69] and whether a state cause of action would interfere with the effective administration of the national labor policy.[70] Weighing these considerations, a plurality of the Supreme Court in *New York Telephone* concluded that where a statute is of general application and protects interests "deeply rooted in local feeling and responsibility"—such as a state's interest in fashioning its own unemployment compensation programs and eligibility criteria—the subject matter will not be preempted.[71]

Garmon preemption issues may also exist where state law or policy is essentially punitive (rather than corrective) in its remedy. The national labor relations regulatory scheme established by Congress is "essentially remedial," and the NLRB may not penalize a party simply to retaliate or deter future wrongful behavior.[72] In *Gould, Inc. v. Wisconsin Dep't of Industry*, the Seventh Circuit held that a Wisconsin statute prohibiting the state from purchasing from any company determined by the NLRB to have engaged in a certain number of unfair labor practices was federally preempted.[73] Although Wisconsin argued that its statute promoted compliance with the NLRA and was therefore compatible with federal law, the court rejected this argument.[74] Instead, the court recognized a conflict in remedial schemes, noting that while the NLRA is a remedial statute, Wisconsin's enforcement of this particular state law was punitive.[75] Such excessive penalties, the court said, are incompatible with the

68. Farmer v. United Bhd. of Carpenters, Loc. 25, 430 U.S. 290, 302 (1977).

69. *Id.* at 298 (quoting Linn v. United Plant Guard Workers, Loc. 114, 383 U.S. 53, 61–62 (1966)).

70. Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 187–89 (1978).

71. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519 (1979) (finding state statute governing the award of unemployment compensation benefits was not preempted under *Garmon* and *Machinists*). *See* Gould et al., *supra* note 45, at 29. A Supreme Court majority approved of this reasoning in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 750–51 (1985).

72. *See* Wis. Dep't of Indus. v. Gould, Inc. 475 U.S. 282, 288 n.5 (1986) (quoting Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–12 (1940)).

73. Gould, Inc. v. Wis. Dep't of Indus., 750 F.2d 608 (7th Cir. 1984).

74. *Id.* at 611.

75. *See id.*; *see also* Wheeler & Browne, *supra* note 46, at 41.

NLRA, which preempts conflicting state laws (like this one) under *Garmon*.

B. *MACHINISTS* PREEMPTION

While states are preempted from regulating in conflict with specific sections of the NLRA under *Garmon*, states are also preempted from regulating conduct that Congress intended to leave to "the free play of economic forces" under *Machinists*.[76] In *Machinists,* the Supreme Court held that a state may not penalize employees' concerted refusal to work overtime where their refusal is neither prohibited nor protected under Sections 7 or 8 of the NLRA.[77] The Court noted that Congress, in developing the NLRA's legislative scheme, intended to leave to both labor and management certain economic weapons at their disposal when negotiating.[78] *Machinists* preemption is premised on the idea that "Congress struck a balance of protection, prohibition, and *laissez-faire* in respect to union organization, collective bargaining, and labor disputes," which would be upset if a state could also pass and enforce its own statutes accommodating those same interests.[79] Recognizing that "[t]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,"[80] the Supreme Court has since found *Machinists* preemption in cases where state laws condition franchise renewals upon the settlements of labor disputes,[81] and where they prohibit the use of state funds to promote or deter union advertising.[82]

Nevertheless, *Machinists* preemption does not foreclose all state regulation untouched by *Garmon*. For example, states can still set minimum labor standards regarding the terms of employment[83] and implement unemployment compensation

76. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976).

77. *See id.* at 147–48.

78. *See id.*

79. Chamber of Com. v. Brown, 554 U.S. 60, 65 (2008) (quoting Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972)).

80. NLRB v. Ins. Agents' Int'l Union (Prudential Ins. Co.), 361 U.S. 477, 495 (1960).

81. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986) (holding that the City was preempted from conditioning a franchise renewal on the settlement of a labor dispute because the condition limited an economic weapon and interfered with the collective bargaining process).

82. *Brown*, 554 U.S. at 66.

83. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

schemes with their own eligibility criteria.[84] In addition, states may also act under the "market participant exception" in situations where they act as proprietors rather than regulators, under the rationale that a state that owns and manages property necessarily must interact with private parties in the marketplace.[85] Such state regulation may still be permissible without running into problems of preemption.

C. LMRA SECTION 301 PREEMPTION

Preemption under Section 301 of the Labor Management Relations Act (LMRA), concerns state claims brought by unionized employees who depend upon the interpretation of collective bargaining agreements (CBAs).[86] Unlike *Garmon* and *Machinists* preemption, the Section 301 preemption doctrine does not strip state courts of the jurisdiction to decide such actions, but rather preempts the application of state law to union-represented employees covered by a CBA in favor of federal common law.[87] Professor Curtiss Mack notes that in the interest of stabilizing labor-management relationships, Congress enacted Section 301 to make CBAs enforceable by law; to create a governing, federal common law for such enforcement; and to promote arbitration (over litigation) as the primary means of CBA interpretation.[88] To resolve preemption questions under Section 301, courts analyze

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84. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 537–40 (1979).

85. *See* Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218, 227 (1993).

86. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210–11 (1985).

87. Section 301(a) 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.

Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964). *See also* Loc. 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103–04 (1962) (holding courts should apply federal (not state) law in disputes concerning Section 301(a)).

88. *See* Curtis L. Mack et al., Presentation to the American Bar Association Section of Labor and Employment Law at the 14th Annual Labor and Employment Law Virtual Conference: The Fundamentals of Federal Labor Preemption 12–13 (Nov. 2020), https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/fundaments-of-federal-labor-preemption.pdf [https://perma.cc/9S95-DZPY] ("Congress enacted Section 301 of the LMRA in order to make CBAs enforceable by law, create a unified body of federal common law to govern the enforcement of CBAs, and encourage the use of binding arbitration as the primary mechanism for interpreting CBAs.").

whether the challenged state law "would frustrate the federal labor-contract scheme established in § 301."[89] In developing the doctrine of Section 301 preemption, the Court also recognized that arbitration agreements were exchanged for no-strike provisions in labor organizations' CBAs and interpreted Section 301 as expressing a federal policy in favor of uniform enforcement.[90]

As the Court explained in *Textile Workers v. Lincoln Mills of Alabama*, "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor law."[91] In three cases known as the "Steelworkers Trilogy," the Court further developed a Section 301 preemption doctrine relating to agreements to arbitrate disputes arising under CBAs. In this "Trilogy," the Court held that lower courts ought not determine the merits of a grievance that is subject to arbitration,[92] and in recognizing a presumption of arbitrability,[93] established a deferential standard for judicial review of arbitration awards.[94] Section 301 preemption also applies to individual employee claims, not just those brought by unions and employers.[95] Because federal, substantive law governs these contractual rights, state law cannot be an alternative source of individual rights, meaning that Section 301 displaces any such state law claim.[96] These developments in the Court's preemption jurisprudence all support the policy of a uniform federal labor law.[97]

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89. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985).

90. Loc. 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962) ("A contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare.").

91. 353 U.S. 448, 456 (1958).

92. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960).

93. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960).

94. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960). For further discussion of Section 301 preemption doctrine and arbitration of CBAs, *see* Mack et al., *supra* note 88, at 15–19.

95. Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).

96. *See* Rebecca White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 395 n.28 (1990) ("The extension of section 301 to individuals claiming a breach of their collective bargaining agreements, necessarily means that section 301 displaces any state law breach of contract action.").

97. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 n.3 (1988) ("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 . . . [b]ecause neither party could be certain of the rights which it had obtained or conceded. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core

III. *MACHINISTS* PREEMPTION IN THE SUPREME COURT AND CIRCUIT COURTS

This Part looks at how different circuit courts have applied Supreme Court case law interpreting the NLRA and labor law preemption with a focus on *Machinists* and minimum labor standards. Part III.A explores the Supreme Court cases, including *Metropolitan Life Insurance Company v. Massachusetts*, that undergird the argument that state just-cause statutes are permissible minimum labor standards legislation and are not preempted by *Machinists*. Part III.B considers these arguments' varying applications by circuit courts—including the seemingly opposing views of the Seventh and Ninth Circuits on the one hand, and the First, Second, and Third Circuits on the other.

A. THE SUPREME COURT SPEAKS

In *Metropolitan Life Insurance Company v. Massachusetts*, the Supreme Court considered a state law that required any general health insurance policy or benefit plan that provided hospital and surgical coverage to also provide certain minimal mental health protections.[98] The law aimed to address problems treating mental illness in Massachusetts, which followed the state's findings that its working people needed to be protected against mental health treatment's high cost and that the voluntary insurance market was inadequately providing mental health coverage.[99] The Court recognized that when Congress developed the NLRA, it did so within the existing body of state law promoting health and safety.[100] In that sense, the federal labor law is "interstitial," in that it "supplement[s] state law where compatible, and supplant[s] it only when it prevents the accomplishment of the purposes of the federal Act."[101] The Court found no intent by Congress to upend the countless concurrent state laws that set minimum labor standards but did not otherwise touch on the bargaining or self-

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of federal labor policy." (quoting Loc. 174 Teamsters v. Lucas Flour Co., 369 U.S. 95, 103–104 (1962))).

98. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 727 (1985).

99. *Id.* at 731.

100. *Id.* at 756.

101. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 n.20 (1941)); Electrical Workers v. Wis. Emp. Rels. Bd., 315 U.S. 740, 749–51 (1942); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

organization processes, pointing to permissible laws regulating child labor, the minimum wage, mandatory state holidays, and occupational health and safety.[102] The Court noted that "when a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA"—for example, a standard remedying the inequality of bargaining power between employees and employers—"it conflicts with none of the purposes of the Act."[103] In upholding the Massachusetts statute requiring employer health care plans to provide minimum mental health care benefits, the Court found that the NLRA does not foreclose the ability of states to regulate wages, hours, working conditions, and pension benefits, even though these terms are, in general, typically negotiated between labor and management.[104]

Importantly, the Court rejected the argument that Congress' overriding goal in passing the NLRA was to leave parties free to reach agreements about contract terms because "[t]he NLRA is primarily concerned with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck. . . ."[105] Therefore, *Machinists* preemption, the Court reasoned, does not apply where the regulation at issue "imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the [regulation] is not incompatible with the[ ] general goals of the NLRA."[106] Permissible labor standards, then, are those that: (1) "affect union and non-union employees equally"; (2) "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA"; and (3) have "but the most indirect effect on the right of self-organization established in the [NLRA]."[107] The Court also concluded that state minimum labor standards should not be treated any differently from federal minimum standards.[108]

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102. *Id.* at 756.
103. *Id.* at 757.
104. *Id. Cf.* Malone v. White Motor Corp., 435 U.S. 497, 504–05 (1978) (rejecting a similar challenge to a state pension act which established minimum funding and vesting levels for employee pension plans).
105. Metropolitan Life Ins. Co., 471 U.S. at 753 (emphasis added). *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20 (1987) ("[T]he NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining.").
106. *Metropolitan Life Ins. Co.*, 471 U.S. at 754.
107. *Id.* at 755.
108. *Id.*

In *Fort Halifax Packing Co. v. Coyne*, the Court again rejected the argument that a state's establishment of minimum labor standards undercuts collective bargaining.[109] Upholding a Maine statute that required employers to provide severance pay to certain employees, the Court noted that even though employees received a benefit under the statute for which they otherwise might have to bargain, such an outcome is necessarily true of any state law substantively regulating terms and conditions of employment.[110] Both labor and management "come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations."[111] Even when a state law permits parties to an employment agreement to contract out of the state law's protections, there still is no preemption.[112]

In NLRA preemption cases, the Court also focuses on "the nature of the activities" sought to be regulated, rather than on the "method of regulation" pursued.[113] For instance, because a state could not pass a law directly regulating or prohibiting union organization, it could not incidentally seek that same result by constraining how certain employers could spend state funds.[114] The Court applies this logic when it strikes down state regulations under both *Garmon* and *Machinists* preemption.[115]

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109. 482 U.S. 1, 20 (1987) ("This argument—that a State's establishment of minimum substantive labor standards undercuts collective bargaining—was considered and rejected in *Metropolitan Life Ins. Co.* . . .").

110. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987).

111. *Id.* at 20–21.

112. *Id.* at 22.

113. Chamber of Com. v. Brown, 554 U.S. 60, 69 (2008) (quoting Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986) (quoting San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236, 243 (1959))).

114. *See Brown*, 554 U.S. at 69.

115. *See* Wis. Dep't of Indus. v. Gould, Inc. 475 U.S. 282, 288–89 (1986) (finding Wisconsin's policy of refusing to purchase goods and services from repeated NLRA violators to be preempted under *Garmon* because the policy imposed a "supplemental sanction" in conflict with the NLRA's "integrated scheme of regulation"; and rejecting the argument that the statute was an exercise of the state's spending power rather than its regulatory power); *see also Brown*, 554 U.S. at 75 (finding that California statutes prohibiting certain recipients of state grants from using such funds "to assist, promote, or deter union organizing" were subject to *Machinists* preemption because these laws regulated within the zone Congress intentionally left protected and reserved for market freedom).

B. EXCEEDING MINIMUM LABOR STANDARDS

Some courts examining purported state minimum labor standards legislation have found these laws preempted under *Machinists* for not truly being "minimal" because they exceed a certain threshold or afford to one group benefits greater than those provided to others under existing state legislation.[116] For example, relying on Supreme Court precedent, the Seventh Circuit in *520 South Michigan Avenue Associates v. Shannon* struck down an amendment to an Illinois law giving hotel room attendants in Cook County increased mandatory breaks and setting out heightened penalties for employers that violated the amendment.[117] Finding that the amendment was preempted under *Machinists*, the Seventh Circuit concluded that the amendment was not "of general application" because it only applied to one occupation, in one industry, within one county.[118]

On appeal, the Seventh Circuit distinguished *Shannon* from the Court's *Metropolitan Life* and *Fort Halifax* decisions, which it deemed true "laws of general application," because the former concerned all "general health insurance polic[ies]" and "any benefit plans" and the latter, despite only applying to large layoffs and distant relocations, "still had a very broad application."[119] Finding a lack of general applicability, the appeals court instead held that "the Attendant Amendment's narrow scope distinguishes it from minimum labor standards which are not subject to preemption,

116. *See* 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1135 (7th Cir. 2008) ("This is especially true when considered in light of what Illinois considered an appropriate minimum for employers in the remaining 101 counties in the One Day Rest in Seven Act—one unpaid twenty-minute break and no shifting of the burden of proof."); Hull v. Dutton, 935 F.2d 1194, 1198–99 (11th Cir. 1991) (finding Alabama's longevity pay statute giving annual lump-sum payments to state employees preempted because it applied only to state employees and not to its citizens generally).

117. 549 F.3d 1119 (7th Cir. 2008). The law in question was the Hotel Room Attendant Amendment to the One Day Rest in Seven Act. The Act provided that "[e]very employer shall allow every employee except those specified in this Section at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day." 820 ILL. COMP. STAT. 140/2. The law further stated that "[e]very employer shall permit its employees who are to work for 7 ½ continuous hours or longer, except those specified in this Section, at least 20 minutes for a meal period beginning no later than 5 hours after the start of the work period." 820 ILL. COMP. STAT. 140/3.

118. *Shannon*, 549 F.3d at 1134. Although the Attendant Amendment applied to hotels in counties with a population greater than three million people, only Cook County met this condition. *Id.* at 1122 n.3.

119. *Id.* at 1130.

and places the Attendant Amendment in the 'zone protected and reserved for market freedom.'"[120] The Amendment's "narrow scope" also disincentivized collective bargaining because it encouraged employers and unions to focus on lobbying at the state capitol instead of negotiating at the bargaining table.[121] Furthermore, even though the law applied to union and non-union employees equally, its narrow application in only one county created the possibility of targeting union-heavy (or union-light) counties to reward (or punish) union activity and allowed non-union employees to benefit from the union's bargaining.[122] Importantly, the statute originally at issue in *Shannon* did not apply to workers whose CBAs provided for meal breaks and break rooms, whereas the Amendment contained no such exemptions.[123]

The Seventh Circuit also found the Attendant Amendment was not truly a "minimum" labor standard because it established terms of employment difficult for any union to bargain for.[124] Specifically, the Amendment set a higher standard for breaks than the One Day Rest in Seven Act (the applicable law for Illinois' remaining 101 counties), created a presumption of retaliation, and shifted the burden of proof to the employer.[125] By permitting an affected employee to bring a retaliation claim, the Attendant Amendment, the court explained, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the NLRA, which favor alternative means of dispute resolution.[126] The Seventh Circuit also noted that the

120. *Id.* at 1132 (quoting Chamber of Com. v. Brown, 554 U.S. 60, 66 (2008)).
121. *Id.* at 1133.
122. *Id.*
123. *Id.* at 1134.
124. *Id.*
125. *Id.* at 1135 n.12 ("Specifically, 820 ILCS 140/3.1(g) provides: 'It is unlawful for any employer or an employer's agent or representative to take any action against any person in retaliation for the exercise of rights under this Section. In any civil proceeding brought under this subsection (f), if the plaintiff establishes that he or she was employed by the defendant, exercised rights under this Section, or alleged in good faith that the defendant was not complying with this Section, and was thereafter terminated, demoted, or otherwise penalized by the defendant, then a rebuttable presumption shall arise that the defendant's action was taken in retaliation for the exercise of rights established by this Section. To rebut the presumption, the defendant must prove that the sole reason for the termination, demotion, or penalty was a legitimate business reason.' Thus, for instance, if a hotel fired a room attendant because the room attendant failed to clean the required daily quota of rooms, but the room attendant alleged that the real reason for his or her termination was that he or she had taken the statutorily mandated breaks, 820 ILCS 140/3.1(g) creates a presumption of retaliation. The burden of proof would then shift to the hotel to prove that the sole reason for the termination was 'a legitimate business reason.'").
126. *Id.* at 1137 (quoting Livadas v. Bradshaw, 512 U.S. 107, 120 (1994)).

Amendment's enforcement mechanism interfered with the NLRA by overriding the existing dispute resolution protocols and permitting recovery of treble damages, attorneys' fees, and costs.[127] The Amendment also interfered with the existing pay and room-cleaning quota established for room attendants, because the increased breaks would prevent attendants from hitting their shift's quota.[128]

In holding that the Illinois statute was preempted, the Seventh Circuit relied on the Ninth Circuit's analysis in *Chamber of Commerce v. Bragdon*.[129] In *Bragdon*, the Ninth Circuit found a California county ordinance that required employers to pay "prevailing wages"[130] to employees on certain private construction projects costing over $500,000 to be preempted under *Machinists*. Distinguishing the Supreme Court's decisions, the Ninth Circuit concluded that the ordinance was "much more invasive . . . than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*"[131] and was "very different from a minimum wage law, applicable to all employees, guaranteeing a minimum hourly rate."[132] Instead, the court found that the ordinance was "more properly characterized as an example of an interest group deal in public-interest clothing."[133] The Ninth Circuit was aware that politics might override economics; indeed, it noted that upholding the ordinance could motivate employees to bargain with legislators rather than employers.[134] As Professor Drummonds noted, "many occupation

127. Such penalties were akin to the "formidable enforcement scheme" noted in Chamber of Com. v. Brown, 554 U.S. 60, 63 (2008), which included recovery of treble damages, attorney's fees, and costs against actors who violated the California statute prohibiting employers received state funds from using the funds "to assist, promote, or deter union organizing," and "put considerable pressure on an employer either to forgo his free speech right to communicate his views to his employees, or else to refuse the receipt of any state funds."

