Labor Law's Preemption Problem: *Glacier Northwest* and What the Fate of *Garmon* Means for American Workers

ALEXANDER S. WHISTLER†

The Supreme Court's 2022–2023 term was, unsurprisingly, terrible for millions of Americans. From the environment to affirmative action to student loan forgiveness, the Court remained committed to its project of reshaping the nation's laws in its conservative image. But despite its well-demonstrated antipathy for organized labor, the Court in Glacier Northwest v. International Brotherhood of Teamsters *managed to leave a long-standing, purportedly worker-friendly doctrine in federal labor law largely intact.* Glacier Northwest *presented the question of whether an employer may sue a union in state court for damages over a strike that allegedly causes property destruction, or whether, under the Court's decision in* San Diego Building Trades Council v. Garmon*, an employer's claim is federally preempted and thus must be brought before the National Labor Relations Board if it alleges conduct that is even "arguably" protected or prohibited by the National Labor Relations Act. Rather than do what many feared it might and overrule* Garmon*, the Court instead found that the Teamster's alleged conduct—allowing delivery drivers at a cement factory to fill their trucks with wet cement before calling a strike, thereby creating the risk of imminent property destruction—was not even arguably protected by federal law. The Court thus declined its invitation, at least for now, to discard a doctrine that has traditionally been viewed as a shield against costly state lawsuits by employers.*

As this Note seeks to demonstrate, however, Garmon*'s application within the current labor and employment law landscape is more ambiguous than the reaction to* Glacier Northwest *might imply. Indeed, recent case law suggests that* Garmon *is no longer serving American workers in the same way it did when it was decided, during the industrial pluralist heyday of the 1950s. This Note expands upon the existing body of scholarship that has criticized* Garmon *as overly broad and ill-suited to the realities of the modern American workplace. It argues that* Garmon *has in part become a procedural tool for employers, both those seeking to avoid liability for violating their employees' rights under state law, as well as those seeking to avoid compliance with state and local ordinances aimed at shoring up workplace protections. It concludes by suggesting that*

† J.D. Candidate 2024, University of California, College of the Law, San Francisco; Articles Editor, *UC Law Journal*. I would like to thank Professor Reuel Schiller for his incredibly helpful insights and suggestions along the way. Additional thanks to the editors of the *UC Law Journal* for their thoughtful feedback. Finally, and most importantly, thanks to my mom and my aunt Jerry for their unwavering support.

as long as the NLRA remains woefully deficient in terms of protecting workers and unions from extreme union-busting tactics, federal preemption should not stand as an obstacle to state and local causes of action and experimentation aimed at facilitating workplace justice.

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INTRODUCTION

The American labor movement stands at a critical juncture. Across the country, traditional unions are flexing their power in ways they have not for decades.[1] At the same time, workers at behemoth corporations like Apple, Starbucks, and Amazon continue to demonstrate a newfound commitment to organizing, scoring a handful of impressive victories over the last several years.[2] While union membership in the United States is still considerably lower than it was at its zenith in the 1950s,[3] public support for unions is higher than it has been since that time.[4] Indeed, polls suggest that a majority of Americans see the decline in union membership as a detriment to the country's well-being.[5] This renewed interest in collective action among workers, coupled with shifting public opinion, could signal that labor is planting the seeds of its resurgence.

In the face of this optimism, however, sits the United States Supreme Court. In just the last five years, the Roberts Court has handed unions and workers a number of high-profile losses, wielding the Bill of Rights and canons of statutory interpretation to further erode the legal protections for organized labor.[6] By some estimates, the Court is more business-friendly than it has been

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1. Andrew Dalton & Leslie Ambriz, *Hollywood Actors Join Screenwriters in Historic Industry-Stopping Strike as Contract Talks Collapse*, ASSOCIATED PRESS (July 13, 2023, 12:05 AM), https://apnews.com/article/hollywood-actors-strike-ca3e3eddc910f1e52d618e5e3c394554; Camila Domonoske, *UAW Once Again Expands Its Historic Strike, Hitting Two of the Big 3 Automakers*, NPR (Sept. 23, 2023, 2:32 PM), https://www.npr.org/2023/09/29/1202354093/uaw-strike-deadline-expansion-big-3-shawn-fain-ford-gm-stellantis; Noam Scheiber, *UPS Employees Approve New Contract, Averting Strike*, N.Y. TIMES (Aug. 22, 2023), https://www.nytimes.com/2023/08/22/business/economy/ups-contract-vote-teamsters.html.

2. Annie Palmer, *Amazon Workers on Staten Island Vote for Company's First Unionized Warehouse in U.S.*, CNBC (Apr. 1, 2022, 6:05 PM), https://www.cnbc.com/2022/04/01/amazon-workers-in-staten-island-vote-to-unionize.html; Noam Scheiber, *Union Wins Election at a Second Buffalo-Area Starbucks*, N.Y. TIMES (Jan. 10, 2022), https://www.nytimes.com/2022/01/10/business/starbucks-union-election-buffalo.html; Catherine Thorbecke, *Apple's First US Labor Union Reaches New Milestone for Tech Industry*, CNN (Jan. 11, 2023, 2:18 PM), https://www.cnn.com/2023/01/11/tech/apple-store-union-negotiations-begin/index.html.

3. Union membership in the private sector stood at just over 10% in 2022. *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members – 2022 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf. In contrast, private sector union membership was as high as 40% in the mid-1950's. *See* Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1017 (1991).

4. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

5. Ted Van Green, *Majority of Adults See Decline of Union Membership as Bad for the U.S. and Working People*, PEW RSCH. CTR. (Apr. 19, 2023), https://www.pewresearch.org/fact-tank/2022/02/18/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-u-s-and-working-people.

6. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (holding that a California regulation that gave union organizers limited access to the premises of agricultural employers was a *per se* physical taking requiring just compensation under the Fifth Amendment); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that the collection of agency fees by public-sector unions from nonconsenting employees violates the First Amendment); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (holding that Section 7 of the National Labor Relations Act does not render arbitration agreements that waive collective and class action procedures unenforceable under the Federal Arbitration Act).

since the early twentieth century.[7] Thus, whatever glimmers of renewed support for unions might be percolating in society, the stark reality is that any chance this Court has had to reshape the nation's labor laws has invariably ended poorly for the average worker.

No wonder, then, that the Court's decision to hear arguments in a case out of Washington state involving a seemingly straightforward application of long-standing labor law doctrine raised more than a few eyebrows.[8] *Glacier Northwest v. International Brotherhood of Teamsters* involved a dispute between a concrete manufacturing company and the Teamsters local that represents its workers.[9] After contract negotiations stalled, the union decided to go on strike.[10] The company claimed that on the morning the strike was called, several delivery drivers were still out on their routes with wet concrete.[11] Because the striking drivers failed to unload their trucks upon returning from their unfinished deliveries,[12] Glacier was allegedly forced to discard the concrete before it hardened and destroyed the vehicles.[13] Glacier sued the union in state court for conversion and trespass to chattels, claiming that the union was liable for the loss of its product.[14]

The Washington Supreme Court ultimately dismissed Glacier's claims, finding that, under the United States Supreme Court's decision in *San Diego Building Trades Council v. Garmon*,[15] the suit was preempted by the National Labor Relations Act ("NLRA" or "the Act").[16] In *Garmon*, the Court sought to confine the adjudication of labor disputes arising under the NLRA within the primary jurisdiction of the National Labor Relations Board ("NLRB" or "the Board"), the federal administrative agency charged with implementing the Act.[17] It held that if a state lawsuit alleges conduct that is even "arguably" protected or

7. Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. 49, 57 (2022).

