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# Provoking Preemption: Why State Laws Protecting the Right to a Union Secret Ballot Election Are Preempted by the NLRA

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## **PROVOKING PREEMPTION: WHY STATE LAWS PROTECTING THE RIGHT TO A UNION SECRET BALLOT ELECTION ARE PREEMPTED BY THE NLRA**

**Ryan Walters\***

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## INTRODUCTION

The rise and fall of the Employee Free Choice Act (“EFCA”)<sup>1</sup> has been one of the hottest topics in labor law in the past few decades. With the Democrats losing their majority in the U.S. House of Representatives in the 2010 midterm elections and watching their majority in the U.S. Senate shrink, the prospects of the proposed EFCA becoming legislation have become far less likely.<sup>2</sup> Before the 2010 midterm elections, the potential passage of the EFCA provoked several States to try and undercut the impact the legislation would have.<sup>3</sup> Four States, specifically Arizona,<sup>4</sup> South Carolina,<sup>5</sup> South Dakota,<sup>6</sup> and Utah,<sup>7</sup> enacted state constitutional amendments in 2010 that protected an employee’s right to a secret ballot election during union representation elections.<sup>8</sup> On January 14, 2011, the Acting General Counsel of the National Labor Relations Board

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1. The EFCA is a piece of proposed legislation that would make the voluntary recognition procedure, one of the tools employees can use to select a union as their bargaining representative, more favorable to unions. *See infra* Part II.A. Furthermore, the proposed bill also includes other provisions that would be favorable to unions. *See infra* Part II.A. Some of those provisions would impose timelines on management to negotiate a collective bargaining agreement with a union. *See infra* Part II.A. If those timelines were not met, the dispute would go to an alternative dispute resolution proceeding, including binding arbitration. *See infra* Part II.A.

2. *See infra* notes 179–80 and accompanying text.

3. *See* Jay Sumner, *Four States Approve Constitutional Amendments Guaranteeing Right to Secret Ballot Union Elections*, LAB. REL. COUNS. (Nov. 04, 2010), available at <http://www.laborrelationscounsel.com/efca/four-states-approve-constitutional-amendments-guaranteeing-right-to-secret-ballot-union-elections/>.

4. ARIZ. CONST. art. II, § 37 (“The right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or requires elections, designations or authorizations for employee representation.”).

5. S.C. CONST. art. II, § 12 (“The fundamental right of an individual to vote by secret ballot is guaranteed for a designation, a selection, or an authorization for employee representation by a labor organization.”).

6. S.D. CONST. art. VI, § 28 (“The rights of individuals to vote by secret ballot is fundamental. If any state or federal law requires or permits an election for public office, for any initiative or referendum, or for any designation or authorization of employee representation, the right of any individual to vote by secret ballot shall be guaranteed.”).

7. UTAH CONST. art. IV, § 8, cl. 1 (“All elections, including elections under state or federal law for public office, on an initiative or referendum, or to designate or authorize employee representation or individual representation, shall be by secret ballot.”).

8. *See* Sumner, *supra* note 3.

(“NLRB” or “the Board”) contacted the Attorneys General of these four States informing them that the National Labor Relations Act (“NLRA”) preempts any state law requiring the use of secret ballots in union representation elections.<sup>9</sup> These letters requested responses from each of the States in two weeks.<sup>10</sup> The Acting General Counsel indicated that the NLRB would initiate civil actions in federal court to have the state constitutional amendments invalidated if each state did not acknowledge that its respective constitutional amendment was preempted.<sup>11</sup>

In response, these four Attorneys General wrote a joint letter back to the Acting General Counsel of the NLRB on January 27, 2011.<sup>12</sup> They rejected the NLRB’s demands to “stipulate to the unconstitutionality” of the state constitutional amendments.<sup>13</sup> The Attorneys General argued that these state constitutional amendments protected “long existing federal rights” and that they would “vigorously defend any legal attack upon them.”<sup>14</sup> The letter emphasized that the state constitutional amendments were consistent with current federal law.<sup>15</sup> The Acting General Counsel of the NLRB then responded on February 22, 2011 to the letter from the four Attorneys General, stating in the letter:

As you have unanimously expressed the opinion that the State Amendments can all be construed in a manner consistent with federal law, I believe your letter may provide a basis upon which this matter can be resolved without the necessity of costly litigation. My staff will shortly be in contact with the staff members you have designated to explore this issue further.<sup>16</sup>

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9. See NLRB, *NLRB Advises Four States that Constitutional Amendments Conflict with Federal Labor Law*, NLRB.GOV, <http://www.nlr.gov/news-media/backgrounders/state-amendments-and-preemption> (last visited Mar. 28, 2012) (linking to each of the four letters); Seth Borden, *NLRB Asserts State Secret Ballot Laws Are Unconstitutional*, LAB. REL. TODAY (Jan. 16, 2010), <http://www.laborrelationstoday.com/2011/01/articles/nlra/nlr-asserts-state-secret-ballot-laws-are-unconstitutional/>.

10. See sources cited *supra* note 9.

11. See sources cited *supra* note 9.

12. Letter from State Attorneys General to Lafe E. Solomon, Acting General Counsel, NLRB 1 (Jan. 27, 2011), available at <http://attorneygeneral.utah.gov/cmsdocuments/nlr012711.sol.pdf>.

13. *Id.*

14. *Id.*

15. See *id.* at 1–2.

16. Letter from Lafe E. Solomon, Acting General Counsel, NLRB, to State

However, on April 22, 2011, the Acting General Counsel informed the four Attorneys General that the NLRB would initiate lawsuits in Arizona and South Dakota.<sup>17</sup> On May 6, 2011, the NLRB initiated litigation against the state of Arizona regarding its amendment.<sup>18</sup> More litigation will likely follow suit against the other States.

This Article will use this conflict between the NLRB and these four States to analyze many of the issues surrounding the EFCA, voluntary recognition, and labor preemption in general. The Article will also discuss some new regulations proposed by the NLRB that have reignited the debate over the EFCA to some extent. Lastly, the Article will examine the likely resolution of the preemption issue raised by these state constitutional amendments. Part I of this Article will discuss the voluntary recognition procedure and the recognition bar, including the effects the *In re Dana Corp.*<sup>19</sup> decision had on the recognition bar and the state of the recognition bar after the NLRB recently overruled *In re Dana Corp.* Part I will also discuss some newly proposed NLRB regulations that will have a significant impact on union recognition determinations.

Part II will address the terms of the EFCA to the extent that they affect voluntary recognition and the policy arguments for and against the act's implementation. Part III of this Article will look at the congressional history of the EFCA. Part IV will examine preemption generally and the various preemption doctrines in the area of labor law. Part V will assess the preemptive effects the NLRA has on these state constitutional amendments providing a right to a secret ballot election in the context of union representation. Given the lengthy history of federal regulation of labor-management relations and a long track record of federal courts finding

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Attorneys General 1 (Feb. 2, 2011), *available at* [http://www.nlr.gov/sites/default/files/documents/234/feb\\_2\\_letter.pdf](http://www.nlr.gov/sites/default/files/documents/234/feb_2_letter.pdf).

17. Letter from Lafe E. Solomon, Acting General Counsel, NLRB, to State Attorneys General 1 (Apr. 22, 2011), *available at* [http://www.nlr.gov/sites/default/files/documents/234/april\\_22\\_letter\\_from\\_gc\\_to\\_states.pdf](http://www.nlr.gov/sites/default/files/documents/234/april_22_letter_from_gc_to_states.pdf) ("After carefully considering your responses to my letters and in view of the seeming impossibility of settling this dispute without litigation, I have directed my staff to initiate lawsuits in federal court . . .").

18. Complaint for Declaratory Judgment at 1–5, *NLRB v. Arizona*, (D. Ariz. May 6, 2011), *available at* <http://www.nlr.gov/sites/default/files/documents/234/azcomplaint.pdf>.

19. *In re Dana Corp.*, 351 N.L.R.B. 434 (2007).

state labor laws preempted if they would undermine the NLRA, preemption in the area of labor law is the norm rather than the exception.<sup>20</sup> The NLRB will likely be successful in challenging these state constitutional amendments as preempted under the NLRA.

#### I. UNDERSTANDING THE VOLUNTARY RECOGNITION PROCEDURE

Employees seeking union representation may take advantage of two primary routes to secure union representation: (1) an NLRB conducted election; or (2) voluntary recognition.<sup>21</sup> After watching union membership steadily decline in the second half of the twentieth century and experiencing a frustration with the process of NLRB conducted elections, voluntary recognition in the past decade has increasingly become the preferred route for union certification.<sup>22</sup> However, some newly proposed NLRB regulations may make an NLRB conducted election a more desirable option for unions.<sup>23</sup> First, this section will discuss the voluntary recognition procedure in general. Second, this section will examine the recognition bar to an NLRB conducted election and the effect the recent *Dana Corp.* decision has had on this bar. Third, this section will address some new rules proposed by the NLRB that will have a significant impact on current union recognition procedures.