128. 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1138 (7th Cir. 2008).

129. 64 F.3d 497 (9th Cir. 1995).

130. The "prevailing wage" was determined by reference to established collective bargaining agreements with the locality. Construction companies were required to agree to pay the state-determined public work prevailing wage before the County would issue a building permit. *See id.* at 498–99.

131. *Id.* at 502.

132. *Id.*

133. *Id.* at 503.

134. *Id.* at 504 ("A precedent allowing this interference with the free play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with

and industry-specific state hours of work statutes are vulnerable under this reasoning [in *Shannon*]."[135] Rather than step in to clarify the issue in *Shannon* and the appropriate standard of preemption for courts around the country, the Supreme Court denied certiorari.[136]

C. UPHOLDING MINIMUM LABOR STANDARDS

Other circuits have applied the Supreme Court's *Machinists* preemption case law differently. In *Concerned Home Care Providers, Inc. v. Cuomo*, for example, the Second Circuit upheld a New York law that required licensed home care services agencies receiving state Medicaid reimbursement to adopt a minimum rate of total compensation for home health aides in New York City and surrounding counties.[137] The court noted that, "*Machinists* preemption does not eliminate state authority to craft minimum labor standards for particular regions or areas of the labor market," citing a decision wherein the Second Circuit had previously upheld a New York prevailing wage law for employees on public works projects.[138] The Second Circuit observed that states have long sought to remedy depressed wages via regulating payment rates, and that these attempts are "'not incompatible' with the 'general goals of the NLRA.'"[139] The Second Circuit

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political bodies. . . . This substitutes the free play of political forces for the free play of economic forces that was intended by the NLRA.").

135. Drummonds, *supra* note 25, at 182.

136. Shannon v. 520 S. Mich. Ave. Assocs., Ltd., 558 U.S. 874 (2009).

137. 783 F.3d 77 (2d Cir. 2015). The Wage Parity Law at issue in *Cuomo*, like the Attendant Amendment at issue in *Shannon*, only applied to one location—New York City—even though its terms specified "cities with populations of one million or more." New York City was the only city that qualified. *See id.* at 82 n.2.

138. *Id.* at 16. *See* Rondout Electric, Inc. v. N.Y. Dep't of Lab., 335 F.3d 162 (2d Cir. 2003) (upholding regulation implementing § 220 of the New York Labor Law, which requires employers on public works projects to pay employees an amount equal to the "prevailing rate of similarly employed workers in the locality," either in the form of benefits or wages (quoting Burgio & Campofelice, Inc. v. N.Y. Dep't of Lab., 107 F.3d 1000 (2d Cir. 1997))).

139. Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 85 (2d Cir. 2015) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 754–55 (1985)). Minimum wage laws are paradigmatic minimum labor standards legislation. The Fair Labor Standards Act (FLSA) represents a baseline that states may exceed with more stringent wage-and-hour laws but cannot legislate below. 29 U.S.C. §§ 206–07 (setting minimum wage and maximum hours for covered employees). As stated by one court, "the FLSA is not intended to preempt independent state wage and hour laws that cover the same conduct as the FLSA, even if those laws offer Plaintiffs additional remedies or procedural protections." In re Lowe's Cos., Inc. Fair Lab. Standards Act & Wage & Hour Litig., 517 F.

recognized that the law did not draw a distinction between workers who were unionized and those who were not, and the law's treatment of their employers was the same either way.[140] Finding further that the establishment of a total compensation floor did interfere with employees' abilities to self-organize or bargain collectively as protected by the NLRA, the court held the Wage Parity Law was not preempted by *Machinists*.[141]

The Second Circuit is not alone in upholding local ordinances establishing substantive worker protections in particular industries. In *R.I. Hospital Ass'n v. City of Providence*, the First Circuit rejected a preemption challenge to a municipal ordinance imposing just-cause limitations on hospitality industry discharges which required a new employer to retain certain employees for three months absent good cause for their dismissal when hotels changed ownership.[142] The First Circuit observed that whether a state law only regulates a single industry is not enough to trigger *Machinists* preemption,[143] finding no legally relevant distinction between the municipal ordinance in question and the permissible labor standards upheld by the Court in *Metropolitan Life* and *Fort Halifax*.[144] Because *Machinists* preemption considers Congress' intent, Judge Stahl in a concurring opinion warned against making the inference that Congress intended to allow economic forces to control decisions of hiring and firing.[145] Similarly, in *Washington Service Contractors Coalition v. District of Columbia*, the D.C. Circuit upheld a local regulation that applied only to

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Supp. 3d 484, 499 (W.D.N.C. 2021). The FLSA's text expressly confirms that states may enact stricter minimum wage and overtime requirements that bind employers notwithstanding the FLSA. *See* 29 U.S.C. § 218(a) ("No provision of this chapter or of any order thereunder shall excuse noncompliance 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 work week lower than the maximum work week established under this chapter."). "The NLRA does not contain an express preemption provision[;] [i]nstead, labor law preemption 'concerns the extent to which Congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor-management relations.'" Ass'n of Car Wash Owners, Inc. v. City of New York, 911 F.3d 74, 80 (2d Cir. 2018) (quoting *Cuomo*, 783 F.3d at 84 (citing N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 527 (1979))).

140. *Cuomo*, 783 F.3d at 86.

141. *Id.* (citing Metropolitan Life, Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985)).

142. 667 F.3d 17, 38 (1st Cir. 2011).

143. *Id.* at 33 n.15.

144. *Id.* at 33.

145. *Id.* at 46–47 ("[C]onsidering the employee-focused nature of the NLRA . . . I do not believe we can infer that, where the successorship doctrine does not apply, Congress intended to leave the area of hiring and firing to be fully controlled by the free play of economic forces.") (Stahl, J., concurring) (internal citations omitted).

employees performing janitorial, maintenance, or nonprofessional healthcare services.[146]

Other courts have also found that wrongful discharge protections are not preempted under *Machinists*. In *St. Thomas-St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands*,[147] the Third Circuit overturned a preliminary injunction preventing enforcement of the Virgin Islands' Wrongful Discharge Act (WDA),[148] finding that the WDA's challengers were unlikely to succeed on their preemption claim. Although the WDA allows unions to contract their members out of the WDA's protections, the Act protects all employees and does not require them to choose between collective bargaining and state law protections.[149] Furthermore, the WDA does not regulate the bargaining process or disrupt NLRA's labor-management power balance; rather, it merely limits the permissible bases for discharge to a broad, all-encompassing set of "all or almost all legitimate reasons for discharge."[150] The Third Circuit, therefore, saw "no principled basis for distinguishing the WDA" from protections upheld in *Metropolitan Life* and *Fort Halifax* because Congress "did not intend to prevent states from establishing minimum substantive requirements for contract terms."[151]

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146. Wash. Serv. Contractors Coal. v. District of Columbia, 54 F.3d 811, 817–18 (D.C. Cir. 1995) (finding that D.C. had not disturbed the NLRA's process for resolving labor disputes but instead had enacted substantive employee protection legislation unrelated to rights to organize or bargain collectively).

147. 218 F.3d 232 (3d Cir. 2000).

148. The WDA outlined nine permissible reasons for discharge:

> Unless modified by contract, an employer may dismiss an employee: (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer; (2) whose insolent or offensive conduct towards a customer of the employer injures the employer's business; (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties; (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are complete;(5) who performs his work assignments in a negligent manner; (6) whose continuous absences from his place of employment affect the interests of his employer; (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer; (8) who is dishonest; or (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

V.I. CODE tit. 24 § 76.

149. *St. Thomas-St. John Hotel*, 218 F.3d at 245 (3d Cir. 2000).

150. *Id.* at 244. *See* V.I. CODE tit. 24 § 76.

151. *St. Thomas-St. John Hotel*, 218 F.3d at 243.

IV. PROTECTING JUST-CAUSE PROTECTIONS

Labor law preemption under the NRLA is broad. Considering *Garmon* and *Machinists* together, one commentator concluded that Congress "has virtually banish[ed] states and localities from the field of labor relations."[152] This Note's central thesis, however, is that federal labor law preemption leaves open certain tools to state and local governments to protect workers via minimum labor standards legislation, and that one such tool—just-cause legislation—has been underemployed. Beyond the cases discussed, Part III.A *supra*, the Supreme Court has failed to elaborate how far states and localities may go when setting minimum labor standards—to the frustration of lower courts.[153]

Part IV.A explains why *Garmon* and Section 301 preemption do not preclude states from enacting just-cause legislation. Part IV.B starts by considering the post-*Machinists* case law that favors the preemption of just-cause statutes. It then argues in favor of an alternative understanding, which the Southern District of New York reached in *Restaurant Law Center v. City of New York*. Finally, Part IV.C closes with a review of Montana's Wrongful Discharge from Employment Act, and Illinois' prospective just-cause legislation and its potential concerns in light of Seventh Circuit precedent.