8. Irina Ivanova, *Why Going on Strike Could Get Harder for American Workers*, CBS NEWS (Oct. 13, 2022, 7:39 AM), https://www.cbsnews.com/news/striking-supreme-court-glacier-northwest-teamsters; Ian Millhiser, *The Supreme Court Hears a Case This Week that Endangers Workers' Ability to Strike*, VOX (Jan. 9, 2023, 7:00 AM), https://www.vox.com/policy-and-politics/2023/1/9/23541349/supreme-court-glacier-northwest-teamsters-unions-strike-concrete-garmon.

9. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 500 P.3d 119, 123 (Wash. 2021).

10. *Id.*

11. *Id.* at 124.

12. *Id.*

13. *Id.* While the state court was obliged to accept the facts alleged in Glacier's complaint as true, the union maintained that it instructed the drivers to keep their trucks' engines running so that the drums containing the concrete would continue to rotate, thus preventing the concrete from hardening. Brief for Respondents at 9, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771 (2023) (No. 21-1449).

14. *Glacier Nw. Inc.*, 500 P.3d at 126.

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

16. *Glacier Nw. Inc.*, 500 P.3d at 138.

17. *Garmon*, 359 U.S. at 242–43.

prohibited by federal law, then the state tribunal is ousted of jurisdiction.[18] According to the Washington Supreme Court, Glacier's allegations described conduct that could potentially be described as a protected strike.[19] The work stoppage and resulting concrete loss were therefore at least "arguably protected" under section 7 of the Act,[20] and the state court was obliged to dismiss the suit.[21]

In an 8–1 opinion, the Supreme Court reversed. Because the strike put Glacier's concrete in "foreseeable and imminent danger," the union did not meet its obligation to "take reasonable precautions to protect" its employer's property.[22] Its conduct was therefore not even "arguably protected" by the NLRA.[23] The Court distinguished the case from the line of NLRB precedent holding that strikes do not lose their protected status simply because they create the risk that an employer's perishable product will spoil.[24] Unlike those strikes, which involved perishable food products, the Court reasoned that Glacier's drivers "*prompted the creation* of the perishable product"—that is, mixed the wet concrete and loaded it into the trucks—before "walk[ing] off the job."[25] The union thus took "affirmative steps to endanger Glacier's property," and therefore lost the protections of the Act.[26]

While the decision in *Glacier Northwest* was by no means positive for American workers, the sentiment in the labor movement appears to be that the result was not as bad as it could have been.[27] At least for now, the movement was spared the loss of a doctrine that has protected unions from state tort lawsuits by employers since the 1950s.[28] Justice Thomas and Alito's concurrences, however, suggest that *Garmon* is still very much in the Court's crosshairs. Justice Thomas wrote separately to emphasize the "oddity of *Garmon*'s broad pre-emption regime," suggesting that "in an appropriate case," the Court should consider replacing *Garmon* with a more traditional form of conflict

18. *Id.* at 244.

19. *Glacier Nw. Inc.*, 500 P.3d at 134.

20. *Id.* at 134–35.

21. *Id.* at 138. In reaching its conclusion that Glacier's allegations described "arguably" protected conduct, the Washington Supreme Court relied upon longstanding NLRB precedent which holds that "incidental product damage does not render a strike unprotected." *Id.* at 132–33.

22. Glacier Nw., Inc. v. Int'l Bhd. Of Teamsters Loc. Union No. 174, 598 U.S. 771, 780–81 (2023).

23. *Id.* at 781.

24. Id. at 782–83 (citing Leprino Cheese Mfg. Co., 170 N.L.R.B. 601 (1968); Cent. Okla. Milk Producers Ass'n, 125 N.L.R.B. 419, 435 (1959); Lumbee Farms Coop., 285 N.L.R.B. 497, 506 (1987)).

25. *Glacier Nw. Inc.*, 598 U.S. at 783.

26. *Id.* at 785. As Justice Jackson noted in her lone dissent, the Court engaged in precisely the kind of fact finding that is typically performed by the NLRB, with the crucial difference being that the Court merely relied on the allegations of one party. *Id.* at 803–04 (Jackson, J., dissenting).

27. Jane McAlevey, *How Should Workers Respond to the Supreme Court's Ruling in* Glacier Northwest*?*, NATION (June 1, 2023), https://www.thenation.com/article/politics/supreme-court-glacier-northwest-workers; Andrew Strom, Glacier Northwest *Could Have Been Worse, but It's Still Bad*, ONLABOR (June 6, 2023), https://onlabor.org/glacier-northwest-could-have-been-worse-but-its-still-bad.

28. McAlevey, *supra* note 27.

preemption.[29] Given this Court's antipathy toward the administrative state[30] and the increasing frequency with which Justice Thomas' views become the views of the Court, it is likely worth considering what such a framework might entail.

As this Note seeks to demonstrate, it is not entirely clear that the post-*Garmon* world Justice Thomas envisions would be exclusively bad for American workers. Indeed, as many labor scholars have emphasized over the last several decades, the profound transformation of workplace regulation in this country since the 1950s has rendered *Garmon*'s preemptive sweep far less justifiable than it once was. This Note thus reveals an irony: what has long been perceived as an exclusively union-friendly doctrine has become—at least in part—a procedural tool used against workers in state and federal court. *Garmon* is now invoked by employers seeking to force their aggrieved workers to bring their claims before an adjudicative body in the NLRB that offers notoriously inadequate remedies.[31] It is also invoked by employers and business groups attempting to invalidate state and local ordinances designed to expand upon the workplace protections offered by federal law.[32]

Given this shift in the doctrine's application, this Note suggests that a modified preemption regime, in which states would be permitted to facilitate and expand upon the workplace protections embodied in NLRA, would better serve American workers. It argues that until the substantive provisions of the NLRA are amended to bolster its protection of concerted workplace activity, *Garmon* should not prevent workers from vindicating their rights under state law. While *Glacier Northwest* certainly provides yet another example of the Supreme Court's willingness to revisit long-standing precedent, it also invites an opportunity for a resurgent labor movement to reassess what kind of federal regime will best facilitate its interests moving forward.

I. THE *GARMON* DOCTRINE

In the late 1950s, the United States Supreme Court announced what has come to serve as one of the foundational pillars of federal labor law preemption doctrine.[33] *San Diego Building Trades Council v. Garmon* involved a dispute

29. *Glacier Nw. Inc.*, 598 U.S. at 785–88 (Thomas, J., concurring). In Justice Thomas' conception, rather than asking whether conduct is even "arguably" protected or prohibited under the NLRB's precedent, courts performing an NLRA preemption inquiry should ask "whether federal law and state law 'are in logical contradiction,' such that it is impossible to comply with both." *Id.* at 788 (Thomas, J., concurring).

30. Amy Howe, *Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies*, SCOTUSBLOG (May 1, 2023, 11:54 AM), https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies.

31. *See infra* Part IV.A.

32. *See infra* Part IV.B.

33. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). There are two other major strands of federal labor law preemption. The first is *Machinists* preemption, under which states may not regulate conduct that Congress intended to be "controlled by the free play of economic forces." Lodge 76 v. Wis. Emp. Rel.

between two unions and a lumberyard in California.[34] The unions wanted a union shop—that is, a commitment by the company to only hire workers who were already members of the unions, or who applied for membership no more than thirty days after being hired.[35] The company refused, and the unions proceeded to peacefully picket the employer's place of business.[36] In response, the company sued the unions in California state court. It alleged that the picketing had caused customers and suppliers to cease doing business with the lumberyard, and that the unions were liable for the company's lost earnings.[37] The state court, relying on both California tort law and provisions of the state's labor code, ruled against the unions and awarded the employer $1000 in damages.[38]

In a 5–4 decision, the Supreme Court reversed the state court's award of damages, articulating a general rule concerning the preemptive effect of the NLRA that has come to define federal labor law for the last half-century. "When an activity is *arguably* subject to [§] 7 or [§] 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."[39] Because the unions' conduct as described in the employer's complaint was at least arguably protected or prohibited by the Act, the California state court was precluded from exercising jurisdiction.[40]

In articulating this new framework for determining when state and federal courts must defer to the NLRB, the majority in *Garmon* expressed its concern that state regulation of conduct either protected or prohibited by the NLRA

Comm'n, 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co. 404 U.S. 138, 144 (1971)). The second is Section 301 Preemption, which derives from Section 301 of the Labor Management Relations Act and grants federal courts jurisdiction over suits alleging violations of collective bargaining agreements. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985). Because these doctrines involve distinct inquiries and were not invoked by either of the parties in *Glacier Northwest*, they are beyond the scope of this Note.