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20. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1572–74 (2002) (“*Garmon* and *Machinists* together virtually banish states and localities from the field of labor relations.” (citing to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 140 (1976)); *infra* Part IV).

21. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304–06 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596–98 (1969).

22. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 825–30; Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1591 (2008); Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board’s Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. FOR SOC. JUST. 819, 819 (2008) (“The success of these unions [who have had success with voluntary recognition] has led most unions to largely reject the slow, cumbersome, and ineffective Board processes for obtaining legal representation of the employees.”).

23. See *infra* Part I.C.

A. *Voluntary Recognition as an Alternative to an NLRB Conducted Election*

Section 9(a) of the NLRA allows unions to obtain authorization to act as the exclusive bargaining agents for employees without NLRB conducted elections when they are “designated or selected” as representatives by a majority of employees in an appropriate bargaining unit.<sup>24</sup> This language has been interpreted by the NLRB and the Supreme Court as authorizing union representation through means other than NLRB conducted elections.<sup>25</sup> While recognizing the place voluntary recognition has in the NLRA statutory scheme, the United States Supreme Court and the NLRB have both shown a preference for NLRB conducted elections.<sup>26</sup> The degree of this preference among the individual NLRB members can vary significantly as revealed by the deep division between the majority and the dissent in the recent *Dana Corp.* decision.<sup>27</sup>

As a method of obtaining union representation, voluntary recognition is the primary alternative to an NLRB conducted election.<sup>28</sup> A union can obtain voluntary recognition from an employer to act as an exclusive bargaining agent by demonstrating to the employer that the union has obtained the majority support of the employees.<sup>29</sup> A union can make this demonstration to an employer by presenting to the

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24. See 29 U.S.C. § 159(a) (2006) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .”).

25. See *Linden Lumber*, 419 U.S. at 304–06; *Gissel*, 395 U.S. at 596–98.

26. See *Gissel*, 395 U.S. at 596; *In re Dana Corp.*, 351 N.L.R.B. 434, 438–41 (2007).

27. Compare *In re Dana Corp.*, 351 N.L.R.B. at 438–40 (criticizing the pressure imposed on employees by unions in the voluntary recognition procedure, misinformation by unions in voluntary recognition drives, and the unreliability of authorization cards compared with secret ballots), *with id.* at 444–50 (Liebman and Walsh, dissenting in part) (“Voluntary recognition is ‘a favored element of national labor policy.’ Yet, the majority decision relegates voluntary recognition to disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started. Ultimately, the majority decision effectively discourages voluntary recognition altogether.”).

28. See Dillard & Dillard, *supra* note 22, at 819.

29. See *Gissel*, 395 U.S. at 596; MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 407 (6th ed. 2007).

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employer cards bearing a majority of the employees' signatures within the bargaining unit or through some other appropriate method.<sup>30</sup> When using cards, the cards must be unambiguous in that they state on their face that the signer authorizes the union to represent the employee for collective bargaining purposes and not to seek an election.<sup>31</sup> An employer always has the right to refuse to voluntarily recognize a union and demand an election<sup>32</sup> but can agree voluntarily to relinquish this right.<sup>33</sup>

As part of the voluntary recognition process, the prospective union may ask the employer to sign a card check agreement and/or a neutrality agreement.<sup>34</sup> Under a card check agreement, the employer agrees that if the union obtains cards from a majority of employees in the bargaining unit authorizing the union to represent the employee that the employer will recognize and bargain with the union.<sup>35</sup> The employer also agrees as part of a card check agreement to forego its legal right to insist upon an NLRB conducted election.<sup>36</sup> Under a neutrality agreement, the employer agrees that if the union seeks to organize its employees that the employer will remain neutral while its employees decide whether they want union representation.<sup>37</sup> More specifically, the employer declines to exercise certain rights to communicate with employees that it would otherwise enjoy under the NLRA and potentially allows the prospective union means of access to and communication with employees that the employer would not be required to permit under the NLRA.<sup>38</sup> The exact extent of neutrality an employer agrees to maintain and the degree to which the employer preserves or

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30. See sources cited *supra* note 29. Other methods unions and employers have used in the past include methods "as informal as employees walking into the owner's office and stating they wish to be represented by a union and formal as a secret-ballot election conducted by a third party such as the American Arbitration Association." *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 3 (2011) (citations omitted).

31. See *Gissel*, 395 U.S. at 597.

32. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309–10 (1974).

33. *Cooper*, *supra* note 22, at 1590–91.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1590.

38. *Id.*

waives various means of communication with the employees can vary significantly depending on the particular agreement.<sup>39</sup>

Prospective unions often desire these types of agreements for several reasons: (1) the effect employer campaigning and interaction with employees has on the ultimate outcome of a union campaign;<sup>40</sup> (2) the general advantage employers have when it comes to access to their employees;<sup>41</sup> (3) the longstanding conflict a bitter campaign between a union and the employer can breed in the workplace;<sup>42</sup> and (4) the success many unions have had with voluntary recognition as opposed to NLRB conducted elections.<sup>43</sup> Additionally, some studies have indicated that employers and unions have a higher chance of quickly finalizing a collective bargaining agreement when they take advantage of voluntary recognition as opposed to using an NLRB conducted election.<sup>44</sup>

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39. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47 (2001) (compiling 118 employer neutrality agreements and comparing the types of provisions that appear in each agreement).

40. See Brudney, *supra* note 22, at 832–33.

41. See, e.g., 29 U.S.C. § 158(c) (2006) (“The expressing [by an employer] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (recognizing that nonemployee union members have very limited rights to be on an employer’s property); *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 409 (1953) (allowing an employer to refuse to allow unions to address employees as part of a captive audience and acknowledging that an employer may have captive audience meetings).

42. See, e.g., *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966) (“Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.”).

43. See *supra* notes 22–33 and accompanying text.

44. See *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 8 n.26 (2011). The NLRB in the *Lamons Gasket Co.* decision contrasted two studies that examined how quickly employers and unions reached collective bargaining agreements when using an NLRB conducted election as opposed to the voluntary recognition procedure. See *id.* Those studies found that, based on the samplings in the studies, an employer and a union finalized negotiations for a collective bargaining agreement “within 2 years in only 56 percent of the cases” if an NLRB conducted election occurred, as opposed to finalizing a collective bargaining agreement “in close to 100 percent of cases” when using the

Given that signing one of these agreements typically makes it easier for the prospective union to successfully become the representative of the employees, the reasons why an employer would agree to sign these types of agreements are not immediately apparent.<sup>45</sup> One benefit to the employer is the avoidance of potential economic losses associated with a work stoppage, such as a strike or a lockout that could take place due to a conflict arising between the employer and prospective union during the union campaign.<sup>46</sup> Another reason is to prevent the disruptive short- and long-term effects that a union picketing or handbilling campaign could have on the employer's business.<sup>47</sup> The loss of a more cooperative workplace culture also motivates some employers to sign these agreements.<sup>48</sup> Likewise, for employers familiar with dealing with unions or for those who project minimal cost increases from working with a union, a neutrality agreement can sometimes save the employer more money compared with the cost of a campaign on union representation and the potential conflict involved.<sup>49</sup> Collective bargaining negotiations may be less drawn out and costly when an employer agrees to voluntary recognition as well, presumably because the union and the employer already have a relatively amicable position towards one another.<sup>50</sup> However, some argue that employers sign these agreements involuntarily because of harassment by union campaigners.<sup>51</sup>

### B. *The Recognition Bar*

The voluntary recognition bar, normally just called the recognition bar, is one of the various bars to an NLRB conducted election.<sup>52</sup> All of the various bars prevent the holding of an NLRB conducted election for a specific bargaining unit until a certain period of time (that varies among the different bars) passes.<sup>53</sup> The primary bars to an

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voluntary recognition procedure. *See id.*

45. Brudney, *supra* note 22, at 835.

46. *See id.* at 836.

47. *See id.*

48. *See id.*

49. *See id.* at 836–37.

50. *See* Lamons Gasket Co., 357 N.L.R.B. No. 72, at 8 n.26 (2011).

51. Cooper, *supra* note 22, at 1592.

52. *See infra* notes 54–57, 61.

53. *See infra* notes 54–57, 61 and accompanying text.