A. JUST-CAUSE LEGISLATION AND PREEMPTION UNDER *GARMON* AND SECTION 301

As discussed, Part II.B *supra*, *Garmon* preemption blocks the regulation of conduct that is arguably protected or arguably prohibited by Sections 7 and 8 of the NLRA. This preemption doctrine focuses on union activity and management that the NLRA either protects or outlaws, so any law setting minimum standards and protections is not likely to conflict with the NLRA's legislative scheme.[154] As the First Circuit noted, the NLRA is largely silent

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152. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1572 (2002).

153. *See, e.g.*, R.I. Hosp. Ass'n v. City of Providence, 667 F.3d 17, 47 (1st Cir. 2011) ("I do hope the Supreme Court will provide some guidance as to just how far a state or locality can go in the name of a 'minimum labor standard.'") (Stahl J., concurring).

154. In *Metropolitan Life Ins. Co. v. Massachusetts*, the Court in dismissed *Garmon* preemption as not relevant to the case, which involved minimum labor standards, and noted there was no claim that "Massachusetts has sought to regulate or prohibit any conduct

on an employer's power to hire and fire its employees, only restricting discrimination "in regard to hire or tenure or employment . . . to encourage membership in any labor organization."[155] Therefore, so long as a state or local law related to hiring or firing decisions neither encourages nor discourages unionization, it should not be preempted under *Garmon* because the NLRA does not itself protect or prohibit an employer's ability to hire and fire.[156]

Preemption under Section 301 is similarly unlikely. To find just-cause legislation preempted under Section 301, as applied to unionized employees governed by a CBA, would only frustrate the purposes of the NLRA. As Stephanie Marcus notes, if an employer, simply by raising a defense that requires CBA interpretation, could bar a union member's state law claims for wrongful discharge, then unionization becomes much less attractive.[157] Marcus concludes, "[i]n passing Section 301, Congress did not intend to give union workers fewer rights than non-union workers."[158] As the Court noted in *Allis Chalmers Corp. v. Lueck*, if the state law right does not exist independently of the CBA or requires interpretation of the CBA, then the claim is preempted.[159] The proper test for Section 301 preemption, then, as Professor Anthony Herman noted, is "whether the cause of action would

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subject to the regulatory jurisdiction of the NLRB, since the Act is silent as to the substantive provisions of welfare-benefit plans." 471 U.S. 724, 748–49 (1985).

155. R.I. Hosp. Ass'n v. City of Providence, 667 F.3d 17, 35 (1st Cir. 2011) (quoting 29 U.S.C. § 158(a)(3)) (upholding a municipal ordinance preventing certain hospitality workers from being fired without cause).

156. *See id.* at 38; *see also* Cal. Grocers Ass'n v. City of Los Angeles, 52 Cal. 4th 177, 198 (2011) ("On the subject of employee hiring and firing, the text of the NLRA is, with one notable exception, resoundingly silent.").

157. Stephanie R. Marcus, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209, 228 (1989). Marcus proposes that Section 301 preemption should depend on whether a state law claim is "independent" of a CBA, meaning it could be asserted without reliance on an employment contract. Where the state law claim is not preempted, but the employer's defense implicates terms of the CBA, courts can apply federal law to assess the defense to allow "doctrines of federal labor law uniformly to prevail over inconsistent local rules." Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962). At least one state court has adopted Marcus' approach. *See* Commodore v. Univ. Mech. Contractors, Inc., 839 P.2d 314 (Wash. 1992). For a further defense of this application of Section 301 preemption, *see* Mark L. Adams, *Struggling Through the Thicket: Section 301 and the Washington Supreme Court*, 15 BERKELEY J. EMP. & LAB. L. 106 (1994).

158. Marcus, *supra* note 157, at 229 n.107 (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 726 (1985)) ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on union employers.").

159. Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

arise 'but for' the existence of the [CBA]."[160] Professor Rebecca White has hypothesized that if a state were to impose an independent, non-negotiable, just-cause discharge standard on all employers, the claim presumably would not be preempted by Section 301, unless the employer's defense raised questions of contract interpretation.[161] Coverage by a CBA does not mean Section 301 inherently preempts state regulation. The Court has upheld certain state minimum rights for workers, even when those rights have involved terms and conditions of employment for employees covered by CBAs.[162] In *Lueck*, for example, the Court found it would be inconsistent with congressional intent under Section 301 "to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."[163] Therefore, Section 301 ought not to preempt a state law providing a just-cause discharge standard.[164] Appeals court decisions also support a finding that Section 301 preemption should not apply to just-cause statutes.[165]

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160. *See* Herman, *supra* note 45, at 634. Taking *Lueck* together with *Metropolitan Life*, Herman has observed that the proper test for Section 301 preemption is whether the cause of action would arise "but for" the existence of the CBA. For an argument that only wrongful discharge claims *functionally* premised on contract violations should be precluded by Section 301, *see id.* at 639.

161. *See* White, *supra* note 96, at 395 n.82.

162. For example, in *Metropolitan Life*, the Court upheld a Massachusetts state law requiring employer health care plans to provide minimum, mental health care benefits. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). Additionally, in *N.Y. Tel. Co. v. N.Y. Dep't of Lab.*, 440 U.S. 519 (1979), a plurality of the Court upheld New York's grant of unemployment benefits to strikers. In both factual settings, however, the Court did not need to interpret any labor contract terms in order to apply the state's respective benefits law.

163. Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985).

164. *See id.* The Court then noted that even if a law isn't preempted by Section 301, it still could be preempted under *Machinists* or *Garmon*. *Id.* at 212 nn.6–9.

165. *See* Peabody Galion v. A.V. Dollar, 666 F.2d 1309, 1321 (10th Cir. 1981); *see also* Garibaldi v. Lucky Food Stores, 726 F.2d 1367, 1375 (9th Cir. 1984). In *Peabody*, an employer fired employees after they filed workers' compensations claims; the union lost in arbitration and the workers joined a federal lawsuit alleging wrongful discharge in violation of the Oklahoma Workers' Compensation Act. *Peabody*, 666 F.2d at 1312. The Tenth Circuit held that the employees could seek remedies beyond those provided in their CBAs, since the claims asserted were "substantive rights that devolve on workers individually, not collectively, and may not be waived under collective bargaining agreements," and because the claims were "not based on rights arising out of the collective bargaining agreement." *Id.* at 1321–23. In *Garibaldi*, the Ninth Circuit considered an employee's wrongful termination claim in violation of public policy after the employee was discharged for contacting the local health department to notify it that he was delivering spoiled milk, which the health department subsequently ordered not to be delivered. *Garibaldi*, 726 F.2d at 1368. Noting that the statute was a law of general applicability, the Ninth Circuit found the wrongful discharge claim was not preempted by Section 301 because such a claim "poses no

B. JUST-CAUSE LEGISLATION AND PREEMPTION UNDER *MACHINISTS*

Additionally, because they set permissible, protective minimum labor standards, as recognized by the Court in *Metropolitan Life* and *Fort Halifax*, *Machinists* should not preempt just-cause laws at the state and local levels. States are allowed to set minimum labor standards covering potential bargaining topics, such as wages, without violating the NLRA.[166] These regulations only mean that future labor-management contract negotiations occur against a different backdrop, one that has already established termination rights, protections, and procedures for employees. Circuits that rely on this logic have upheld wrongful discharge statutes covering employees both generally[167] and in only one industry.[168] Furthermore, "the Supreme Court has never applied *Machinists* preemption to a state law that does not regulate the mechanics of labor dispute resolution."[169] And because the establishment of labor standards falls within states' traditional police power, "pre-emption should not be lightly inferred in this area."[170]

Just-cause legislation's promotion of job security and job stability also counsels against finding preemption. In *New York Telephone Co. v. New York State Dep't of Labor*, the Supreme Court accepted the district court's finding that New York's law governing the award of unemployment benefits to strikers had shifted the labor-management balance that is generally left to the free play of economic forces.[171] Nevertheless, a plurality of the Court held it was not preempted. The Court noted that the case involved a state program of allocating unemployment benefits, not a state's effort to regulate what private actions that labor and management may take in pursuit of their objectives.[172] The law's purpose was not, therefore, to regulate the parties' bargaining relationships, but

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significant threat to the bargaining process; it does not alter the economic relationship between the employer and employee." *Id.* at 1375–76.

166. *See* Part II, *supra*.

167. *See* St. Thomas-St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 218 F.3d 232 (3d Cir. 2000) (upholding the Virgin Islands Wrongful Discharge Act against a preemption challenge).

168. *See* R.I. Hosp. Ass'n v. City of Providence, 667 F.3d 17 (1st Cir. 2011) (hospitality).

169. Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 86 (2d Cir. 2015).

170. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987).

171. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 532 (1979).

172. *Id.*

instead "to provide an efficient means of insuring employment security in the State."[173] The Court accepted New York's conclusion that a state's collective interest in the economic security of individuals affected by strikes is greater than any interest in avoiding the impact it may have on a given labor dispute.[174] With New York City's just-cause law, the City has similarly decided that the community interest in increased job security—especially in an industry plagued by turnover and low wages—wins out.[175] Perhaps the only more "efficient means to insure employment security in the state"[176] would be to extend it state-wide.