34. *Garmon*, 359 U.S. at 237.

35. *Id.*

36. *Id.*

37. *Id.* at 237–38. The company also insisted that the sole purpose of the picketing was to force the company to sign the unions' proposed contract. *Id.* at 237. The unions disputed this characterization and claimed that their conduct was aimed at educating the workers about the benefits of union membership and convincing them to join the unions. *Id.*

38. *Id.* at 237–39.

39. *Id.* at 245 (emphasis added).

40. *Id.* at 246. If the purpose of the picketing was to force the lumberyard to sign a union contract without proof of majority support from the lumberyard's workers, then the picketing was a prohibited unfair labor practice under the NLRA. *See* Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REGUL. 355, 356 n.6 (1990). On the other hand, if the picketing was merely aimed at convincing the lumberyard's workers to join the union, then the picketing would be protected by the NLRA. *Id*. at 356 n.4 (noting that prior to the Landrum-Griffin amendments in 1959, "the NLRA contained no ban on organizational picketing," and therefore such picketing was "embraced within the protection afforded to organization and union formation by [s]ection 7" of the Act).

would disturb the development of a uniform national labor policy.[41] In passing the Act, the Court explained, Congress sought a "uniform application of [the NLRA's] substantive rules . . . ." [42] In order to "avoid the[] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies,"[43] it was imperative to prevent multiple tribunals from adjudicating the same dispute.[44] Because "remedies form an ingredient of any integrated scheme of regulation," the state's award of damages, which are not available under the NLRA, would "only accentuate[] the danger of conflict."[45]

The majority went on to suggest that the NLRB, the entity tasked with administering the nation's newly enacted labor laws, would produce a more informed and coherent interpretation of the Act than state courts were capable of fashioning.[46] In their view, the NLRA did not merely reflect Congress' desire to lay down a body of substantive law.[47] It also reflected congressional intent to entrust the implementation of that substantive law to a "centralized administrative agency, armed with its own procedures, and equipped with . . . specialized knowledge and cumulative experience."[48] The decision to "confide primary interpretation and application [of the NLRA] to a specific and specially constituted tribunal" was thus vital, in the majority's view, to the proper administration of the Act.[49]

Despite the broad preemptive sweep of its decision, the Court nonetheless carved out two exceptions to the "arguably protected or prohibited" framework. First, federal courts may not prevent the States from regulating "where the activity regulated [is] a merely peripheral concern" to the national policy of industrial relations.[50] Second, the Court refused to oust the state courts of jurisdiction over suits implicating the protections and prohibitions of the NLRA "where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court cannot] infer that Congress ha[s] deprived the States of the power to act."[51] These exceptions, the Court maintained, would ensure "due regard for the presuppositions of our embracing federal system," while still preventing state interference with implementation of the NLRA.[52]

41. *Garmon*, 359 U.S. at 242–43
42. *Id.* at 243.
43. *Id.*
44. *Id.*
45. *Id.* at 247.
46. *Id.* at 242–43.
47. *Id.* at 242.
48. *Id.*
49. *Id.* at 242–43.
50. *Id.* at 243.
51. *Id.* at 244.
52. *Id.* at 243.

II. MERITS OF THE DOCTRINE: INDUSTRIAL PLURALISM'S HOSTILITY TO THE COURTS

In order to fully appreciate the Court's rationale in *Garmon*, it is helpful to examine the judiciary's treatment of concerted workplace activity prior to the 1930s, and how that treatment informed the Court's New Deal-era justices' conception of labor relations. During the late nineteenth and early twentieth centuries, the nation's courts were notoriously hostile to organized labor,[53] using "doctrines such as conspiracy and tortious interference with contractual relations" to obstruct workers' ability to engage in concerted activity.[54] Judicial review increasingly came to be seen by progressives as a tool for monied interests to block any kind of union-friendly reform.[55] Indeed, during the pre-New Deal era, "the labor injunction became the principal vehicle of judicial intervention in labor disputes."[56] By some estimates, the 1920s saw roughly one in four strikes enjoined by the nation's courts.[57]

It is against this historical backdrop that the principles underpinning the NLRA took shape. The Wagner Act of 1935 reflects a commitment by certain leaders of the labor movement at that time to the concept of "voluntarism," which has been described as a "staunch commitment to the 'private' ordering of industrial relations between unions and employers."[58] Voluntarism reflects the belief that "workers should pursue improvements in their living and working conditions through collective bargaining and concerted action in the private sphere rather than through public political action and legislation."[59] Thus, in the "industrial pluralist" vision of labor-management relations, "[t]he workplace, portrayed as a self-contained mini–democracy becomes . . . an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."[60] Instead of providing a robust set of substantive rights, the NLRA would merely provide a "'bare legal framework' to facilitate private ordering by management and labor" whereby the two parties would be free to create their own substantive rights through a collective bargaining agreement.[61]

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53. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 270, 272 (1978).

54. Katherine Van-Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1518 (1981).

55. Klare, *supra* note 53, at 272.

56. WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59 (1st ed. 1991).

57. *See id.* at 61–63 (describing how the "exuberant growth of the labor injunction" was in part a response to a "sharp increase in the proportion of strikes called and orchestrated by unions.").

58. *Id.* at 1–2 n.3.

59. *Id.* at 2 n.3.

60. Van-Wezel Stone, *supra* note 54, at 1515.

61. *See id.* at 1513 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955)).

Justice Frankfurter, who wrote the Court's majority opinion in *Garmon*, was committed to this vision of labor relations.[62] Indeed, Justice Frankfurter was acutely aware of the judiciary's enthusiasm for aiding management in workplace disputes and harbored a "long-seated distrust of judicial policy making in the labor relations area."[63] In 1930, then-professor Frankfurter co-authored a book describing in detail the doctrinal development of the labor injunction.[64] The willingness of the nation's courts to freely employ the labor injunction and invalidate legislation aimed at curtailing its use suggested that the injunction was not merely a mechanism "to prevent property from being injured [or] to protect the owner in its use," but had instead become a tool to "endow property with active, militant power which would make it dominant over men."[65]

In the view of Frankfurter and the New Dealers, the implementation and interpretation of the nation's labor laws was a task that simply could not be entrusted to the judiciary.[66] The solution to this problem was to banish courts from the business of formulating the national labor policy, and instead entrust the task to the experts who staffed the newly formed administrative agencies created by the various pieces of New Deal-era legislation.[67] These experts, unlike judges, could bring their expertise to bear on the complex technological and economic forces reshaping the nation.[68] The determinations of an expert administrator, it was suggested, would produce a far more rational and pragmatic set of policy prescriptions than the business-friendly propensities of the nation's judiciary.[69] Thus, courts "should stay out of the administrative process as much as possible because they d[o] not possess the specialized knowledge necessary to second-guess expert administrators."[70] This model was not only necessary to ensure effective implementation of federal labor policy, but was essential to the very functioning of democracy itself.[71]

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62. Klare, *supra* note 53, at 330; *see* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("The [NLRA] does not create rights for individuals which must be vindicated according to a rigid scheme of remedies.").

63. 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, 165 (2009).