NLRB conducted election besides the recognition bar include the election bar,<sup>54</sup> the certification bar,<sup>55</sup> the contract bar,<sup>56</sup> and the settlement bar.<sup>57</sup> Each of these bars trigger when a certain event occurs, such as an NLRB conducted election or the certification of a union by the NLRB.<sup>58</sup> Once the triggering event has occurred, these bars limit for a certain period of time the holding of an NLRB conducted election to certify or decertify a union.<sup>59</sup> Consequently, these bars provide some stability and regularity to the relationship between labor and management.<sup>60</sup>

The recognition bar prevents anyone from requesting an NLRB conducted election for the newly represented bargaining unit and disallows an employer from withdrawing its recognition of a union for a reasonable period of time after an employer has voluntarily recognized a union that has demonstrated majority support.<sup>61</sup> A reasonable period of time in this context does not depend on the number of months spent bargaining between the employer and the union, but

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54. See 29 U.S.C. § 159(c)(3) (2006) (“No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.”).

55. See *Brooks v. NLRB*, 348 U.S. 96, 98 (1954) (“A certification, if based on a Board-conducted election, must be honored for a ‘reasonable’ period, ordinarily ‘one year,’ in the absence of ‘unusual circumstances.’”). The certification bar is not statutory in nature but instead emanates from the NLRB’s interpretation of section 9. See *id.* at 98–102.

56. See *Cind-R-Lite Co.*, 239 N.L.R.B. 1255, 1256 (1979); *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160, 1161–62 (1958). The contract bar doctrine generally bars an election among employees covered by a valid and operative collective bargaining agreement of reasonable duration. HARPER ET AL., *supra* note 29, at 385. The policy behind the contract bar doctrine centers on promoting stability in labor relations. *Id.*

57. See *In re Dana Corp.*, 351 N.L.R.B. 434, 440 (2007) (“At least since *Poole Foundry & Machine Co.*, the Board has held that an unfair labor practice settlement agreement in which the employer agrees to bargain bars the filing of a decertification petition within a reasonable period of time after the agreement.” (footnote omitted) (citing *Poole Foundry & Mach. Co. v. NLRB*, 192 F.2d 740 (4th Cir. 1951))).

58. See *Brooks*, 348 U.S. at 99–104; HARPER ET AL., *supra* note 29, at 385.

59. See sources cited *supra* note 58.

60. See sources cited *supra* note 58.

61. See *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 1 (2011); *Keller Plastics E.*, 157 N.L.R.B. 583, 587 (1966). This particular bar arises from the NLRB’s administrative authority rather than any specific requirement contained in the NLRA. *Keller Plastics E.*, 157 N.L.R.B. at 587; *In re Dana Corp.*, 351 N.L.R.B. at 434–35; HARPER ET AL., *supra* note 29, at 385.

rather on what has transpired in the bargaining sessions.<sup>62</sup> The NLRB has further clarified what qualifies as a reasonable period of time in a recent decision, specifically that it will “be no less than 6 months after the parties’ first bargaining session and no more than 1 year.”<sup>63</sup> The recognition bar always applies to an employer starting from the period that the employer voluntarily recognizes the union, thus requiring the employer to bargain with the union immediately.<sup>64</sup> The NLRB’s recent *Dana Corp.* decision made the rules more complex with respect to how the voluntary recognition bar applies to the employees within the bargaining unit seeking an NLRB conducted election to decertify a union or a rival union filing its own election petition.<sup>65</sup> Although the NLRB has recently overruled that decision,<sup>66</sup> it is still important to understand the changes *Dana Corp.* made.

Before the *Dana Corp.* decision, the recognition bar went into effect immediately for all purposes following the employer’s voluntary recognition of a union.<sup>67</sup> However, the NLRB concluded in *Dana Corp.* that employees within the bargaining unit and rival unions should have a forty-five day window to challenge the employer’s choice to voluntarily recognize the union.<sup>68</sup> This window does not begin until the affected employees within the bargaining unit receive adequate notice of the voluntary recognition and of their opportunity to file for an NLRB election.<sup>69</sup> After that window has passed, the recognition bar goes into effect with respect to employees in the bargaining unit and rival unions.<sup>70</sup>

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62. *Livent Realty*, 328 N.L.R.B. 1, 1 (1999).

63. *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 10 (2011). To determine exactly when a reasonable period of time has passed, courts consider five factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties’ bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. *See id.* at 10 n.34.

64. *In re Dana Corp.*, 351 N.L.R.B. at 441–42.

65. *See id.*

66. *See Lamons Gasket*, 357 N.L.R.B. No. 72, at 1.

67. *See id.*; *In re Dana Corp.*, 351 N.L.R.B. at 437 (quoting *Keller Plastics E.*, 157 N.L.R.B. 583, 587 (1966)).

68. *See In re Dana Corp.*, 351 N.L.R.B. at 441–42.

69. *Id.* at 441.

70. *See id.* at 441–42.

While the *Dana Corp.* decision has received a great deal of criticism,<sup>71</sup> many have also come out in support of it as protective of workers' rights.<sup>72</sup> NLRB members Liebman and Walsh wrote a scathing dissent to the majority's decision.<sup>73</sup> These two members criticized the majority's departure from established NLRB precedent dating back to the 1966 decision in *Keller Plastics Eastern*.<sup>74</sup> The dissenting members continuously pointed out that the majority did not take into account one of the key policies underlying the NLRA, promoting stability in bargaining relationships.<sup>75</sup> Likewise, they emphasized that voluntary recognition is "a favored element of national labor policy" that the majority was too quick to criticize.<sup>76</sup> These members articulated that the election process leads to many of the same types of pressure that the majority found to be unappealing about the voluntary recognition process and that the majority's criticisms of the voluntary recognition process could be dealt with in more effective ways than how the majority proposed.<sup>77</sup>

On August 26, 2011, the NLRB issued its decision in *Lamons Gasket Co.*, overruling the *Dana Corp.* decision.<sup>78</sup> In a three-to-one decision, the NLRB returned the state of the

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71. See, e.g., Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 230 (2010) ("*Dana Corp.* symbolizes the Bush II Board's vigorous resistance to union organization and signals a new era of government repression of unionization."); Henry M. Willis, *Organizing--With or Without the NLRB: The Short-Term Prospects for Restoring Workers' Right to Organize*, 66 NAT'L LAW. GUILD REV. 115, 117 (2009) ("It is hard to overstate the perverseness of that decision's logic. Years of dealing with an NLRB that was unable to protect workers from anti-union retaliation have driven down the number of NLRB-conducted elections by more than 80 percent over the past forty years.").

72. See, e.g., N. Mott, *Dana Corp and EFCA*, NOLA EMPLOYERS BLOG (Sept. 17, 2010, 6:18 AM), <http://nolaemployers.blogspot.com/2010/09/dana-corp-and-efca.html> ("In reality this approach created a rationale safety valve to prevent coercive card check tactics. We have argued before unions should have embraced this model and should have adopted it as their reform proposal. It would have liberated the labor reform movement from the valid accusation it was attempting to eliminate secret ballot elections.").

73. See *In re Dana Corp.*, 351 N.L.R.B. at 444-50 (3-2 decision) (Liebman and Walsh, dissenting in part).

74. See *id.* at 444 ("[N]othing in the majority's decision justifies its radical departure from that well-settled, judicially approved precedent.").

75. See *id.*

76. See *id.* at 450 (quoting *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981)).

77. See *id.* at 444-50.

78. See *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 1 (2011).

recognition bar to what it was before the *Dana Corp.* decision.<sup>79</sup> The majority emphasized that *Dana Corp.* did not provide an adequate rationale for its holding and did not rely on empirical evidence to support a decision to depart from established recognition bar precedent, which dates back to 1966.<sup>80</sup> The majority emphasized that Congress authorized voluntary recognition as a valid alternative to an NLRB conducted election, a consideration it believed the *Dana Corp.* decision did not adequately take into account.<sup>81</sup> The NLRB also felt that *Dana Corp.* created procedures that “placed the Board’s thumb decidedly on one side,” the side of employers, “of what should be a neutral scale.”<sup>82</sup> It also stressed the awkwardness of complying with these procedures and their unwelcome novelty.<sup>83</sup>

The rationale that the Board focused on the most in overruling *Dana Corp.* was the basic policy underlying all of the various bars to NLRB conducted elections, that “newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge.”<sup>84</sup> The majority felt that *Dana Corp.*’s procedures stressed to an improper degree the allegedly coercive nature of the voluntary recognition process without taking into account the NLRA’s goals of reducing industrial strife.<sup>85</sup> The NLRB also clarified what qualifies as a reasonable period of time in determining the length which the recognition bar applies, specifically that it will “be no less than 6 months after the parties’ first bargaining session and no more than 1 year.”<sup>86</sup> It adopted the multi-factor test from *Lee Lumber & Building Material Corp.*<sup>87</sup> to determine when exactly the recognition

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79. *Id.*

80. *See id.* The NLRB pointed to some information regarding *Dana* filings it had received since the *Dana Corp.* decision, and noted that these filings indicated “employees decertified the voluntarily recognized union under the *Dana* procedures in only 1.2 percent of the total cases in which *Dana* notices were requested.” *Id.* at 4.