The Second Circuit's analysis in *Concerned Home Care Providers, Inc. v. Cuomo* supports the conclusion that just-cause laws targeting specific locations or industries should not be preempted.[177] Without accepting the legal conclusions reached by other circuits in *Bragdon* and *Shannon*, the Second Circuit, in a footnote, distinguished the Wage Parity Law at issue in *Cuomo* from those at issue in *Bragdon* and *Shannon*.[178] The court's distinction of these laws provides helpful guidance for formulating a just-cause law that can escape preemption. *Shannon*'s Attendant Amendment arguably interfered with the NLRB's jurisdiction and the parties' grievance and arbitration procedures because its shifting burden of proof, rest-period specifications, and changed calculation of damages in lawsuits alleging retaliatory termination impermissibly constrained the collective-bargaining process.[179] Similarly, *Bragdon*'s construction ordinance dictated not just the wages a worker would receive, but how much an employer must pay for the worker's health, pension, and welfare benefits.[180] These regulations, taken together, constituted a "much

173. *Id.* at 533.

174. *Id.* at 534–37 (finding that the Social Security Act's history makes it "abundantly clear" that Congress intended states to have broad discretion in constructing their unemployment compensation schemes).

175. *See* Testimony of Lorelei Salas, Hearing on Int. 1396-2019 and Int. 1415-2019, New York City Dep't of Consumer and Worker Protection Committee on Civil Service and Labor (Feb. 13, 2020), https://www.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-Intros1396-1415-Just-Cause-02132020.pdf [https://perma.cc/73RY-RF3M] (noting that "workers in the fast food industry have historically been confronted with declining real wages and unstable working schedules").

176. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 520 (1979).

177. 783 F.3d 77 (2d Cir. 2015).

178. *Id.* at 86 n.8.

179. *See id.* (citing 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1134 (7th Cir. 2008)).

180. Chamber of Com. v. Bragdon, 64 F.3d 497, 502 (9th Cir. 1995).

more invasive and detailed interference with the collective-bargaining process" than the specified, total compensation laid out in New York's Wage Parity Law.[181]

On February 17, 2022, a district court judge in the Southern District of New York granted summary judgment to New York City in a suit challenging the City's fast-food industry just-cause laws as preempted by the NLRA.[182] The court's decision in *Restaurant Law Center v. City of New York* reaffirms the power of New York localities to enact such minimum standards legislation protecting both unionized and nonunionized workers from arbitrary dismissals.[183] But the Southern District's interpretation of labor law preemption is not guaranteed to be followed in other district courts, let alone by other circuits or by the Supreme Court. Moreover, the court's discussion of NLRA preemption comprises just four pages of its decision and covers only *Machinists* preemption[184]—that is, the opinion fails to consider how either *Garmon* or Section 301 preemption could operate if raised by challengers in other states or industries. With states in other circuits also considering just-cause legislation,[185] attention to this issue remains timely.

C. MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT

Montana's WDFEA offers several lessons for designing a modern just-cause statute, including the benefits of statewide protection regardless of industry, the downsides of excluding workers already covered by CBAs, and the complexity of limited monetary remedies. Perhaps surprising for a law protecting

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181. *Id.*

182. Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. Feb. 10, 2022).

183. *Id.* at 377 ("The City's Wrongful Discharge Law is a validly enacted minimum labor standard. The Law is one of general applicability aimed at promoting job stability for hourly employees in a particular sector[,] makes no distinction between fast food employees who are unionized and those who are not[, and] . . . regulates the process through which fast food employees may be lawfully terminated from their positions. . . .").

184. Plaintiffs challenging the law originally mentioned *Garmon* preemption in their May 2021 Complaint but failed to raise it in their motions for summary judgment. *See* Complaint at 16, Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022) (No. 21-cv-4801); *cf.* Plaintiffs' Motion for Summary Judgment Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022) (No. 21-cv-4801). As a result, the plaintiffs' *Garmon* claim was deemed abandoned. *See* Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 376 n.5 (S.D.N.Y. 2022) (citing Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128, 143 (2d Cir. 2016)).

185. *See supra* Part III.C.

workers from wrongful discharge, the WDFEA was promoted by employers and insurers.[186] Motivated by a concern regarding the common law's expansion of at-will employees' rights to sue employers for wrongful discharge, the WDFEA (1) limited employers' liability, (2) limited penalties and awards, and (3) required use of the employer's grievance procedure, arbitration, and fee-shifting provisions.[187] Lawyers also lacked strong incentives to bring claims on behalf of plaintiffs.[188] The WDFEA was amended in 2021 to further limit the damages discharged employees may recover, to shorten the timeframe for employees to give notice, and to increase employers' flexibility to provide notice of internal grievance policies—all employer-friendly changes.[189]

Montana's WDFEA expressly excludes employees covered by CBAs from its coverage.[190] The Ninth Circuit ruled in *Barnes v. Stone Container Corp.* that a worker's wrongful discharge claim under the WDFEA—brought after his CBA had expired but before a bargaining impasse had been reached—could not survive under *Machinists* because the WDFEA would afford him just-cause protections that didn't exist under his CBA.[191] Due to the WDFEA's express exclusion of CBA-covered employees from the statute's protections, the Ninth Circuit found the imposition of a just-cause requirement on the parties negotiating a contract to be "meddling at the heart of the employer-employee relationship at a time when such interference is most harmful."[192]

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186. *See* LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108–09 (1990) (explaining how employers and insurers turned to the Montana Association of Defense Counsel to draft a bill that would eventually become the WDFEA).

187. *See id.* at 120–21.

188. *See* Leonard Bierman et al., *Montana's Wrongful Discharge from Employment Act: The Views of the Montana Bar*, 54 MONT. L. REV. 367, 372 (1993). Although 52.3% of survey respondents felt that adequate incentives existed, only 20.5% of respondents who identified themselves as primarily plaintiffs' attorneys agreed (compared to 86.7% of primarily defense attorneys). *Id.* Nearly half of all respondents stated they had personally declined a case involving the WDFEA, with a substantial majority citing inadequate remuneration as the reason why. *Id.* at 379.

189. *See* Act of Mar. 31, 2021, 2021 Mont. Laws ch.117, at 319.

190. *See* MONT. CODE ANN. § 39-2-912(2). Collective bargaining agreements often contain just-cause provisions.

191. 942 F.2d 689, 693 (9th Cir. 1991).

192. *Id.* at 693.

D. ILLINOIS' PROPOSED JUST-CAUSE LEGISLATION

The Southern District of New York's upholding of the fast-food industry just-cause law is not surprising given the Second Circuit's approval of a New York City wage-parity law aimed at home care aides in *Concerned Home Care Providers v. Cuomo*.[193] As noted, Part I *supra*, however, Illinois is considering a just-cause law of its own, which would abrogate the longstanding doctrine of at-will employment statewide. In crafting this law, the Illinois legislature should pay special attention to the Seventh Circuit's decision in *Shannon*, which invalidated a statutory amendment providing specific benefits to hotel room attendants, and its treatment of *Machinists* preemption therein.

The proposed Illinois Employee Security Act, first introduced in the state legislature in February 2021, and currently in the Illinois House Rules Committee, would grant just-cause protections to employees on a level not seen since Montana's 1987 passage of the WDFEA.[194] Under the Act, employers may only terminate employees for just cause, and they must provide employees with mandatory severance upon termination.[195] Like New York City's fast-food industry legislation, the Illinois bill has received significant opposition. For instance, the Illinois Chamber of Commerce has said it "imposes mandates on an employer's discipline system and interferes with personnel management."[196] The Illinois bill includes a definition of "just cause" similar to New York City's,[197] and the employer bears the burden of proof in court

193. *See* Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022); *supra* Part III.C.

194. *See* David Sirota et al., *Before the Deadly Tornadoes, Corporations Blocked a Bill That Could Have Protected Workers*, JACOBIN (Dec. 14, 2021) https://jacobinmag.com/2021/12/tornado-amazon-kentucky-illinois-just-cause-workers [https://perma.cc/H6NS-7SBY]; David Roeder, *Labor Allies Target "At-Will" Employment Rules*, CHI. SUN TIMES (Mar. 31, 2021) https://chicago.suntimes.com/business/2021/3/31/22360796/labor-allies-target-at-will-employment-rules-secure-jobs-act [https://perma.cc/5GZB-AHBX].

195. *See* Illinois Employee Security Act, H.B. 3530 102nd Gen. Assemb. (introduced Feb. 22, 2021).

196. Sirota, *supra* note 194. It is unsurprising that the state Chamber of Commerce opposes a bill conferring greater protections to workers and restricting employers' freedom to terminate them.