64. *See generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1st ed. 1930).

65. *Id.* at 132–33 (quoting Traux v. Corrigan, 257 U.S. 312, 368 (1921) (Brandies, J.)).

66. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 414 (2007) (explaining that for the New Dealers, "[j]udges were, at best, inexpert meddlers in prescriptive government and, at worst, a reactionary force struggling to preserve laissez-faire capitalism in the face of obvious obsolescence.").

67. *Id.* at 415.

68. *Id.* at 418.

69. *Id.* at 420.

70. *Id.* at 419.

71. *Id.* at 429 (detailing the New Dealers' belief that the "administrative state . . . was an institutional embodiment of democracy in action").

Given this ideological backdrop, the Court's decision in *Garmon* makes a great deal of sense. Reversing the California state court's award of damages was not merely a matter of avoiding overlapping and potentially conflicting determinations by distinct tribunals. Instead, couched in the "heroic" conception of the administrative state articulated by the New Dealers,[72] the broad preemption doctrine announced in *Garmon*—covering not only conduct that is protected by federal law, but also that which is merely *arguably* protected or prohibited—would help ensure the preservation of a properly functioning democratic state.

III. THE CRITIQUE

Over the ensuing decades since *Garmon* was decided, several scholars have offered wide-ranging criticisms of the doctrine. *Garmon*, it has been suggested, has played a driving force in the "ossification" of American labor law, whereby states and municipalities are "virtually banish[ed] . . . from the field of labor relations."[73] These various critiques largely focus on the uniquely expansive scope of *Garmon* preemption in relation to other strands of federal preemption, as well as the shifting political and legal landscape that has rendered the Court's rationale in *Garmon* far less compelling than it was a half-century ago.

A. *GARMON*'S BROAD PREEMPTIVE SWEEP

As the Supreme Court has recognized on several occasions, Congress provided virtually no guidance about when and to what extent the nation's labor laws preempt state regulation of collective bargaining.[74] Instead, the Court has been "forced . . . to divine the will of Congress by implication."[75] The divination performed by the majority in *Garmon*, however, stands in marked contrast to the

72. *Id.* at 420.

73. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV 1527, 1572 (2002). Professor Estlund identifies "ossification" as the process by which American labor law has been largely "sealed off . . . both from democratic revision and renewal and from local experimentation and innovation." *Id.* at 1530. She identifies several drivers of this process, including "political impasse at the national level" which "has blocked any major congressional revision of the basic text since at least 1959," the "built-in obstacles to change" within the Act itself, and the judicially created "preemption of state and local laws" that has "block[ed] democratically inspired reforms" and "common law innovation." *Id.* at 1530–31.

74. *See* Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958) ("The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."); Garner v. Teamsters Union, 346 U.S. 485, 488 (1953) ("The [N]ational Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much."); Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd., 330 U.S. 767, 771 (1947) ("Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action.").

75. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 621 (1986) (Rehnquist, J., dissenting).

kind of preemption analysis that federal courts typically perform with regard to other federal statutes.[76] Thus, while a court hearing a state law claim will typically make the initial determination regarding whether the conduct in question is federally protected, *Garmon* ousts the states from adjudicating disputes if the conduct in question is even *arguably* protected.[77] The Court's decision in *Garmon* to include arguably *prohibited* conduct within the NLRA's preemptive sweep is also noteworthy. Prior to the Warren era, the Court typically "presumed from congressional silence that Congress intended parallel state law to survive."[78] Unless it was determined that the state law stood in "actual conflict" with the federal statute in question, the state law would not be preempted.[79]

Indeed, the Court in *Garmon* was split over this very issue. Four of the Court's justices were unwilling to sign on to what in their view appeared to be a departure from the Court's prior traditional preemption jurisprudence.[80] Justice Harlan, writing for the concurrence, feared that the majority's opinion would "cut[] deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited."[81] The Court's pre-*Garmon* preemption cases, the concurrence believed, dictated that "if no conflict . . . exist[s]," then the state law must survive.[82] The rule announced in *Garmon* thus represented a departure from the Court's prior preemption jurisprudence. It also displayed a willingness to interpret Congress' silence as congressional intent to displace the states from regulating industrial relations.

B. THE SHIFTING LANDSCAPE OF LABOR AND EMPLOYMENT LAW

Other scholars have focused their critiques on *Garmon*'s underlying rationales, suggesting that the doctrine does not appear as compelling as it once did in light of the profound social, economic, and legal developments that have

76. Gottesman, *supra* note 40, at 378.

77. *Id.* ("*Garmon's* 'arguably protected' rule imposes greater restrictions on state courts with respect to labor disputes: so long as the assertion of NLRA protection is not frivolous, the state court is without authority to proceed, *even though ultimately the NLRB might determine that the challenged conduct is not federally protected*.") (emphasis in original).

78. *Id.* at 384.

79. *Id.* As Professor Gottesman notes, the more reserved version of the Court's preemption jurisprudence before *Garmon* was well established when Congress passed both the Wagner Act and the Taft-Hartley amendments in 1947. There is very little to suggest, then, that the Congress that passed the NLRA would have assumed that it's "silence . . . respecting preemption would generate the sweeping, blanket prohibition of parallel state regulation that *Garmon* later decreed." *Id.* at 384–85.

80. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 249 (1959) (Harlan, J., concurring).

81. *Id.* at 253 (Harlan, J., concurring).

82. *Id.* at 252 (Harlan, J., concurring).

transpired since the 1950s. As Professor Henry Drummonds has argued, the notion that investing the NLRB with primary jurisdiction over conduct that arguably implicates the NLRA would produce a uniform labor law has been belied by time.[83] Because the composition of the Board changes from one presidential administration to the next, its decisions fluctuate back and forth depending on which way the political winds are blowing.[84] However favorable the Board's jurisprudence under a particular administration may be for unions and workers, those victories are susceptible to swift reversal.[85] Additionally, there is often little consistency between the determinations of the NLRB and those of the federal courts.[86] The federal appellate courts routinely demonstrate their willingness to disregard the NLRB's interpretations of the Act,[87] and have "used the enforcement process to incorporate into the NLRA their own visions of desirable labor relations policies."[88] Likewise, the NLRB does not "consider itself bound to follow legal interpretations of the courts of appeal in any case other than the case under review." Thus, labor law attorneys seeking to advise their clients on the rules governing a particular dispute find themselves faced with "a chimera of changing Board decisions, conflicting courts of appeal decisions, and inconsistent Supreme Court willingness to defer to Board expertise under administrative review doctrines."[89]

It is also no longer clear that deference to the expertise of the NLRB provides as compelling a rationale as it once did. Since the post-war era, it has become clear that federal labor law questions do not arise solely before the NLRB.[90] State courts often exercise concurrent jurisdiction with federal courts

83. Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 583 (1993).

84. *Id.* As Professor Drummonds notes, the NLRB's treatment of misrepresentations by parties in the context of Board conducted representation elections is illustrative. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 129 (1982) (reversing *General Knit of California* and returning to the standard announced in *Shopping Kart Food Mart*); Gen. Knit of Cal., Inc., 239 N.L.R.B. 619, 620 (1978) (reviving the rule announced in *Hollywood Ceramics*); Shopping Kart Food Mkt., 228 N.L.R.B. 1311, 1313 (1977) (overruling *Hollywood Ceramics* and determining that election results will only be set aside if "a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents"); Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962) (noting that the Board may set aside the results of a representation election if the prevailing party misrepresents facts in a way that "involves a substantial departure from the truth").

85. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 52 (2005) (describing how it took the Reagan Administration "less than six months in 1983 to reverse nearly 40 per cent of the [NLRB] decisions made during the 1970s that had been, in the view of business, too favorable to labour").