81. *See id.* at 2–4.

82. *See id.* at 5.

83. *See id.* at 5–6, 9–10 (“In no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights.”).

84. *See id.* at 6.

85. *See id.* at 7–10.

86. *See id.* at 10.

87. *Lee Lumber & Bldg. Material Corp.*, 334 N.L.R.B. 399, 402 (2001).

bar's effect ends in a given case.<sup>88</sup>

Much like *Dana Corp.*, *Lamons Gasket* has already received significant criticism. The dissent in *Lamons Gasket* accused the majority of making “a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise.”<sup>89</sup> One commentator described the opinion as one of many chapters in employers’ “summer of discontent” spearheaded by the Obama administration.<sup>90</sup> The congressional House Appropriations Committee has threatened to cut off the NLRB’s funding to enforce this decision.<sup>91</sup> While there is certainly room for disagreement on the issues raised in *Dana Corp.* and *Lamons Gasket*, it is difficult to say that either decision sought to tackle illusory problems or that the NLRB overreached its authority by overruling *Dana Corp.* As the majority in *Lamons Gasket* stressed, *Dana Corp.* was a rather novel decision that created conflicts within a long line of precedent. Speaking in broad terms, the difference between the two opinions boils down to the attitude they take towards voluntary recognition as well as their emphasis on employee choice versus industrial peace.

### C. Proposed NLRB Regulations Affecting the Union Recognition Process

In a rare exercise of rulemaking power,<sup>92</sup> the NLRB recently proposed some regulations that would have a significant impact on the union election procedures and to a lesser extent the voluntary recognition process.<sup>93</sup> These

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88. See *Lamons Gasket*, 357 N.L.R.B. No. 72, at 10 & n.34; see sources cited *supra* note 63.

89. *Lamons Gasket*, 357 N.L.R.B. No. 72, at 11 (Hayes, dissenting).

90. Mark A. Spognardi, *Employers’ Summer of Discontent: Obama Labor Board Pushes Anti-Employer Agenda*, WESTLAW J. EMP., Sept. 20, 2011, at 1.

91. See Glenn Spencer, *House Appropriations Committee Stands Up Against Regulatory Onslaught*, WORKFORCE FREEDOM INITIATIVE, <http://www.workforcefreedom.com/blog/house-appropriations-committee-stands-against-regulatory-onslaught> (last visited Mar. 29, 2012).

92. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rule-making.”). Indeed, in over seventy years, the NLRB has promulgated only one significant substantive rule. HARPER ET AL., *supra* note 29, at 102.

93. Particularly after the *Dana Corp.* decision, the voluntary recognition procedure and NLRB-conducted-election procedure intertwine and overlap in many significant ways, so changes to one can impact the other. See *infra* Part

proposed regulations appeared in the Federal Register on June 22, 2011.<sup>94</sup> The proposed regulations are generally viewed as favorable to unions.<sup>95</sup> The stated goals of the proposed regulations are as follows: (1) to streamline the resolution of questions on union representation; (2) increase transparency and the uniformity of these procedures; (3) eliminate unnecessary litigation arising out of this process; and (4) modify the process by which the NLRB reviews these union-representation questions.<sup>96</sup> This portion of the Article will first discuss why the NLRB decided to implement these changes and then outline some of the specifics of these proposed regulations.

The proposed regulations contain a lengthy discussion by the NLRB of why it chose to propose these new regulations and specific areas where it had seen a need for streamlining the representation process.<sup>97</sup> The NLRB emphasized that Congress intended that there be procedures in place to determine questions regarding union representation both quickly and fairly.<sup>98</sup> The NLRB cited Congress's findings that such procedures would safeguard commerce from disruptions and promote industrial peace.<sup>99</sup> The Board then pointed to various shortcomings in current union representation proceedings, particularly with respect to narrowing the issues in dispute in representation proceedings.<sup>100</sup> The NLRB noted that the lack of a requirement for responsive pleadings in

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I.A–B. A more streamlined election procedure may also encourage more unions to use that process as opposed to attempting to use voluntary recognition, especially when faced with the hurdles of the *Dana Corp.* decision. *See infra* Part I.A–B.

94. Representation-Case Procedures, 76 Fed. Reg. 36,812, 36,812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pt. 101–03). The NLRB stated that it would accept initial comments on the proposed rules until August, 22, 2011. *Id.*

95. *See* Steven Greenhouse, *N.L.R.B. Rules Would Streamline Unionizing*, N.Y. TIMES, June 22, 2011, at B3, available at <http://www.nytimes.com/2011/06/22/business/22labor.html>.

96. Representation—Case Procedures, 76 Fed. Reg. at 36,812.

97. *See id.* at 36,812–18. The NLRB also included a lengthy discussion of the history and evolution of union recognition procedures. *See id.* A discussion of the history of union recognition procedures, beyond what has already been addressed in Parts II.A and II.B, is beyond the scope of this Article. For a thorough summary of current representation case procedures, *see id.* at 36,817–18.

98. *Id.* at 36,813.

99. *See id.* (citing 29 U.S.C. § 151 (2006)).

100. *See id.* at 36,814–16.

proceedings regarding representation under section 9 of the NLRA allowed a non-petitioning party to not identify and to not join the issues they intend to raise at a hearing.<sup>101</sup> The Board then stated that current regulations also do not expressly provide for any form of summary judgment or offer-of-proof procedures that would allow a hearing officer to narrow the issues at a pre-election hearing by determining whether there are any genuine disputes as to any material facts.<sup>102</sup>

The NLRB further identified pre-election disputes over individual employees' eligibility to vote in an election as an issue that frustrates the determination of the key inquiry that should take place during this period of time, whether a question concerning representation exists that an election is needed to answer.<sup>103</sup>

Technological advances have also proven to be a challenge. Given significant increases in technology and newer methods of electronic communication that have come into existence, the Board recognized the need for updating its rules regarding an employer's obligation to provide a list of names and addresses of eligible employee voters.<sup>104</sup> Likewise, the Board recognized the need for updating its electronic filing procedures to permit the filing of representation petitions electronically.<sup>105</sup>

A wide variety of new procedural changes appear in these proposed regulations.<sup>106</sup> To avoid getting lost in the minute details of these proposed changes, this Article will focus on the most significant aspects of the proposed changes. With respect to initial filing of a petition for certification or decertification, the proposed changes would permit parties to file petitions for certification or decertification electronically and impose additional service requirements on the petitioner.<sup>107</sup> One of the additional service requirements is the filing of a Statement of Position form.<sup>108</sup> Failing to file

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101. *See id.* at 36,814.

102. *See id.* at 36,815.

103. *See id.*

104. *See id.* at 36,815–16.

105. *See id.* at 36,816.

106. *See generally id.* at 36,818–47.

107. *See id.* at 36,819, 36,835–36.

108. *See id.* at 36,821, 36,838–39. This form will replace the current NLRB Form 5081, the Question on Commerce Information. *See id.* Employers would

this form precludes a party from raising certain issues at a pre-election hearing and participating in the litigation of those issues.<sup>109</sup> Non-petitioning parties must also file a Statement of Position form before a pre-election hearing.<sup>110</sup> This form would solicit the parties' position on the following issues: (1) the Board's jurisdiction to process the petition; (2) the appropriateness of the petitioned-for bargaining unit; (3) any proposed exclusions from the petitioned-for bargaining unit; (4) the existence of any bar to the election; (5) the type, dates, times, and location of the election; and (6) any other issues that a party intends to raise at the pre-election hearing.<sup>111</sup> Parties that enter into one of the current election agreements authorized in 29 C.F.R. § 102.62 that either avoid the need for a pre-election hearing or limit the parties' ability to dispute some issues before the election<sup>112</sup> would not need to file a Statement of Position form.<sup>113</sup>

The proposed regulations would also codify and revise the requirement initially recognized by the NLRB in *In re Excelsior Underwear, Inc.*<sup>114</sup> that an employer must provide certain information to the proposed union regarding eligible employee voters before an election occurs.<sup>115</sup> These changes would generally require the employer to provide this information in electronic form and reduce the period of time that an employer has to provide this list from seven days to two days.<sup>116</sup> The employer must also follow the same timing guidelines when providing this list to the regional director and the other parties rather than just file the list with the

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additionally be required to file as part of the Statement of Position form the information required by the newly codified *Excelsior Underwear* requirements. *See id.* at 36,821–22, 36,838–39; *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966); *infra* notes 114–118 and accompanying text.

109. *See* Representation—Case Procedures, 76 Fed. Reg. at 36,821, 36,838–39.

110. *See id.*

111. *See id.*

112. The proposed amendments further clarify the three forms of election agreements already in existence under current law by labeling them with their current common designations: (1) consent election agreements; (2) stipulated election agreements; and (3) full consent election agreements. *See id.* at 36,819–20, 36,837.