197. "Just cause" means (1) an employee's failure to satisfactorily perform their job duties or to comply with employer policies if the employee was afforded progressive discipline; (2) an employee's egregious misconduct; or (3) for "bona fide economic reasons" provided in writing to the employee. *See* Illinois Employee Security Act, H.B. 3530, § 5, 102nd Gen. Assemb. (introduced Feb. 22, 2021). An employer must provide the employee a written explanation of the reasons for the discharge. *Id.* at § 10.

to establish just cause.[198] Like Montana's WDFEA, the bill exempts from its coverage employees covered by a CBA,[199] and, where the Illinois Department of Labor finds that an employer has discharged an employee unlawfully, the employee may receive reinstatement and treble damages, with additional damages for failures to provide explanations for discharge.[200] The employer must also pay a civil penalty of $10,000 for an unlawful discharge and $5,000 for failing to provide a timely written explanation for a discharge.[201] The Employee Security Act also provides for a private cause of action, with reasonable attorneys' fees awarded to the prevailing party.[202]

The Southern District of New York's opinion in *Restaurant Law Center v. City of New York* highlighted plaintiffs' reliance on decisions from the Seventh and Ninth Circuits.[203] It also observed, however, that "[t]hese decisions have not been followed in this Circuit,"[204] and cites *Cuomo* as an example.[205] The court further noted that the Ninth Circuit has since narrowed its *Bragdon* decision in *Associated Builders & Contractors of Southern California, Inc. v. Nunn*,[206] where it found that "the NLRA does not authorize us to preempt minimum labor standards simply because they are applicable only to particular workers in a particular industry."[207] Given these updated interpretations, the court then concluded that *Shannon*, which relied on *Bragdon*, has therefore "lost its persuasive authority."[208]

A New York federal court might easily distinguish precedent from other circuits, but an Illinois federal court—which would be tasked with interpreting Illinois' prospective just-cause legislation, should it come to pass—would be required to look more closely at the Seventh Circuit's decision in *Shannon* and could ignore *Bragdon* as supplanted by the Ninth Circuit's later decision in

198. *Id.* at § 10(g).
199. *Id.* at § 25.
200. *Id.* at § 50.
201. *Id.*
202. *Id.* at § 55.
203. These decisions are Chamber of Com. v. Bragdon, 64 F.3d 497 (9th Cir. 1995) and 520 S. Mich. Ave. Assocs. v. Shannon, 549 F.3d 1119 (7th Cir. 2008), respectively.
204. Rest. L. Ctr. v. City of New York. 585 F. Supp. 3d 366, 379 (S.D.N.Y. 2022).
205. Concerned Home Care Providers v. Cuomo, 783 F.3d 77, 86 n.8 (2d Cir. 2015).
206. *See* 356 F.3d 979, 990 (9th Cir. 2004).
207. *Rest. L. Ctr.*, 585 F. Supp. 3d at 379 (quoting Associated Builders & Contractors of S. California, Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004)).
208. *Id.* at 379.

Nunn. In fact, the Seventh Circuit explicitly discounted *Nunn*'s relevance to the Attendant Amendment at issue in *Shannon*, distinguishing *Nunn* from *Bragdon*,[209] and may be asked to do so again by challengers to any future just-cause law.

As the Southern District of New York's decision in *Restaurant Law Center v. City of New York* shows, it is permissible for a just-cause statute to only cover one industry.[210] Despite *Shannon*'s disfavoring of state laws that apply "to only one occupation, in one industry, in one county,"[211] even the Ninth Circuit, on whose *Bragdon* decision the *Shannon* court purported to rely, has recognized that "the NLRA does not authorize us to preempt minimum labor standards simply because they are applicable only to . . . a particular industry."[212] In distinguishing the Ninth Circuit's decision in *Nunn*, from the facts in *Shannon*, the Seventh Circuit noted that the regulation at issue in *Nunn* applied to more than one location, whereas the Attendant Amendment was limited to only one of Illinois' 102 counties.[213] Therefore, if a just-cause statute is only covering one industry, it should extend beyond one county to avoid the tension between *Nunn* and *Shannon*.

V. LOOKING AHEAD

As states and municipalities consider just-cause laws of their own, Part V.A begins with recommendations on how best to structure such legislation to avoid preemption. Part V.B follows with a reframing of the labor-management relations balance to argue that statutory just-cause protection does not unduly tip the scales in favor of labor. Part V.C concludes with additional policy

209. *See* 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1132 n.9 (7th Cir. 2008) (quoting *Nunn*, 356 F.3d at 990–91) ("As *Nunn* recognized, 'Congress authorized states to establish apprenticeship standards and to regulate the conditions governing the implementation of apprenticeship programs, whether the apprentices were working on public or private projects,' and this 'differentiates California's apprenticeship regulations from the Contra Costa County ordinance at issue in *Bragdon*.' The court in *Nunn* further distinguished *Bragdon*, reasoning '[s]econd and equally important, unlike in the case of the Contra Costa County ordinance at issue in *Bragdon*, here contractors may completely avoid the applicability of the California apprenticeship regulations' by not hiring apprentices.").

210. Rest. L. Ctr. v. City of New York. 585 F. Supp. 3d 366, 377 (S.D.N.Y. 2022).

211. *Shannon*, 549 F.3d at 1134.

212. *Nunn*, 356 F.3d at 990. *See* Am. Hotel and Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 960 (9th Cir. 2016) (finding a law applying only to hotel workers not preempted by *Machinists*).

213. *Shannon*, 549 F.3d at 1131.

considerations so that the benefits of just-cause legislation may be felt in full force.

A. RECOMMENDATIONS

Hyper-targeted legislation, such as the Attendant Amendment struck down in *Shannon*, may be too specific to be characterized as a permissible minimum labor standard of general applicability. Just-cause statutes ought to be broad enough to avoid this pitfall. The discharge ordinance upheld in *Rhode Island Hospitality Association* applied to the entire hotel industry in Providence,[214] and the Virgin Islands' WDA applied to all employees, save supervisors.[215] While New York's recent just-cause law protecting fast-food workers may resemble the Attendant Amendment at issue in *Shannon*, the First Circuit noted "the fact that [Providence], rather than the state, regulates this industry lessens *Shannon*'s concern that 'by regulating only one county the state makes it possible to target union-heavy counties (or union-light counties), and thus reward (or punish) union activity.'"[216] To avoid *Shannon*'s political fears of targeting specific counties based on union activity, just-cause legislation should instead cover all employees statewide, regardless of industry, occupation, or location—thereby making the law one of general applicability. This change would also ameliorate the Seventh Circuit's issue with Illinois' legislating baseline protections for certain workers above those which workers in the rest of the state enjoy.[217] Legislatures in Indiana and Wisconsin (which likewise belong to the Seventh Circuit) should similarly take note.

A just-cause statute, therefore, should "go big or go home," in order to have its greatest effect; that is, it should cover as many employees as possible under the NLRA, rather than attempting to

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214. R.I. Hosp. Ass'n v. City of Providence, 667 F.3d 17, 33 n.15 (1st Cir. 2011).

215. St. Thomas-St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 357 F.3d 297, 304 (3d Cir. 2004) ("Nevertheless, the WDA indirectly compels an employer to bargain collectively with supervisors by requiring that an employer who wishes to alter the WDA's grounds for terminating a supervisor enter into a collective bargaining agreement. Since this limitation constitutes pressure to bargain with supervisory employees, the WDA, as applied to supervisors, conflicts with Section 14(a) of the NLRA.").

216. *R.I. Hosp. Assoc.*, 667 F.3d at 33 n.15 (quoting *Shannon*, 549 F.3d at 1133).

217. *See Shannon*, 549 F.3d at 1135–36 ("This is especially true when considered in light of what Illinois considered an appropriate minimum for employers in the remaining 101 counties in the One Day Rest in Seven Act—one unpaid twenty-minute break and no shifting of the burden of proof.").

replicate what one group of workers might bargain for under a CBA. In *Concerned Home Care Providers v. Cuomo*, the Second Circuit recognized that the laws at issue in *Shannon* and *Bragdon* represented a "substantially more targeted invasion of the bargaining process" than a local minimum wage law aimed at stabilizing a certain industry.[218] Likewise, in *Restaurant Law Center v. City of New York*, the Southern District of New York similarly held New York City's just-cause statute to be a legitimate minimum labor standard focused on protecting vulnerable hourly employees in a specific industry, here fast food service.[219] Because the NLRA is primarily concerned with establishing "an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck,"[220] a just-cause law that regulates employee termination does not impact or regulate the process by which collective bargaining occurs, but instead forms the "backdrop" of rights that the Supreme Court recognized in *Fort Halifax*.[221] If New York City's legislation, decried on appeal as an "invasive and detailed" meddling with labor-management negotiations,[222] forms the marginal case of permissible minimum labor standards, then other legislatures, like Illinois', should embrace the opportunity to legislate broader protections against arbitrary terminations.

A just-cause statute also should cover employees protected by CBAs. Though some commentators have suggested CBA-covered employees' wrongful discharge claims would be preempted,[223] "[i]t would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on union employers."[224] Minimum state labor standards must apply equally—whether an employee is unionized or not.[225] The Southern District of New York relied on this principle in upholding New York City's fast-food

218. 783 F.3d 77, 86 n.8 (2d Cir. 2015).
219. 585 F. Supp. 3d 366, 377 (S.D.N.Y. Feb. 10, 2022).
220. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985).
221. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987).
222. *See* Brief for Appellant at 36, Rest. L. Ctr. v. City of New York (No. 22-491) (2d Cir. June 22, 2022).
223. *See* Gardner, *supra* note 46, at 555 (concluding that "any state wrongful discharge claim brought by a unionized employee for breach of the terms of a collective bargaining contract will be preempted under section 301 of the LMRA").
224. *Metropolitan Life Ins. Co.*, 471 U.S. at 726.
225. *Id.* at 725.

industry just-cause law which made no exceptions for employees covered by CBAs.[226] Furthermore, the Court has held that claims by union employees based on state law are not preempted if they are "independent," can be resolved without interpreting the CBA,[227] and involve a state public policy,[228] which should pose no issue if the state statute exclusively defines just-cause for discharge.

Additionally, to avoid preemption, a state or local just-cause statute should not extend such protections to supervisors. Although the Court has stressed that laws should be of general application to escape preemption, the Third Circuit has interpreted the Virgin Islands' WDA[229] not to apply to supervisors, finding that such application was preempted by the NLRA.[230] This understanding follows from the nature of collective bargaining and labor-management relations, in which supervisors are aligned with management, and from the NLRA itself, from which supervisors are expressly excluded.[231] Excluding any employees from a just-cause statute's protections is of course undesirable, but a statute drafted in this way would still protect the employees most vulnerable to unjust dismissals.