86. Drummonds, *supra* note 83.

87. Estlund, *supra* note 73, at 1558–59.

88. Drummonds, *supra* note 83, at 583 (quoting ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 112–13 (1991).

89. Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 127 (2009).

90. Drummonds, *supra* note 83, at 569–70; Estlund *supra* note 73, at 1555 (describing the "judiciary's vastly increased experience in recent decades with enforcing employee rights").

to interpret collective bargaining agreements, apply the courts' various and intricate preemption doctrines, and decide questions relating to the duty of fair representation.[91] It is also important to note that the NLRA now exists within a much larger body of federal and state law regulating the workplace.[92] Over the last several decades, the country has witnessed an "individual rights revolution," which has largely "replaced the older, New Deal-era, collective bargaining system for most American employees."[93] These federal and state statutory models, regulating wages, workplace safety, and employment discrimination, coexist with federal standards regulating the same conduct.[94] Indeed, many of these federal models, including both the Fair Labor Standards Act and Occupational Health and Safety Act, were in fact based on statutes that originated at the state level.[95] Unlike the other areas of workplace regulation in which the federal and state governments share authority, the "broad implied federal preemption of state and local laws affecting collective labor relations blocks democratically inspired reforms or variations at the state and local level, as well as state common law innovation."[96]

Thus, it appears that the Court's decision in *Garmon* rests on an increasingly questionable foundation. Not only did it represent a departure from the Supreme Court's traditional preemption analysis—one that four of the Court's justices were unwilling to sign onto at the time—but its underlying rationales are arguably far less compelling than they may have once been, given the profound transformation of the nation's labor and employment law landscape since the 1950s. As the remainder of this Note seeks to demonstrate, it is also far from clear that *Garmon* serves American workers in the way that the New Deal-era theorists and jurists imagined it would. Indeed, the case law suggests that the doctrine has morphed from a tool exclusively employed by unions to one that employers often regard as a means of furthering their interests.

IV. *GARMON* PREEMPTION AT WORK

In the post-war period, the politics of the Court's preemption analysis under the NLRA was relatively straightforward. Unions, seeking protection behind the "preemption shield," would rely on the doctrine to protect themselves against state laws that were "less hospitable to their activities than the now neutral federal labor laws."[97] However, by the 1980s, the shifting legal landscape had

91. Drummonds, *supra* note 83, at 569–70.
92. Drummonds, *supra* note 89, at 113.
93. *Id.* at 113–14.
94. *Id.* at 114.
95. *Id.* at 114–16.
96. Estlund, *supra* note 73, at 1530–31.
97. Drummonds, *supra* note 83, at 562.

caused "business interests and employee advocates to switch sides."[98] Thus, armed with new individual causes of action against employers, workers increasingly sought to vindicate their rights in state court, where they could expect a far more robust set of remedies than the NLRB was capable of providing.[99] This Note supplements the existing scholarship and shows that *Garmon*'s transformation into a procedural tool for employers seeking "sanctuary behind the preemptive shield" continues to this day.[100]

A. FORECLOSING INDIVIDUAL CLAIMS

Moreno v. UtiliQuest,[101] a recent decision by the Ninth Circuit Court of Appeals, is emblematic of this trend and illustrates how *Garmon* is capable of producing perverse outcomes. Cesar Moreno worked as a field supervisor for a company called UtiliQuest.[102] According to Moreno's complaint, UtiliQuest promised him that if he convinced his fellow employees to "sign away" their right to join a union, UtiliQuest would give him and anyone who signed such an agreement a ten percent pay raise.[103] Moreno alleged that after he obtained signatures from several of the company's employees, UtiliQuest gave him a ten percent raise but did not fulfill its promise to the other workers.[104] Moreno confronted his supervisors about the company's refusal to honor its agreement and was subsequently terminated.[105] Moreno then brought several California state law claims against the company, including intentional misrepresentation, fraud and deceit, whistleblowing retaliation, and termination in violation of public policy.[106]

In finding Moreno's suit preempted by the NLRA, the Ninth Circuit performed a straightforward application of *Garmon*. Because all of Moreno's claims arguably implicated sections 7 and 8 of the NLRA, the District Court was obligated to yield to the primary jurisdiction of the NLRB.[107] With regard to the fraud and misrepresentation claims, the Ninth Circuit reasoned that because the "subject of UtiliQuest's alleged deception" could be described as "an attempt on the part of [the employer] to interfere with the collective bargaining process,"

98. *Id.* at 563.
99. *Id.*
100. *Id.*
101. 29 F.4th 567 (9th Cir. 2022).
102. *Id.* at 572.
103. *Id.*
104. *Id.* at 572–73.
105. *Id.* at 573.
106. *Id.* at 574.
107. *Id.*

those claims were preempted under *Garmon*.[108] Similarly, because the "central theory" underlying the whistleblowing and retaliation claims was that Moreno was "terminated for acting on behalf of his fellow employees," the conduct underlying those claims "arguably violated the NLRA."[109] The court rejected Moreno's argument that his "grievances with UtiliQuest were personal in nature," concluding that "[a]lthough Moreno contends that he acted on his own volition, the NLRB could reasonably find that his 'individual actions were concerted to the extent they involved a "logical outgrowth" of prior concerted activity.'"[110] Additionally, because the "underlying controversy" in Moreno's complaint would be "identical with that which could be presented to the Board," the state court's exercise of jurisdiction "necessarily involve[d] a risk of interference" with the jurisdiction of the NLRB.[111] Thus, Moreno's advocacy for his fellow employees placed his conduct within the scope of activity protected by section 7 and ousted the District Court of jurisdiction.[112]

The Ninth Circuit's decision in *UtiliQuest* is noteworthy not because it represents a departure from the doctrinal framework, but because it illustrates how a faithful application of *Garmon* can function to deny workers vindication of their rights under state law. The result in *UtiliQuest* is also by no means an aberration. In *Kilb v. First Student Transportation*, the Washington Court of Appeals reached the same conclusion based on a similar set of facts.[113] It held that a supervisory employee's claim that he was wrongfully discharged for refusing to fire pro-union employees was preempted under *Garmon* because his state law claim was "essentially the same claim he could make under the Act."[114] Notwithstanding the exclusion of supervisors from the NLRA's definition of "employee," the court concluded that an "employer's discharge of a supervisor for refusing to commit unfair labor practices is, at least arguably, a violation of section 8(a)(1)" of the NLRA.[115] The minimal differences between the elements in Kilb's state law claim and the claim he could bring before the NLRB did not change the fact that the "essential element of proving the employer's prohibited conduct in state court is the very same conduct that the Board would consider in

108. *Id.* at 574–75. The court noted that although the two claims did not deal "primarily with UtiliQuest's alleged illegal conduct," the alleged conduct nonetheless "touch[ed] on conduct clearly covered by the NLRA." *Id.*

109. *Id.* at 575.

110. *Id.* at 576–77 (quoting NLRB v. Mike Yurosek & Son, Inc. 53 F.3d 261, 265 (9th Cir. 1995)).

111. *Id.* at 576.

112. *Id.* at 577.

113. *See generally* Kilb v. First Student Transp., 236 P.3d 968 (Wash. Ct. App. 2010).

114. *Id.* at 970.