113. *See id.* at 36,821, 36,838–39.

114. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966).

115. *See generally* Representation—Case Procedures, 76 Fed. Reg. at 36,820–21, 36,838, 36,843.

116. *See id.*

regional director as under current law.<sup>117</sup> Additionally, the list must now contain the employees' email addresses if available in addition to their names and physical addresses as required under current law.<sup>118</sup>

Regarding specific procedures that impact pre-election hearings, the proposed amendments provide that, absent special circumstances, the regional director must set the hearing to begin seven days after service of the notice of hearing.<sup>119</sup> They also clarify that resolution of disputes concerning the eligibility or inclusion of individual employees is not ordinarily necessary in order to determine if a question of representation exists and thus should not be addressed at the pre-election hearing.<sup>120</sup> The amendments also narrow the scope of evidence that may be offered at hearings to that [which is] relevant to any genuine dispute as to any material fact.<sup>121</sup> They also authorize the hearing officer to play a greater role in identifying issues in dispute and determining if there are genuine disputes as to facts material to those issues.<sup>122</sup> As discussed above, the Statement of Position form requirements also place significant limitations on the parties' ability to raise any issues at the hearing not raised in their Statement of Position form.<sup>123</sup>

With respect to appeals, the first major change is that the circumstances under which a request for special permission to appeal under 29 C.F.R. §§ 102.65 and 102.67 have been narrowed in order to avoid piecemeal appeals that would disrupt the timely disposition of questions of representation.<sup>124</sup> Parties filing objections to the conduct of the election or to conduct affecting the results of the election must also file a written offer of proof in order to demonstrate factual support for their objection.<sup>125</sup> Lastly, Board review of post-election decisions made by one of the regional directors

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117. *See id.*

118. *See id.* *Excelsior Underwear* only required that their names and addresses be given. *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1239–40.

119. Representation—Case Procedures, 76 Fed. Reg. at 36,821, 36,838. This practice was in the past not uniform among the regions, although some regions did follow this practice. *See id.* at 36,821.

120. *See id.* at 36,822, 36,839–40.

121. *See id.* at 36,822, 36,841.

122. *See id.* at 36,822–23, 36,841.

123. *See id.* at 36,823, 36,841.

124. *See id.* at 36,822, 36,840, 36,842–43.

125. *See id.* at 36,826, 36,844.

would be discretionary rather than mandatory.<sup>126</sup>

The NLRB issued a final rule on December 22, 2011.<sup>127</sup> The final rule deferred the final adoption of some aspects of the proposed rule.<sup>128</sup> Specifically, the Board decided to take further time to review the proposed regulations regarding “scheduling of the pre-election hearing, the requirement of a statement of position, and the content and timing of eligibility lists” as well as some other proposed rules.<sup>129</sup> The NLRB chose to do so because of the particularly large number of comments it had received on these proposals.<sup>130</sup>

However, the NLRB decided to adopt some of the less controversial proposed rules, treating them as severable from the other proposed rules.<sup>131</sup> The most notable rules it chose to adopt include provisions that would: (1) direct that section 9(c) of the NLRA be construed such that the statutory purpose of a pre-election hearing is to determine if a question of representation exists; (2) give hearing officers presiding over pre-election hearings the authority to limit the presentation of evidence to questions of representation; (3) give hearing officers presiding over pre-election hearings discretion to permit or disallow post-hearing briefs; (4) defer all requests for review of the regional director’s decision and direction of election until after the election occurs; (5) eliminate the codified recommendation that the regional director should ordinarily not schedule an election sooner than twenty-five days after the decision and direction of election; and (6) create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and provide that Board review of regional directors’ resolution of such disputes is discretionary.<sup>132</sup> These changes will go into effect on April 30, 2012.<sup>133</sup>

Some have compared these changes to a regulatory imposition of the EFCA, although the proposed regulations

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126. *See id.* at 36,827, 36,844–45.

127. *See* Representation—Case Procedures, 76 Fed. Reg. 80,138 (Dec. 22, 2011) (to be codified at 29 C.F.R. pt. 101–02).

128. *See id.* at 80,140.

129. *Id.*

130. *See id.*

131. *See id.*

132. *See id.* at 80,141.

133. *See id.* at 80,138.

are not as favorable to unions as the EFCA would have been.<sup>134</sup> For example, the proposed rules contain no provisions requiring binding arbitration if labor and management cannot agree to the terms of a collective bargaining agreement.<sup>135</sup> Furthermore, the EFCA contains many more provisions that affect the voluntary recognition procedure than these proposed regulations.<sup>136</sup> Additionally, as some labor supporters have argued, these proposed regulations provide no guarantees for union election timeframes even though they do in many ways streamline the process.<sup>137</sup> The terms of the EFCA more concretely allow unions to accelerate the process of becoming the exclusive bargaining agent for a group of employees.<sup>138</sup> Some members of Congress proposed trumping these regulations by statute, but no such effort has materialized into legislation.<sup>139</sup>

## II. UNDERSTANDING THE EFCA

### A. *Changes to Voluntary Recognition Contained in the EFCA*

According to the preamble of the proposed EFCA bill, the EFCA's purpose is "[t]o amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organization, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes."<sup>140</sup> Although the bill actually predates the *Dana Corp.* decision, the bill does contain language that would have abrogated that decision

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134. Kevin Bogardus, *Labor Bill Battle Reborn with NLRB's New Union Election Rules Proposal*, THE HILL (June 26, 2011, 6:00 AM), <http://thehill.com/homenews/administration/168483-labor-bill-battle-reborn-with-nlrbs-new-union-election-rules>.

135. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,812–47 (June 22, 2011) (to be codified at 29 C.F.R. pts. 101–103). The EFCA, on the other hand, does contain such a provision. See H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

136. See *infra* Part II.A; *supra* notes 82–123.

137. Bogardus, *supra* note 134.

138. See *infra* Part II.A; *supra* notes 82–123.

139. See Seth Borden, *NLRB Announces Final Rule to Expedite Elections; Senator Announces Effort to Block Rule Via Congressional Resolution*, LABOR RELATIONS TODAY (Dec. 21, 2011), <http://www.laborrelationstoday.com/2011/12/articles/nlr-rulemaking/nlr-announces-final-rule-to-expedite-elections-senator-announces-effort-to-block-rule-via-congressional-resolution/>.

140. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

before the NLRB chose to overrule that decision itself.<sup>141</sup> Notably, the EFCA as proposed actually makes the voluntary recognition procedure more favorable to unions than it was before the *Dana Corp.* decision.<sup>142</sup> Furthermore, the proposed bill addresses issues unrelated to the *Dana Corp.* decision, such as imposing various timelines on management to negotiate a collective bargaining agreement with a union.<sup>143</sup>

The main changes that the EFCA would make to the voluntary recognition process are: (1) the options an employer has once the union has obtained majority support of the employees as represented through appropriate cards; (2) the involvement of the NLRB in investigating the cards to determine if the union has majority support; and (3) the abolishment of the changes *Dana Corp.* made to the recognition bar.<sup>144</sup> The text of the EFCA that would make these changes, amending section 9(c) of the NLRA, is as follows:

Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds

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141. See *In re Dana Corp.*, 351 N.L.R.B. 434 (2007); Dillard & Dillard, *supra* note 22, at 820 (“In contrast, Congress is considering the Employee Free Choice Act (EFCA), which would not only overrule the Board’s decision in *Dana / Metaldyne* but also *mandate* employer recognition of a union with a card-check showing of majority support.”) (footnote omitted); *infra* Part III. The NLRB recently overruled the *Dana Corp.* decision in *In re Lamons Gasket Co.* See *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 1–2 (2011).

142. Under current law, an employer can reject a card showing by the union that it has obtained majority support and instead seek an NLRB conducted election. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309–10 (1974). The EFCA would change this current law by doing away with an employer’s immediate right to challenge a card showing by the union. See H.R. 1409, 111th Cong.; S. 560, 111th Cong. The EFCA would instead place the power in the NLRB’s hands to determine if the union has majority support. See H.R. 1409, 111th Cong.; S. 560, 111th Cong.

143. H.R. 1409, 111th Cong.; S. 560, 111th Cong. If management does not comply, the dispute would go to an alternative dispute resolution proceeding, including binding arbitration. H.R. 1409, 111th Cong.; S. 560, 111th Cong. This Article will not focus on any aspects of the EFCA other than the provisions regarding voluntary recognition.