Some commentators raise the possibility that a state statute requiring all employee discharges to be supported by just-cause and creating a tort cause of action for its breach, would be preempted under *Machinists*.[232] These commentators argue that such a statute would decimate the federally-favored use of arbitration if litigation remedies were more desirable than those available in private dispute resolution, and that the policy

226. *See* Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 377 (S.D.N.Y. 2022).

227. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

228. *See id.* at 406 n.6 (1988) ("Although the cause of action was not based on any specific statutory provision, . . . the Illinois Workers' Compensation Act expresses the public policy underlying the common-law development . . . .") (citing Kelsay v. Motorola, Inc., 74 Ill.2d 172 (1978)).

229. *See supra* Part III.C.

230. St. Thomas-St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 357 F.3d 297, 304 (3d Cir. 2004). The Third Circuit relied on the Supreme Court's reasoning in Beasley v. Food Fair of N.C., Inc., 416 U.S. 653 (1974), which "teaches that state (or territorial) laws that pressure employers to accord supervisors the status of employees for collective bargaining purposes conflict with Section 14(a) of the NLRA." *See St. Thomas*, 357 F.3d at 303.

231. *See* 29 U.S.C. § 152(3). This relationship between supervisors and management was cited in Del Valle v. Officemax N. Am., 680 Fed. App'x 51 (3d Cir. 2017).

232. *See* Wheeler & Browne, *supra* note 46, at 40; *see also* Gardner, *supra* note 46, at 554–55.

advanced by the statute—job security—is parallel to that of the NLRA.[233] They further note that a just-cause requirement could run afoul of the Court's decision in *Metropolitan Life* if it creates an inequality of bargaining power by dictating too many substantive terms favoring one side and interferes with the federal policy favoring private dispute resolution by allowing all discharges to be litigated.[234]

These concerns are not without merit, but a legislature can address them through deliberate drafting and a reframing of the labor-management balance of bargaining power. Although both New York City and Illinois' laws provide for private causes of action, just-cause statutes should encourage private dispute resolution over litigation as much as possible. Careful drafting should aim not to disrupt the use of arbitration, which is favored in federal labor law policy,[235] even if that means limiting just-cause discharge disputes to the arbitral mechanism or restricting damages and penalties. The Attendant Amendment invalidated in *Shannon* created a private cause of action, which the Seventh Circuit found to interfere with the NLRA's objectives and the employment relationship's existing dispute-resolution structure, which included a grievance procedure and arbitration.[236]

Even though meager awards might disincentivize attorneys from bringing claims, as seen in Montana's WDFEA, a just-cause statute should limit its penalties to backpay, restoration of hours, and reinstatement, with only minor damages or penalties allowed. As discussed, Part II.A *supra*, the NLRA is intended to be remedial, not punitive, and state labor laws must be in harmony with this policy. The Attendant Amendment provided for treble damages, which the Seventh Circuit held were not "minimal."[237] Excessive penalties might create a "formidable enforcement scheme" found preempted by *Machinists* in *U.S. Chamber of*

233. *See* Wheeler & Browne, *supra* note 46, at 40–41.

234. *Id.* at 41.

235. *See id.* at 2–3 ("Since most collective bargaining agreements contain both a provision requiring discharges to be for cause and a provision for grievance and arbitration of disputes, most such claims could be arbitrated. The Supreme Court has repeatedly stressed the centrality of arbitration to the collective bargaining process and the role of the arbitrator as the 'proctor' of the agreement. Bypassing the arbitration process in favor of seeking redress in the courts may have a substantial detrimental effect on the use of arbitration. Therefore, in most circumstances such disputes should be resolved through arbitration.").

236. *See* 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1139 (7th Cir. 2008).

237. *Id.* at 1135.

Commerce v. Brown,[238] or resemble the Wisconsin state law struck down under *Garmon* by the Seventh Circuit in *Gould*.[239] Limited statutory penalties and remedies may not deter unjust discharges, but they would promote a core NLRA purpose—job security—without risking preemption.

B. REFRAMING THE BALANCE OF BARGAINING POWER

Legislating a just-cause standard for discharge can be seen as restoring equality of bargaining power to labor-management relations, given that workers' striking power has diminished in recent history. As noted, Part III.A *supra*, a fair process for negotiating employment terms and conditions is paramount in the NLRA—afforded that the terms reached are of lesser concern.[240] *Machinists* preemption, as discussed Part II.B *supra*, protects the use of certain economic weapons in the bargaining process by labor and management. Even so, the court's toleration of the use of economic weapons may go beyond what seems apt or intuitive. Although Section 7 of the NLRA empowers employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid of protection,"[241] and Section 13 protects employees' right to strike,[242] the Act does not prohibit employers from permanently replacing employees who strike. Under *NLRB v. Mackay Radio & Telegraph Co.*[243] and its progeny, "it is not an unfair labor practice under the NLRA for an employer to refuse to discharge replacement employees in order to make room for strikers at the end of an economic strike."[244] NLRB General

238. *See* Chamber of Com. v. Brown, 554 U.S. 60, 66 (2008), discussed *supra* Part II.B.
239. *See* Wis. Dep't of Indus. v. Gould, Inc. 475 U.S. 282 (1986).
240. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985).
241. National Labor Relations Act § 7, 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.").
242. *See* National Labor Relations Act § 13, 29 U.S.C. § 163 ("Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.").
243. 304 U.S. 333 (1938).
244. Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 427 (1989).

Counsel Jennifer Abruzzo, however, recently questioned this principle.[245]

The right to use and threaten to use permanent replacement workers during economic strikes is a powerful tool. In the words of former NLRB Chairman William Gould, it is akin to the "right to use nuclear weaponry in the arsenal of industrial warfare."[246] Its legality is itself minatory, hanging "like a 'Sword of Damocles' partially paralyzing the union movement" and lowering strike levels.[247] Also permissible is the creation of competition among striking workers for the positions they left, as this employment scenario is "a secondary effect fairly within the arsenal of economic weapons available to employers during a period of self-help."[248] Though uncommon during the NLRA's infancy, this tactic has risen in popularity over the last several decades since President Reagan permanently replaced striking air traffic controllers in 1981.[249] Undergirding the hiring of permanent replacements for striking workers is the theory that employers need permanent employees in order to continue operations.[250] The NLRB's own statistics, however, tell a different story; the temporary employment industry increased 577 percent from 1982 to 1998, compared with a mere forty-one percent increase in the entire workforce.[251] This explosion in the temporary workforce suggests that many employers do not require permanent employees.

Due in part to employers' ability to permanently replace striking workers,[252] major strikes—involving one thousand or

245. *See* JENNIFER ABRUZZO, NLRB GEN. COUNS. MEM. GC 21-04, 8 (Aug. 12, 2021).

246. WILLIAMS B. GOULD, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 202 (1993).

247. BLOOMBERG INDUS. GRP., *Daily Labor Report, Management Attorney Says Striker Replacement Measure Will Tilt Labor Laws Against Employers*, A-2/3 (Mar. 6, 1991). For a discussion of the "striker replacement doctrine" and declining strike levels, *see* John Logan, *Permanent Replacements and the End of Labor's "Only True Weapon,"* 74 INT'L LAB. & WORKING-CLASS HIST. 171, 187–88 (2008).

248. *Trans World Airlines*, 489 U.S. at 438.

249. *See* Joseph A. McCartin, *Marking a Tragic Anniversary*, ORIGINS (Aug. 3, 2001), https://origins.osu.edu/history-news/marking-tragic-anniversary?language_content_entity=en [https://perma.cc/7ND7-PL9K].

250. *See* Logan, *supra* note 247, at 187–88; Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 437 (1989).

251. *See* BLOOMBERG INDUS. GRP., *Daily Labor Report*, *Temporary Worker Growth May Be Cause To Reconsider Legitimacy of Replacements*, A-12 (Feb. 11, 2008); *see also* M.B. Sturgis Inc., 331 N.L.R.B. 1298, 1298 (2000) (noting the significant increase in temporary workers over the preceding two decades).

252. *See* Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1605 (2002) (observing that "the strike [has] become[ ] increasingly suicidal for many employees in view of the threat of permanent replacements").

more workers—in the United States are not nearly as common as they used to be, declining from a high of 470 in 1952 to 145 in 1981, and failing to exceed 100 in the last four decades.[253] The number of workers participating in major work stoppages has also declined.[254] This reduction indicates a seachange in the balance of labor-management relations. The rising tide of the economy, moreover, has not lifted all boats; in the last four decades, worker productivity has grown over three-and-a-half times as much as pay, when adjusted for inflation.[255] This statistic offends the NLRA's ultimate goals: resolving the problem of "depress[ed] wage rates and the purchasing power of wage earners in industry" and "the widening gap between wages and profits."[256] Therefore, the labor-management balance may be less even than it was when Congress enacted the NLRA in 1935, or when the *Machinists* Court divined Congress' intent to leave undisturbed the use of economic weapons in 1976. When only one side enjoys "the right to use nuclear weaponry in the arsenal of industrial warfare,"[257] even the image of bringing a knife to a gun fight appears rosy.

Given the increasingly unbalanced playing field, and that "preemption may not be lightly inferred,"[258] courts should not interpret just-cause legislation as incompatible with the NLRA's goals or as interfering with the collective bargaining process. This is especially true given that states already may influence bargaining relationships by, for example, providing unemployment benefits to strikers.[259] Instead, such laws should be seen as setting minimum labor standards and as restoring (at least some) equilibrium in bargaining power to what should be a fair fight.