115. *Id.* at 972–73. The court reached this conclusion by relying on precedent from various federal appellate courts, which have found that an "employer who forces supervisors to engage in unfair labor practices necessarily interferes with employees' section 7 rights." *Id.* at 971.

an unfair labor practice claim."[116] Kilb, like Moreno, was therefore required to seek relief from a tribunal that is not empowered to award compensatory or punitive damages.[117]

In courts across the country, *Garmon* is wielded by employers attempting to prevent their aggrieved workers from pursuing state law causes of action. An employer in Connecticut successfully invoked *Garmon* to avoid liability under a state law protecting workers who engage in free speech activity from retaliation.[118] In Iowa, an employer used *Garmon* to defeat its former employee's claims of wrongful discharge, promissory estoppel, and fraudulent misrepresentation.[119] A worker in Kentucky was denied relief for retaliatory discharge under state law after the court concluded that the NLRA also prohibited the employer's conduct.[120] And the list goes on.[121] Thus, it seems that Justice Harlan's concurrence in *Garmon*, warning of the decision's potential to thwart the ability of states to "furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct," has unfortunately proven prophetic.[122]

It also does not appear that the exceptions to *Garmon*, which could conceivably be invoked to save causes of action that reflect a state's legitimate

116. *Id.* at 973.

117. Estlund, *supra* note 73, at 1552.

118. Andrewsikas v. Supreme Indus., No. 3:19-CV-00574 (JAM), 2021 WL 1090786, at *1 (D. Conn. Mar. 22, 2021). Because the plaintiff "jointly engaged in his speech activity along with his co-worker . . . to complain about workplace safety conditions," his conduct could arguably be described as "concerted activit[y] for the purpose of . . . mutual aid or protection." *Id.* at *4.

119. Hussaini v. Gelita USA, Inc., 749 F. Supp. 2d 909, 923 (N.D. Iowa 2010). In *Hussaini*, the employer convinced the plaintiff to assist the company in its efforts to decertify a union, and then "pretextually fired [both the plaintiff and the] pro-Union workers in an attempt to mask" its anti-union intent. *Id.* at 922. Because those allegations implicated section 8's prohibition against employer interference with activity that is protected under section 7, they were preempted under *Garmon*. *Id.* at 923.

120. Smith v. Excel Maint. Servs., Inc., 617 F. Supp. 2d 520, 531 (W.D. Ky. 2008).

121. *See, e.g.*, Leonard v. FedEx Freight, Inc., No. 22-15970, 2023 WL 2445683, at *1 (9th Cir. Mar. 10, 2023) (workers' allegations that employer retaliated against them because of their concerted workplace activity were preempted); Chaulk Servs., Inc. v. Mass. Comm'n Against Discrimination, 70 F.3d 1361, 1367 (1st Cir. 1995) (worker's claim of sex discrimination, brought before the state anti-discrimination commission, was preempted because state claim and pending unfair labor practice charge rested on "identical facts"); Traister v. Albertson's LLC, No. 8:21-CV-01735-JLS-KES, 2023 WL 1141927, at *5 (C.D. Cal. Jan. 11, 2023) (plaintiff's allegations of whistleblowing retaliation, wrongful termination in violation of public policy, and intentional infliction of emotional distress are preempted by *Garmon*, in part because the claims were brought "in concert with other employees for their mutual benefit and protection."); Sarmiento v. Sealy, Inc., 367 F. Supp. 3d 1131, 1149 (N.D. Cal. 2019) (retaliatory discharge claims were preempted where the NLRA provisions at issue were "almost identical to the state statute at issue") (internal quotations omitted); People v. Amazon.com, 169 N.Y.S.3d 27, 29 (App. Div. 2022) (allegations that employer retaliated against workers who raised complaints about workplace safety were preempted by *Garmon* because pending NLRB proceedings rested on the same set of facts); Luke v. Collotype Labels USA, Inc., 159 Cal. App. 4th 1463, 1466 (2008) (allegations that worker who disclosed information about employer's working conditions was discriminated against were preempted, in part because worker's conduct could arguably be described as concerted).

122. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 253 (1959) (Harlan, J., concurring).

interest in protecting its workers, have provided much relief against the doctrine's preemptive sweep. The Supreme Court has applied the "peripheral concern" exception in a relatively small number of cases.[123] Where the conduct in question implicates the regulation of traditional contract and tort law—areas where the states have long been recognized as possessing the power to regulate—the Court has found that the state cause of action is "peripheral" to the federal scheme and is therefore not preempted.[124] Because state causes of action addressing workplace discrimination, retaliation, and wrongful discharge naturally align with the broadly worded protections created by section 7,[125] it is no wonder that lower courts are not always comfortable calling the conduct underpinning those suits "peripheral" to the NLRA.[126]

The "local feeling" exception has had similarly limited utility in saving worker-initiated state lawsuits from preemption. Courts have primarily applied this exception where the alleged conduct involves violence, threats of violence, or destruction of property.[127] As Professors Benjamin Sachs and Sharon Block have observed, it is typically worker conduct that is subject to state regulation under this exception, since more often than not it is employers who accuse workers and unions of violence, rather than vice versa. [128] The Supreme Court has also extended the "local feeling" exception to include nonviolent, nonobstructive picketing of an employer's private property.[129] This extension has an obvious pro-employer tilt, as states now remain free to enforce trespass laws against organizers.[130] Conversely, courts have refused to apply the "local feeling" exception in cases involving allegations of wrongful or retaliatory

123. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1165–66, n.49 (2011).

124. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (misrepresentation and breach of contract); Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 304–05 (1977) (intentional infliction of emotional distress); Linn v. United Plant Guard Workers, 383 U.S. 53, 61 (1966) (defamation).

125. 29 U.S.C. § 157 ("Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."); *see* Estlund, *supra* note 73 at 1559 ("Many of the crucial provisions of the NLRA are written in open-textured language . . . and are manifestly open to a range of interpretations.").

126. *See Traister*, 2023 WL 1141927, at *4 (whistleblowing retaliation and wrongful discharge claims not peripheral where the plaintiff's "central theory" was that "he was terminated for advocating on behalf of his fellow employees") (quoting Moreno v. UtiliQuest, 29 F.4th 567, 575 (9th Cir. 2022)); Kilb v. First Student Transp., 236 P.3d 968, 974 (Wash. Ct. App. 2010) (employer's alleged discriminatory discharge of supervisor as a means of deterring unionization "the very definition" of an unfair labor practice).

127. Lodge 76 v. Wis. Emp. Rel. Comm'n, 427 U.S. 132, 136 (1976); Pa. Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 803 (3d Cir. 1996).

128. Benjamin Sachs & Sharon Block, *Glacier's Employer-Only Preemption Reform*, ONLABOR (Oct. 24, 2022), https://onlabor.org/glaciers-employer-only-preemption-reform.

129. *See generally* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180 (1978).

130. *See* United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc., 162 A.3d 909, 912 (Md. 2017); Wal-Mart Stores, Inc. v. United Food & Com. Workers Int'l Union, 208 Cal. Rptr. 3d 542, 563–64 (Ct. App. 2016).

discharge.[131] The same has proven true for causes of action brought under state whistleblowing laws.[132] Whatever potential *Garmon*'s exceptions may have had to preserve worker-friendly state causes of action from preemption, it has seemingly gone untapped.

As these cases demonstrate, when the conduct underlying a state law claim could arguably be described as falling within the ambit of sections 7 or 8 of the Act, workers are often forced to vindicate their rights before a forum that awards an extremely limited set of remedies compared to those that are available in state court.[133] In this sense, *Garmon*—at least in some instances—imposes an indirect penalty on workers pursuing workplace justice collectively. What remains unclear is how preventing workers from vindicating their statutory rights under state law helps further the purposes of the NLRA. Under a traditional preemption analysis, allowing plaintiffs to pursue a cause of action that exists under state law for conduct that is prohibited by the federal scheme presents no actual conflict.[134] Indeed, allowing such claims to proceed may even further the NLRA's goal of encouraging "concerted" workplace activity.[135] These decisions thus demonstrate the employer-friendly outcomes that the broad sweep of *Garmon* and the limited application of its exceptions are capable of producing.

B. STIFLING LOCAL INITIATIVES

Not only does *Garmon* function as a tool for management to resist claims by individual workers, but it has also been invoked by employers and business groups seeking to invalidate duly enacted state and local ordinances aimed at facilitating collective bargaining and shoring up workplace protections.