144. See sources cited *supra* note 143.

that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).<sup>145</sup>

Essentially, the Board would determine whether or not majority support exists, rather than the employer himself.<sup>146</sup> Furthermore, once the NLRB has determined that a majority of workers did support the union, the employer could not demand the holding of a secret ballot election.<sup>147</sup> For comparison, any employer who currently signs a card check agreement agrees to waive this right to demand an election, but employers that have not signed an agreement may demand a secret ballot election.<sup>148</sup> Lastly, the final sentence of this subsection would require that the NLRB certify the union immediately once it determines the union has majority support.<sup>149</sup> Notably, these provisions would effectively overrule the result in the *Dana Corp.* decision.<sup>150</sup> Because the NLRB has recently overruled *Dana Corp.*, any effects the EFCA would have on that decision are of course now moot.<sup>151</sup>

### *B. Arguments for and Against the EFCA*

Due to the nature of the changes that the EFCA would bring about in the labor world as well as the politically sensitive nature of the balance of power between management and unions, the EFCA has generated a significant amount of controversy. Some of the members of Congress who spoke on the congressional floor the day the

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145. See sources cited *supra* note 143.

146. See sources cited *supra* note 143.

147. See sources cited *supra* note 143.

148. See sources cited *supra* notes 32–33 and accompanying text.

149. See sources cited *supra* note 143.

150. Dillard & Dillard, *supra* note 22, at 820 (“In contrast, Congress is considering the . . . EFCA[], which would not only overrule the Board’s decision in *Dana/Metaldyne* but also *mandate* employer recognition of a union with a card-check showing of majority support.”).

151. See *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 1–2 (2011).

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most recent version of the EFCA was proposed summarized the main arguments for and against it. As stated by Representative Stark, the proponents of the EFCA argue that it: (1) benefits the economic interests of average Americans as well as the economy as a whole; (2) prioritizes the rights of individual workers; and (3) curbs some of the worst abuses by employers:

Middle-class Americans are the backbone of the economy, and yet they took a back seat to corporate giants over the past eight years. The previous Administration decided to protect big business at the expense of their employees, and corporate profits ballooned while real worker wages stagnated or even declined.

Right now, employers can use coercive tactics in the run-up to an employer-forced election even when a majority of workers want to form a union, they can stall indefinitely during contract negotiations, and they can engage in illegal labor practices and receive only a slap on the wrist. American workers deserve better.

The Employee Free Choice Act levels the playing field between employees and employers by allowing workers to decide whether to hold a NLRB election or instead show that a majority of workers support unionization. The Act prevents employers from stonewalling and makes it easier for employees to reach a collective bargaining agreement. Finally, the Employee Free Choice Act stiffens penalties against employers who violate the law.

The current economic recession makes passage of the Employee Free Choice Act even more important. Workers with higher wages will stimulate the economy, spur investment, and get America back on the road to prosperity.<sup>152</sup>

Proponents of the bill also point to the consistent drop in union membership in the United States since the middle of the twentieth century from the high point of roughly one-third of the country's workers being members of a union.<sup>153</sup>

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152. 155 CONG. REC. E620 (daily ed. Mar. 10, 2009) (statement of Rep. Stark).

153. See Cooper, *supra* note 22, at 1591 ("In the mid-1950s union density reached its peak, including about a third of the workforce. By the mid-1970s density had dropped to about a quarter of the workforce. Since then, the decline has accelerated to the point that union membership in 2007 included only 12.1%

On the other hand, critics of the EFCA argue that the bill: (1) undercuts the rights of employees by undermining secret ballot elections, thus taking away employee autonomy; and (2) prioritizes union membership when nationwide union membership already stands at a level high enough to adequately safeguard workers' rights.<sup>154</sup> As Representative Roe articulates, regarding the bill's effect on workers' rights, "[T]he curiously named Employee Free Choice Act . . . actually does the opposite of its title by taking away an employee's free choice to choose in secret whether or not to join a union."<sup>155</sup> Likewise, to undercut arguments of waning union membership nationwide, Representative Roe pointed to recent statistics from the Bureau of Labor Statistics showing that "union membership was just over 16 million in 2008, a 2.6 percent rise over 2007."<sup>156</sup> Another commonly raised criticism of the EFCA centers on the economic impact it would have on the job market and the economy as a whole.<sup>157</sup> More specifically, opponents of the EFCA argue that the legislation would burden employers who are already overloaded with government regulations and prevent them from creating more jobs in the process.<sup>158</sup>

### III. CONGRESSIONAL HISTORY OF THE EFCA

The EFCA has a colorful legislative history in Congress. On November 21, 2003, Representative George Miller first introduced an early form of the EFCA.<sup>159</sup> However, the bill and its Senate counterpart never made it out of committee.<sup>160</sup>

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of the workforce." (footnote omitted)); Dillard & Dillard, *supra* note 22, at 819. In 2010, union membership was approximately 11.9% of the workforce. News Release, U.S. Dep't of Labor, Union Members—2010, at 1 (Jan. 21, 2011), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

154. See 155 CONG. REC. H3111 (daily ed. Mar. 10, 2009) (statement of Rep. Pitts); *id.* at H3112–13 (statement of Rep. Roe).

155. *Id.* at H3112 (statement of Rep. Roe).

156. *Id.*

157. Kris Maher, *Economy Heightens Debate Over Bill to Ease Union Organizing*, WALL STREET JOURNAL, Nov. 1, 2008, at A3, available at <http://online.wsj.com/article/SB122549927797489907.html> ("Business and industry groups say the legislation, known as the Employee Free Choice Act, will lead to massive job losses and hobble the economy.").

158. *Red Tape and Scissors*, ECONOMIST (May 28, 2009), <http://www.economist.com/node/13686444>.

159. H.R. 3619, 108th Cong. (2003).

160. See H.R. REP. NO. 110-23, at 4 (2007) (Conf. Rep.).

The bill once again stalled in committee when reintroduced in 2005.<sup>161</sup> When the bill resurfaced in early 2007, it finally made it out of committee and to the full House of Representatives.<sup>162</sup> The House on March 1, 2007 passed a version of the bill by a vote of 241 to 185.<sup>163</sup> Shortly afterwards, former Senator Ted Kennedy introduced a version of the bill in the Senate on March 29, 2007.<sup>164</sup> Republicans successfully filibustered the bill in the Senate when a motion to invoke cloture failed to pass by nine votes with a final vote of fifty-one to forty-eight.<sup>165</sup> On March 10, 2009, a few months after the 111th Congress was sworn in, former Senator Ted Kennedy and Representative George Miller both introduced a version of the bill in the Senate and House respectively.<sup>166</sup>

When reintroduced in 2009, the bill faced the largest hurdles in the Senate with the prospect of a potential filibuster where Republican opposition to the bill was uniform.<sup>167</sup> Former Senator Arlen Specter, a moderate Republican viewed as key to the passage of the bill, stated in March of 2009 that he opposed the legislation.<sup>168</sup> Democratic Senator Ben Nelson of Nebraska also expressed his opposition to the bill.<sup>169</sup> Several other Democratic Senators stated that they could not support the bill in its current form or that they would prefer alternative legislation, including Arkansas Senator Blanche Lincoln,<sup>170</sup> Delaware Senator Thomas

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161. *See id.*

162. *See id.* at 5.

163. 153 CONG. REC. H2091 (daily ed. Mar. 1, 2007).

164. S. 1041, 110th Cong. (2007).

165. 153 CONG. REC. S8378-98 (daily ed. June 26, 2007).

166. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

167. *See* James Oliphant, 'Card Check' Bill Loses Key Supporters, L.A. TIMES (Mar. 28, 2009), <http://articles.latimes.com/2009/mar/28/nation/na-card-check28> ("All along, Republicans have made it clear that they would try to stop the bill with a filibuster. Specter's announcement Tuesday means all forty-one Senate Republicans are lined up against the measure.").

168. *See id.* Senator Arlen Specter soon switched parties to become a Democrat in late April of 2009 after he realized that he could not likely win the upcoming Republican primary he faced and that the Republican Party in his view had shifted too far rightward politically. *See* Carl Hulse, *Specter Switches Parties*, N.Y. TIMES (April 28, 2009, 12:13 pm), <http://thecaucus.blogs.nytimes.com/2009/04/28/specter-will-run-as-a-democrat-in-2010/>.

169. *See* Ryan Grim, *Ben Nelson Opposes Employee Free Choice Act*, HUFFINGTON POST (Mar. 10, 2009, 02:16 PM), [http://www.huffingtonpost.com/2009/03/10/breaking-ben-nelson-oppos\\_n\\_173548.html](http://www.huffingtonpost.com/2009/03/10/breaking-ben-nelson-oppos_n_173548.html).