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253. U.S. BUREAU OF LAB. STATS., *Work Stoppages Involving 1,000 or More Workers, 1947–2007* (Feb. 9, 2018), https://www.bls.gov/news.release/wkstp.t01.htm [https://perma.cc/8898-UXEA].

254. MARGARET POYDOCK ET AL., ECON. POL'Y INST., DATA SHOW MAJOR STRIKE ACTIVITY INCREASED IN 2021 BUT REMAINS BELOW PRE-PANDEMIC LEVELS 4–5 (2022), https://files.epi.org/uploads/244965.pdf [https://perma.cc/Z86F-EWZJ].

255. ECON. POL'Y INST., *The Productivity-Pay Gap* (Oct. 2022), https://www.epi.org/productivity-pay-gap/ [https://perma.cc/K938-E4AR] ("From 1979 to 2020, net productivity rose 61.8%, while the hourly pay of typical workers grew far slower—increasing only 17.5% over four decades (after adjusting for inflation).").

256. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 754 (1985) (citing 29 U.S.C. § 151; 79 CONG. REC. 2371 (1935) (remarks of Sen. Wagner)).

257. Gould, *supra* note 246, at 202.

258. *See* Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 367 (S.D.N.Y. 2022).

259. *See* N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 545, 545–46 (1979) (finding no preemption of New York statute allowing unemployment benefits to strikers). Notably, while the Court recognized that New York's law "has altered the economic balance between labor and management," the plurality still held the law was not preempted. *Id.* at 532.

One potential issue with Illinois' proposed Employee Security Act is that employers bear the burden of proving both just cause for termination and that they first used progressive discipline, or a system of graduated steps to correct an employee's conduct or performance. New York City's fast-food industry statute contains the same requirements.[260] In *Shannon*, the Seventh Circuit criticized the "unprecedented shifting of the burden of proof to the employer" in holding that the Attendant Amendment was not truly a minimum labor standard.[261] Despite this concern, it is impractical to draft a just-cause statute with the burden of proof on any other party. The employer alone knows the reasons for discharge, and it would be antithetical to the principle of "just cause" to allow an employer to rely on pretext or the discharged employee's absence of evidence, which the employee realistically would not possess. Furthermore, this allocation of the burden of proof should in no way be decisive for purposes of preemption; it is outside the realm of *Garmon*, and how legislatures choose to assign evidentiary burdens cannot be said to interfere with the "free play of economic forces"[262] in the way that *Machinists* contemplates.

C. ADDITIONAL POLICY CONSIDERATIONS

This Note is primarily concerned with structuring just-cause legislation to avoid preemption and to protect workers. For that reason, policy considerations are ancillary to the question of NLRA preemption, but they still warrant brief discussion so that these laws' protections may be realized in practice.

Following the passage of New York's just-cause statute, practitioners in the field highlighted harmful potential employer responses, including that employers might hire fewer new employees, increasingly rely on independent contractors, or terminate employees with performance issues during the law's

260. N.Y.C. Admin. Code § 20-1272(e) ("The fast food employer shall bear the burden of proving just cause by a preponderance of the evidence in any proceeding brought pursuant to this subchapter, subject to the rules of evidence as set forth in the civil practice law and rules or, where applicable, the common law.").

261. 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1139 (7th Cir. 2008).

262. Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976).

probationary period.[263] Now that the law has been upheld at the district level, a focus on its practical effects is timely.

Contrary to practitioner fears about reduced hiring, just-cause legislation is not likely to raise unemployment levels.[264] Similarly, the fear that fast-food employers might fire workers during the 30-day probationary period, rather than train them more intensively at the outset, is unrealistic given the significant costs of replacing workers[265] and the turnover endemic to the industry.[266] In light of these considerations, and the vulnerabilities associated with unstable and unpredictable work schedules,[267] legislatures should primarily focus on extending just-cause protections to industries with high layoff rates, such as the hospitality, food service, and retail industries.[268] Additionally, although exceptions to at-will employment may increase employer use of independent

263. *See* Harris Mufson & Julia Hollreiser, *NYC Fast Food Worker Protections May Portend 'At Will' Shift*, LAW360 (Apr. 22, 2021), https://www.law360.com/articles/1377808/nyc-fast-food-worker-protections-may-portend-at-will-shift?copied=1 [https://perma.cc/PE55-JK4G].

264. A recent meta-analysis of seventy-five studies on the effect of employment protection legislation could not reject the hypothesis that the average effect of employment protection on unemployment is zero. *See* Philip Heimberger, *Does Employment Protection Affect Unemployment? A Meta-Analysis* 23–24 (Vienna Inst. for Int'l Econ. Stud., Working Paper No. 176, 2020), https://wiiw.ac.at/does-employment-protection-affect-unemployment-a-meta-analysis-dlp-5225.pdf [https://perma.cc/KY4K-8REQ] ("There is no robust evidence for an overall adverse impact of employment protection on unemployment . . . . In general, employment protection seems to be less important as a factor for explaining unemployment than is often believed."). Note that the effect of just-cause protections on unemployment may vary depending on a country's labor and product markets, the design and enforcement of employment protections, and other aspects of the country's political economy. *See* ANDRIAS & HERTEL-FERNANDEZ, *supra* note 18, at 49.

265. For an argument that businesses that prioritize low labor costs over job quality and retention are misguided because they do not take into consideration the direct and indirect costs of worker replacement, which may exceed one-fifth of a worker's annual wage, *see* KATE BAHN & CARMEN SANCHEZ CUMMING, WASH. CTR. FOR EQUITABLE GROWTH, IMPROVING U.S. LABOR STANDARDS AND THE QUALITY OF JOBS TO REDUCE THE COSTS OF EMPLOYEE TURNOVER TO U.S. COMPANIES (2020), https://equitablegrowth.org/wp-content/uploads/2020/12/122120-turnover-costs-ib.pdf [https://perma.cc/PM2Q-JUFK]

266. *See, e.g.*, Eric Rosenbaum, *Panera is Losing Nearly 100% of its Workers Every Year as Fast-Food Turnover Crisis Worsens*, CNBC (Aug. 29, 2019), https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html [https://perma.cc/5Y59-BJVC] ("In the restaurant industry, turnover is 130%, turning over more than a full workforce every year." (quoting Panera C.F.O. Michael Bufano)).

267. For an argument that in the service industry, unpredictable work schedules can heighten vulnerability to job turnover and downward wage mobility, *see* Joshua Chopper et al., *Uncertain Time: Precarious Schedules and Job Turnover in the U.S. Service Sector*, 75 INDUS. & LAB. REL. REV. 1099 (2021). Assuming such conditions are to some degree inherent in the service industry, just-cause protections can mollify their negative effects.

268. *See* U.S. BUREAU OF LAB. STATS., *Job Openings and Labor Turnover Survey* (Mar. 10, 2022), https://www.bls.gov/news.release/jolts.t16.htm#jolts_ [https://perma.cc/79KT-XK25] (showing the average number of job openings per industry, year).

contractors,[269] courts and legislatures (including Congress) have several options to prevent companies from misclassifying workers as independent contractors.[270] Likewise, they can still hold companies liable for unlawful terminations as joint employers with temporary agencies.[271]

CONCLUSION

Workers in the United States terminable at the whim of their employer have endured the doctrine of at-will employment for over a century. States and localities possess the power to enact statutory, just-cause protections to shield workers from arbitrary dismissals without running afoul of the NLRA. Although New York City's recent fast-food industry just-cause statute has escaped preemption so far, similar challenges to other proposed just-cause laws—if they come to pass—are likely inevitable. States considering their own just-cause legislation, such as Illinois, must be mindful of their circuit's case law interpreting minimum labor standards and craft their bills accordingly—sweeping economy-wide—to avoid preemption.

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269. Businesses responded to increasing state exceptions to at-will employment in the 1980s and 1990s by shifting more employment activity to temporary help agencies to minimize their legal liability. *See* David H. Autor, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing*, 21 J. LAB. ECON. 1, 3 (2003) (noting that state courts' adoption of the implied contract doctrine resulted in more than twenty percent excess temporary help employment growth in adopting states).

270. For example, under the "ABC test," modeled off of California's AB5 law, workers are independent contractors only if they (A) are free from the putative employer's nominal and actual control with respect to the performance of the work; (B) perform work outside the usual course of the putative employer's business; and (C) are customarily engaged in an independently established trade of the same nature as the performed work. *See* CAL. LAB. CODE § 2750.3. Some scholars have also suggested a modified ABC test, which incorporates the economic realities test of the Fair Labor Standards Act (FLSA) and focuses on the aspects of relative bargaining power, like who sets prices or makes decisions regarding costs, or simply adds a rebuttable presumption of employment to the FLSA's economic realities test. *See* Tanya Goldman & David Wil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace* 50 (Inst. for New Econ. Thinking, Working Paper No. 114, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551446 [https://perma.cc/76GV-BEYQ]. An even more radical approach focusing on latent bargaining power in the modern, fissured economy would find a company to be a "joint employer" of a given worker whose conditions it has the ability to improve. *See* MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING 15 (2015), https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf [https://perma.cc/P6WX-BHSZ].

271. *See, e.g.*, Amarnare v. Merrill Lynch, 611 F. Supp. 344 (S.D.N.Y. 1984). Illinois' proposed Employee Security Act provides a just-cause discharge standard and holds that temporary labor services agencies and their third-party clients are joint employers of an employee under the Act. *See* SB 2332, Section 20, 102d Gen. Assemb. (Ill. 2021).