The Supreme Court's decision in *Wisconsin Dept. of Industry v. Gould*[136] provides a useful demonstration of *Garmon*'s potential to thwart the efforts of enterprising states seeking to supplement the federal scheme. *Gould* involved a Wisconsin statute that disbarred individuals and firms from doing business with the State if those individuals or firms were found to have violated the NLRA at least three separate times over a five-year period.[137] Gould, one of the companies that had been placed on this list of repeat offenders, filed an action in federal

131. *See* Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348, 1350 (9th Cir. 1984); Hussaini v. Gelita USA, Inc., 749 F. Supp. 2d 909, 921 (N.D. Iowa 2010); Henry v. Intercontinental Radio, Inc., 202 Cal. Rptr. 328, 332 (Ct. App. 1984).

132. *See* Platt v. Jack Cooper Transp., Co., 959 F.2d 91, 95 (8th Cir. 1992); Casumpang v. Hawaiian Comm. & Sugar Co., 712 F. App'x 709, 710 (9th Cir. 2018).

133. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 26 (2016).

134. Gottesman, *supra* note 40, at 383–84.

135. *Id.* ("[T]he availability of state enforcement and state sanctions should have the effect of increasing the deterrence of federally prohibited conduct, an effect that seems wholly compatible with the federal [statute].").

136. Wis. Dep't of Indus. v. Gould, Inc., 475 U.S. 282 (1986).

137. *Id.* at 283.

court seeking injunctive and declaratory relief, claiming that the Wisconsin disbarment statute was preempted by the NLRA.[138]

The Court, noting that the rule formulated in *Garmon* was "designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated scheme of law, remedy, and administration,'" held that the Wisconsin statute was preempted by the NLRA.[139] Because the statute essentially served as a "supplemental sanction for violations of the NLRA," it necessarily conflicted with the "Board's comprehensive regulation of industrial relations."[140] "Each additional statute" aimed at punishing labor law violators, the Court reasoned, "incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress."[141] The Court rejected Wisconsin's argument that the State was merely acting as a market participant rather than a regulator in limiting its business with repeat violators of the NLRA.[142] Regardless of how Wisconsin sought to characterize the statute, the Court deemed it "tantamount to regulation," and determined that, by "flatly prohibiting state purchases from repeat labor law violators, [the State] 'simply is not functioning as a private purchaser of services.'"[143]

Employers have learned from *Gould* that *Garmon* provides a potential tool to resist state and local ordinances that they deem unfavorable to their interests. A recent saga involving the City of Seattle and the U.S. Chamber of Commerce provides a useful illustration. In 2015, the Seattle City Council passed an ordinance granting drivers working for ridesharing and taxi companies the right to collectively bargain over the terms and conditions of their employment.[144] The ordinance was the first of its kind in the country, giving workers who are arguably independent contractors—and thus not protected by the NLRA—the right to unionize.[145] The Seattle Chamber of Commerce sued the city, arguing that the ordinance was preempted under both the federal antitrust laws as well

138. *Id.* at 285.
139. *Id.* at 286.
140. *Id.* at 288.
141. *Id.* at 288–89.
142. *Id.* at 289.
143. *Id.*
144. Heather Somerville, *Seattle Passes Law Letting Uber, Lyft Drivers Unionize*, REUTERS (Dec. 14, 2015, 7:52 PM), https://www.reuters.com/article/us-washington-uber/seattle-passes-law-letting-uber-lyft-drivers-unionize-idINKBN0TX2NO20151215.
145. Daniel Wiessner, *U.S. Court Revives Challenge to Seattle's Uber, Lyft Union Law*, REUTERS (May 11, 2018, 11:59 AM), https://www.reuters.com/article/us-uber-seattle-unions/u-s-court-revives-challenge-to-seattles-uber-lyft-union-law-idUSKBN1IC27C.

as the NLRA,[146] and the case eventually made its way to the Ninth Circuit Court of Appeals.[147]

The Ninth Circuit ultimately found that the ordinance was preempted under federal antitrust law, concluding that the City had not satisfied the requirements for invoking the state-action immunity doctrine.[148] While the Ninth Circuit dismissed the Chamber's NLRA preemption claims, its discussion of *Garmon* is noteworthy.[149] The Chamber argued that the Seattle ordinance effectively required state and local officials to intrude upon the jurisdiction of the NLRB because it required those officials to make a determination about "whether for-hire drivers are employees under the NLRA."[150] As the Ninth Circuit explained, however, the party invoking preemption has the burden of establishing that the conduct in question is arguably protected or prohibited, and must do more than rely on mere conclusory allegations.[151] The Chamber took the somewhat remarkable position that "there [was] no need for the Chamber to take a position on the employment status of for-hire drivers, and there [was] no need for the Chamber to provide any supporting evidence."[152] Thus, it appears that the Chamber's *Garmon* claims were unsuccessful, not necessarily based upon their merit, but instead based upon the paucity of the briefing. Had the Chamber simply met the relatively low burden of presenting "at least an arguable case that the drivers at issue are covered by the NLRA," then it is quite possible that the City's preemption claims could have prevailed.[153]

Fortunately for American workers, courts do not appear to be as willing to invalidate worker friendly legislation under *Garmon* as they have been to stymie worker-initiated lawsuits under state wrongful discharge and retaliation laws.[154]

146. *Id.*

147. Chamber of Com. v. Seattle, 890 F.3d 769, 779 (9th Cir. 2018).

148. *Id.* at 781.

149. *Id.* at 795.

150. *Id.* at 794.

151. *Id.*

152. *Id.* at 795.

153. *Id.*

154. *See* Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 490 (9th Cir. 1996) (noting that statutes establishing a "minimum employment standard and an opt-out provision" are not an "impermissibl[e] intru[sion] upon the collective bargaining process" and are therefore not preempted by *Garmon*); RHC Operating LLC v. City of New York, No. 21-CV-9322 (JPO), 2022 WL 951168, at *2 (S.D.N.Y. Mar. 30, 2022) (noting employer's argument that *Garmon* invalidated a law requiring severance pay to hotel workers during the COVID-19 pandemic unsuccessful); Fortuna Enters., L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1006 (C.D. Cal. 2008) (finding that city's "living wage" ordinance, which set baseline wages for hotel workers in a certain neighborhood but also created an exception for employers who entered CBAs that waived the terms of the ordinance, was not preempted by *Garmon*). Instead, it is *Machinists* preemption that has most recently been the basis for a successful Supreme Court challenge against a state law that was perceived as favorable to unions. *See* Chamber of Com. v. Brown, 554 U.S. 60, 69–72 (2008) (striking down a California statute that prohibited employers from using state funds to "assist, promote, or deter union organizing"). For more extended discussions

Instead, the real issue for states and localities in taking action similar to the Wisconsin disbarment statute at issue in *Gould* is whether the state or local decision comports with the Supreme Court's distinction between the state as a regulator and the state as a proprietor.[155] Nonetheless, it is remarkable that employers have come to view what was once perceived as an exclusively worker-friendly doctrine as a potential tool for them to invalidate state and local lawmaking that they deem to be burdensome.

CONCLUSION

As this Note demonstrates, the broad preemption regime created by the Supreme Court's decision in *Garmon* has come to play an increasingly complicated role in the modern labor and employment law landscape. In the 1950s, when unions were at the height of their power and the various state causes of action for workplace discrimination, retaliation, and wrongful discharge did not yet exist,[156] confining the adjudication of labor disputes to a centralized federal agency made a great deal of sense for workers. Unions could wield their strength to collectively bargain for the "mini–democrac[ies]" imagined by the voluntarists, knowing that their relationship with management would be shielded from hostile judicial intervention.[157] That paradigm, however, simply no longer reflects reality for most workers in this country. As union strength has waned and as work has become more precarious for millions of Americans,[158] the private right of action has emerged as the primary tool through which working-class people vindicate their rights.[159] These profound developments suggest that it is perhaps time to revisit, as one scholar has described it, labor's fidelity to the "doctrinal shrine" of *Garmon*.[160]

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of *Machinist*'s effect on state law efforts to protect workers, see Drummonds, *supra* note 63, at 178–86; Estlund, *supra* note 73, at 1575–77; Gottesman, *supra* note 40, at 379–81.