170. *See* Alec MacGillis, *Drifting Right, Lincoln Comes Out Against EFCA*,

Carper,<sup>171</sup> and California Senator Dianne Feinstein.<sup>172</sup> The focus of attention in Congress soon shifted to other legislation, such as healthcare overhaul<sup>173</sup> and financial reform.<sup>174</sup> Particularly with the loss of the Democratic super majority in the Senate due to the January 2010 special election upset in the Massachusetts Senate race following the death of Senator Ted Kennedy,<sup>175</sup> the original sponsor of the bill in the Senate, the prospects of passing the EFCA quickly dimmed.<sup>176</sup> AFL-CIO President Richard Trumka claimed that there would be a push to pass the EFCA in the lame-duck session following the Democratic defeats in the 2010 midterm elections,<sup>177</sup> but no such effort ever materialized into legislation in an otherwise active lame duck session.<sup>178</sup>

Given the uniform opposition of Republicans to the EFCA<sup>179</sup> and the results of the 2010 congressional midterm elections, the loss of the Democratic majority in the House of Representatives and the net loss of seven of sixty seats in the U.S. Senate including the Democratic loss in Massachusetts in January 2010, little likelihood exists that Congress will pass the EFCA in the foreseeable future.<sup>180</sup> However,

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WASH. POST (Apr. 6, 2009, 5:41 PM), [http://voices.washingtonpost.com/44/2009/04/06/report\\_lincoln\\_comes\\_out\\_again.html](http://voices.washingtonpost.com/44/2009/04/06/report_lincoln_comes_out_again.html).

171. Sean Hackbarth, *Carper to Oppose Employee Free Choice Act*, SENATUS (Apr. 15, 2009, 12:29 PM), <http://senatus.wordpress.com/2009/04/15/carper-to-oppose-employee-free-choice-act/>.

172. See Oliphant, *supra* note 167.

173. See Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering 'the Call of History'*, N.Y. TIMES, Mar. 21, 2010, at A1, available at <http://www.nytimes.com/2010/03/22/health/policy/22health.html>.

174. Editorial, *Congress Passes Financial Reform*, N.Y. TIMES, July 15, 2010, at A26, available at <http://www.nytimes.com/2010/07/16/opinion/16fri1.html>.

175. See John Fritze, *Scott Brown Wins Massachusetts Senate Race*, USA TODAY (Jan. 19, 2010, 9:44 PM), <http://content.usatoday.com/communities/onpolitics/post/2010/01/620007121/1>.

176. Derrick Cain, *Harkin Says He Does Not Have Enough Votes to Approve EFCA*, DAILY LAB. REP., May 14, 2010, at A-8.

177. Carter Wood, *Card Check: Union Leader Implies Lame-Duck Push for EFCA*, SHOPFLOOR (Sept. 17, 2010, 10:13 AM), <http://shopfloor.org/2010/09/card-check-union-leader-implies-lame-duck-push-for-efca/14558>.

178. See Laurie Kellman, *Lame Duck Session Culminates with Big Accomplishments for Democrats*, HUFFINGTON POST (Dec. 23, 2010), [http://www.huffingtonpost.com/2010/12/23/lame-duck-session-democratic-accomplishments\\_n\\_800654.html](http://www.huffingtonpost.com/2010/12/23/lame-duck-session-democratic-accomplishments_n_800654.html).

179. See Oliphant, *supra* note 167.

180. See Calvin Woodward, *2010 Midterms Put Democratic Control On the Line*, HUFFINGTON POST (Nov. 2, 2010), [http://www.huffingtonpost.com/2010/11/02/election-results-2010-midterms\\_n\\_777475.html](http://www.huffingtonpost.com/2010/11/02/election-results-2010-midterms_n_777475.html).

voluntary recognition has become a somewhat more desirable option for unions now that the NLRB has overruled its decision in *Dana Corp.*<sup>181</sup>

#### IV. PREEMPTION IN THE CONTEXT OF LABOR LAW

##### A. *The Gradual Federalization of Labor Law and Historical Context*

Until the passage of the National Industrial Recovery Act (“NIRA”) in 1933 and subsequently the NLRA in 1935, States primarily regulated labor-management relations and union activity.<sup>182</sup> However, the role the States played in these areas had already begun to decrease in the decades that preceded the NIRA and NLRA. As early as 1898, Congress and various federal agencies became involved in regulating union activity related to railroad employees.<sup>183</sup> In 1914, Congress began to tacitly bless the organization of labor unions with the passage of the Clayton Act, which provided an antitrust exemption to labor organizations and decreased the ability of federal courts to issue injunctions in labor disputes.<sup>184</sup> Outside of various laws passed during wartime, the passage of the Railway Labor Act in 1926 marked one of Congress’s most significant moves into the area of labor-management relations.<sup>185</sup> Lastly, the Norris-LaGuardia Act of 1932 outlawed yellow-dog contracts,<sup>186</sup> gave greater recognition to a union’s ability to act as the representative of an employee, and placed greater restrictions on the federal courts’ ability to issue injunctions against labor unions.<sup>187</sup>

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181. See *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 1–2 (2011); *supra* Part I.B.

182. HARPER ET AL., *supra* note 29, at 81–82, 905.

183. See *id.* at 78.

184. See Clayton Act, Pub. L. No. 63-212, § 6, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 17 (2006)). The Norris-LaGuardia Act more comprehensively deals with injunctions in labor disputes in modern times. See Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101–115 (2006)); HARPER ET AL., *supra* note 29, at 67.

185. See generally Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (2006)); see also HARPER ET AL., *supra* note 29, at 67–68.

186. Yellow-dog contracts are contracts where an employee agrees not to join a union or be involved in union activities during the term of their employment. HARPER ET AL., *supra* note 29, at 66.

187. See Norris-LaGuardia Act, 47 Stat. at 70 (codified as amended at 29

Once World War I broke out, wartime concerns created a stronger federal interest in maintaining stable labor-management relations. Following the federal seizure of roads in 1917, the Railroad Administration recognized the rights of rail workers to organize and bargain collectively in order to reduce industrial strife during wartime that could affect nationwide transportation.<sup>188</sup> Likewise, the need for consistent wartime production prompted President Wilson in 1918 to create the National War Labor Board to prevent labor disputes.<sup>189</sup> During this wartime period, this agency protected workers who sought to organize and bargain collectively by enforcing their right to do so.<sup>190</sup> The purpose of these and other changes at the federal level during this period of time more directly related to promoting efficiency and peace between labor and management during wartime as opposed to promoting union membership and growth.<sup>191</sup>

The two key factors that influenced federal intervention into the area of labor-management relations in the early twentieth century were: (1) the changing dynamics of the relationship between employees and employers; and (2) the Great Depression. First, due to the changing dynamics between employees and employers, the workplace in the early twentieth century became a much different place than it had been a century or even several decades earlier. Around the turn of the twentieth century, states began to make their corporate laws more favorable to corporations in order to attract corporations to register in their state.<sup>192</sup> Likewise, the size of corporations and other business entities began to grow significantly following the Civil War.<sup>193</sup>

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U.S.C. §§ 101–115).

188. HARPER ET AL., *supra* note 29, at 78.

189. See BRUCE E. KAUFMAN, *THE GLOBAL EVOLUTION OF INDUSTRIAL RELATIONS: EVENTS, IDEAS AND THE IIRA* 82 (2004).

190. See *id.* Technically speaking, the National War Labor Board did not have much in the way of enforcement authority, but President Wilson exercised his war powers to secure obedience to its decisions. See HARPER ET AL., *supra* note 29, at 64.

191. See HARPER ET AL., *supra* note 29, at 64. Notably, after World War I during the 1920s, the federal government did take a less active role in protecting unions and allowed businesses to exercise a more free hand. See *id.*

192. See JOHN E. MOYE, *THE LAW OF BUSINESS ORGANIZATIONS* 159 (6th ed. 2005); Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 *J. ECON. HIST.* 667, 667 (1989).

193. HARPER ET AL., *supra* note 29, at 32; KAUFMAN, *supra* note 189, at 16–

These changes to the basic form of businesses largely ended the personal relationship between employers and employees that was more typical of smaller enterprises.<sup>194</sup> When coupled with the strong demand for labor in this post-Civil War period, these changes played a significant role in the development of unions and the labor movement in America.<sup>195</sup> In a more industrialized workplace, employees became more fungible thus reducing their individual bargaining power.<sup>196</sup> Significant increases in the migration of employees also created more of a free-labor market.<sup>197</sup> Workers became more willing to leave the countryside for larger cities and even to leave their countries and move to America for work.<sup>198</sup> Additionally, the advent of the factory and the use of heavy machinery posed new types of threats within the workplace that were foreign or at least less prevalent in a pre-industrial economy.<sup>199</sup>

Second, the pressure the Great Depression placed on American workers arguably played the largest role compared to any other factor in the federalization of labor laws. National income plummeted from eighty-one billion dollars in 1929 to forty-nine billion dollars in 1932, with employee

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17 (“As home production and artisanal workshops gave way to large-scale mines, mills and factories, hundreds of thousands of workers were grouped together in one enterprise under the centralized control of an owner and a cadre of managers.”).