155. When the state action at issue merely amounts to contract specifications in government projects with defined limits, the courts have deemed such action proprietary and therefore shielded from preemption. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 232 (1993); Bldg. Indus. Elec. Contractors Ass'n v. City of New York, 678 F.3d 184, 192 (2d Cir. 2012); Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1026 (9th Cir. 2010). Conversely, if the state is using its spending and contracting power to achieve certain public policy goals—as was the case in *Gould*—then courts have deemed the action regulatory and therefore possibly subject to preemption. *See Brown*, 554 U.S. at 69; Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 692 (5th Cir. 1999) (listing cases where state action was deemed regulatory). In at least one case the author was able to find, the State actually redrafted portions of its statute after the lower court found that it was regulatory in nature, and the appellate court then deemed it proprietary. *See* Mich. Bldg. & Const. Trades Council v. Snyder, 729 F.3d 572, 576 (6th Cir. 2013).

156. Drummonds, *supra* note 83, at 483.

157. Van-Wezel Stone, *supra* note 54, at 1515.

158. *See* Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIO. REV. 1, 2 (2009).

159. Estlund, *supra* note 73, at 1553.

160. Drummonds, *supra* note 63, at 167.

What then, exactly, does *Glacier Northwest* mean for American workers? To be clear, despite its seemingly narrow and fact-specific holding,[161] the Court's decision was not good for workers or unions. It placed yet another limit upon the scope of protected strike activity in this country, "endow[ing]" a company's concrete with "active, militant power" to punish workers for using economic weapons.[162] The rumblings of Justice Thomas are similarly no cause for comfort. Given the Court's business-friendly jurisprudence over the last several years, it is far from clear that whatever version of conflict preemption the Court chooses to adopt the next time it gets the chance to revisit *Garmon* will be applied in an even-handed manner.[163] *Glacier Northwest* is thus yet another portent of the immense challenges that organized labor will face in the years and decades to come.

What *Glacier Northwest* should also provide, however, is an opportunity for a resurgent labor movement to question what kind of regulatory and doctrinal framework will best serve its interests going forward. As recent events have made clear, U.S. corporations are going to fight tooth and nail to drain the momentum behind the recent surge in unionization.[164] They will be aided in this effort by a federal regulatory scheme that imposes woefully inadequate penalties for union-busting.[165] Thus, the labor movement's first priority should be to continue applying pressure on Congress to amend the NLRA in a way that meaningfully re-shifts the Act's allocation of power in favor of the workers and unions.[166] While the fate of the most recent efforts to amend the NLRA suggest that congressional intransigence will continue to remain an obstacle, workers and unions will need to be persistent in demanding more of their elected officials.[167]

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161. Benjamin Sachs, *A Fact Specific Holding in* Glacier*?*, ONLABOR (June 1, 2023), https://onlabor.org/a-fact-specific-holding-in-glacier.

162. FRANKFURTER & GREENE, *supra* note 64, at 132–33.

163. Benjamin Sachs, Glacier *and Justice Thomas' Preemption Breadcrumbs*, ONLABOR (June 2, 2023), https://onlabor.org/glacier-and-justice-thomas-labor-preemption-breadcrumbs.

164. Steven Greenhouse, *'Old-School Union Busting': How US Corporations Are Quashing the New Wave of Organizing*, GUARDIAN (Feb. 26, 2023, 4:00 AM), https://www.theguardian.com/us-news/2023/feb/26/amazon-trader-joes-starbucks-anti-union-measures.

165. *Id.* (noting that "companies, including Starbucks, have determined that the penalty for retaliation is minimal – and much more appealing than allowing workers to unionize"); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1790 (1983).

166. For example, the proposal by some labor reformers that the Board be permitted to award punitive damages would be an obvious improvement upon the current framework. *See* Weiler, *supra* note 165, at 1790. Another obvious deficiency under the current framework is the rule permitting employers to hire permanent replacement workers during unfair labor practice strikes. *See* Estlund, *supra* note 73, at 1541.

167. In both 2020 and 2021, the House of Representatives passed the Protecting the Right to Organize Act (PRO Act), which would significantly expand protections for unions and workers under federal law. Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts; Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, WASH.

As part of this pressure campaign, the movement should also insist that the states be permitted to regulate activity that is protected under the NLRA. From a doctrinal perspective, a faithfully applied conflict preemption regime would allow state causes of action that overlap with the protections of section 7 to proceed.[168] Absent *Garmon*'s uniformity and expertise rationales, there is no reason why a state court should not be permitted to furnish workers with remedies for violations of state law that are consistent with the Act. There would similarly be no reason under such a framework why states like California, Washington, and New York should be precluded from passing, say, a disbarment statute for repeat NLRA offenders.[169] Indeed, given the direction the Court may very well already be heading in, states should be prepared to immediately pass worker-friendly legislation aimed at enhancing the NLRA when the opportunity arises. Rather than wait for the courts to act, Congress could also narrow the broad preemptive reach of the NLRA itself, thus allowing states to have more of a say in the regulation of collective workplace activity.

Whatever route preemption reform ultimately takes, allowing states to supplement the NLRA and experiment in the realm of collective bargaining would bring the nation's labor laws in line with the other federal statutes governing workplace standards, whereby federal law provides a floor rather than a ceiling on the kinds of protections that may be extended to workers.[170] Allowing for pro-worker experimentation at the state level would permit unions and workers to push the envelope more forcefully in certain parts of the country, and would hopefully facilitate the labor movement's resurgence after decades of

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POST (Feb. 6, 2020, 9:21 PM), https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions. Among other improvements to the federal scheme, the Act would permit unions to override states' right-to-work laws and collect dues from all workers in union represented workplaces. Gonyea, *supra* note 167. It would also forbid company sponsored, mandatory meetings during union elections, and would create monetary penalties for employers who violate federal labor law. *Id.* While the Act continues to be championed by certain members of Congress, it has yet to reach the Senate for a floor vote. Levi Sumagaysay, *PRO Act Introduced for Third Time as Lawmakers Cite Growing Unionization Push*, MARKETWATCH (Mar. 1, 2023, 9:18 AM), https://www.marketwatch.com/story/pro-act-reintroduced-for-third-time-as-lawmakers-cite-growing-unionization-push-fc9f82c1.

168. On the other hand, if the conduct is prohibited by the NLRA, then deferring to the jurisdiction of the NLRB would still make sense, as allowing the state court to reward conduct that the Act prohibits would run afoul of conflict preemption.

169. In lieu of this dramatic shift, some tinkering around *Garmon*'s edges would also be an improvement. Perhaps the pro-employer tilt of the "local feeling" exception could be reinterpreted to recognize the states' profound "responsibility" in protecting its citizens from dangerous workplaces or discriminatory behavior. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Perhaps it is also not unreasonable to suggest that wrongful discharge statutes—many of which were adopted in the 1970's—are becoming increasingly "deeply rooted" in the fabric of state regulatory regimes. *Id.*

170. SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 80 (2019), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5a8f2a8064_CleanSlate_Report_FORWEB.pdf.

obsolescence.[171] If the labor movement is to successfully ride its current wave of momentum into a sustained position of power, it should insist that federal preemption not act as an obstacle to states seeking to provide their workers with more rights than are currently granted under federal law.

171. *Id.* at 81.