194. HARPER ET AL., *supra* note 29, at 32; KAUFMAN, *supra* note 189, at 15–16.

195. HARPER ET AL., *supra* note 29, at 32.

196. KAUFMAN, *supra* note 189, at 16. That is not say that workers did not benefit in a variety of ways from these changes that came from industrialization. Commentators sometimes paint an idyllic picture of social and economic conditions before this period of industrialization. See Ludwig von Mises, *Facts About the “Industrial Revolution,”* THE FREEMAN, Feb. 1956, reprinted in THE INDUSTRIAL REVOLUTION AND FREE TRADE 53, 53–54 (Burton W. Folsom, Jr. ed., 1996). However, in spite of some negative effects industrialization had on the workplace (in the worst instances egregiously negative effects), economic conditions did generally improve for many workers. See *id.* at 53–55. For example, mass production made goods cheaper for everyone, including workers. See *id.* at 56. Likewise, workers received significantly higher wages as a result of some of these changes. See KAUFMAN, *supra* note 189, at 25. Working hours for workers decreased as well as the nineteenth century progressed. *Id.* Workers’ life expectancies also rose. *Id.*

197. KAUFMAN, *supra* note 189, at 16.

198. See *id.*

199. See *id.* The same was true for other types of workplaces that were either foreign to a pre-industrial economy or became more prevalent as a result of industrialization, such as railroads and mines. See *id.*

wages sustaining the greatest losses.<sup>200</sup> Private construction dropped from \$7.5 billion in 1929 to \$1.5 billion in 1932.<sup>201</sup> Over fifteen million people were unemployed in 1933, with the national unemployment rate at its peak rising to roughly twenty-five percent.<sup>202</sup> Many businesses tried to avoid wage cuts at first, but eventually a variety of industries began to make these cuts as the Great Depression deepened.<sup>203</sup> These conditions led President Franklin Delano Roosevelt to push for a variety of reforms as part of the New Deal program after his presidential election in 1932.<sup>204</sup> The National Industrial Recovery Act (“NIRA”) was one of the first and most ambitious aspects of the New Deal.<sup>205</sup> In addition to establishing minimum-wage and maximum-hours standards in every industry, the NIRA created a federal statutory right for employees to organize themselves into a union.<sup>206</sup> Particularly with respect to the strength of the NLRB, the agency charged with enforcing the NLRA, the NLRA was in many ways broader and more favorable to employees than the NIRA that preceded it.<sup>207</sup>

### *B. Modern Policy Rationales Supporting Labor Law Preemption*

With the passage of the NIRA and subsequently the NLRA, Congress decided that the area of labor-management

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200. HARPER ET AL., *supra* note 29, at 80.

201. ARTHUR M. SCHLESINGER, *THE COMING OF THE NEW DEAL* 87 (2003).

202. IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 14–15 (1950); ROBERT FRANK & BEN BERNANKE, *PRINCIPLES OF MACROECONOMICS* 98 (3d ed. 2007).

203. HARPER ET AL., *supra* note 29, at 80.

204. *See id.*

205. *See id.*

206. *See id.* at 81. The NIRA contained no real mechanisms to handle labor disputes. *See id.* Consequently, President Roosevelt created by executive order the National Labor Board to conduct representation elections and hold hearings to determine whether firms had discriminated against employee organizers. *See id.* This agency lacked any enforcement authority, however. *Id.* Notably, the Supreme Court struck down the NIRA as unconstitutional in 1935. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539–42, 546–51 (1935) (striking down key provisions of the NIRA as an unconstitutional delegation of legislative power to the executive branch and as outside the scope of Congress’s Commerce Clause powers). After Congress passed the NLRA in 1935, the Court upheld that statute in 1937. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the NLRA as within Congress’s Commerce Clause powers); HARPER ET AL., *supra* note 29, at 81.

207. HARPER ET AL., *supra* note 29, at 81–83.

relations needed uniform federal standards.<sup>208</sup> As Justice Jackson once articulated in *Garner v. Teamsters Union*, “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.”<sup>209</sup> While those who would seek pro-labor or pro-business legislation from state legislatures may complain about preemption in this area,<sup>210</sup> the added cost of understanding and complying with fifty different sets of state laws would likely undermine any benefits gained from increased state regulation.<sup>211</sup> All of the following would be potential consequences of delegating more power over labor policy to the States: (1) compliance costs would rise for businesses and unions; (2) attempted compliance with inconsistent or conflicting state laws would increase uncertainty for businesses and unions; (3) enforcement of labor laws would become more difficult due to choice-of-law and other multijurisdictional concerns; (4) inconsistency in results would increase (potentially dramatically); (5) forum

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208. See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 190–95 (1978); *HARPER ET AL.*, *supra* note 29, at 905; *supra* Part IV.A.

209. *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953).

210. Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225, 225–27 (2008), available at <http://yalelawjournal.org/images/pdfs/659.pdf>.

211. See *id.* at 225–26, 228 (“At best, multiple layers of regulations create complexities and redundancies that increase compliance costs and make enforcement more difficult. At worst, inconsistencies or outright conflict make compliance and enforcement nearly impossible. Exclusive federal regulation would eliminate many of these problems and produce a more effective and economically competitive workplace governance regime.”); *Garner*, 346 U.S. at 490–91 (“A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.”); David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 509 (1986) (“Centralization of labor policy is essential because the NLRA, despite its political defects, is far better suited to anchor and to guide the development of labor policy than are the fifty separate states. If labor policy loses this centralization, state courts will yield a volatile checkerboard of inconsistent decisions, and labor law practice will disintegrate into raw forum shopping.”). However, some would counter that “labor law preemption doctrine exists within a bodyguard of exceptions making it at once one of the most complex and in decipherable areas in all of employment law.” Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 104 (2009).

shopping would increase; and (6) the desirability of the United States as a place of business would decrease for foreign businesses.<sup>212</sup>

While it once made sense for States to regulate employment practices that were truly local in nature, the modern workplace is strikingly different than it once was.<sup>213</sup> A large amount of employers are at least regional in nature, and many others are national or international in scope.<sup>214</sup> Comparing a localized dispute, such as a dispute between a single employee and his employer over a covenant not to compete, to a large-scale labor dispute, which can impact hundreds of employees in several different states<sup>215</sup> and can bring even a large employer's business to a screeching halt, illustrates the point.<sup>216</sup> State regulation does have its place with respect to many types of employment issues impacting concerns that have a more localized effect.<sup>217</sup> In comparison, the interests that the States have in employment and labor policies decreases significantly when it comes to disputes that have national and international consequences.<sup>218</sup>

Many complain about the politicized nature of federal labor policy and the resulting congressional impasse this situation creates.<sup>219</sup> The point is well taken, but this situation is far from a recent phenomenon.<sup>220</sup> Additionally, significant changes in federal labor law do take place as a

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212. See Gregory, *supra* note 211, at 509; Hirsch, *supra* note 210, at 225–26, 228.

213. See Hirsch, *supra* note 210, at 228; *supra* notes 192–199 and accompanying text.

214. See Hirsch, *supra* note 210, at 228.

215. One example would be the highly publicized case where the NLRB brought an action against Boeing for retaliating against a union by moving a factory from Washington to South Carolina. See Steven Greenhouse, *Boeing Labor Dispute Is Making New Factory a Political Football*, N.Y. TIMES, July 1, 2011, at A1, available at <http://www.nytimes.com/2011/07/01/business/01boeing.html?pagewanted=all>. This dispute, which has since reached a resolution, affected at least two states, impacted thousands of workers and one of the world's largest airplane manufacturers, and involved a plant with construction costs around \$750 million. See *id.*; Chris Isidore, *Boeing Unfair Labor Charge Dropped*, CNNMONEY (Dec. 9, 2011), [http://money.cnn.com/2011/12/09/news/companies/boeing\\_nlrbl/](http://money.cnn.com/2011/12/09/news/companies/boeing_nlrbl/).

216. See Hirsch, *supra* note 210, at 225–28.

217. See *id.*

218. See *id.*

219. See, e.g., Estlund, *supra* note 20, at 1530.

220. See *id.* (stating that no major congressional revision of federal labor laws has occurred since 1959).

result of adjudications that take place within the NLRB, the agency charged with implementing the NLRA, and ultimately the federal court system.<sup>221</sup> Likewise, politicization of labor policy is far from a purely Congressional phenomenon.<sup>222</sup> It already happens at some level in all states when they shape labor and employment laws within the areas that the states may permissibly regulate.<sup>223</sup> Allowing the states to exercise a freer hand in regulating labor policy would simply change the forum of this politicized battle rather than eliminate it. While the end result in labor policy would of course be different given that all fifty states would have the freedom to adopt their own labor policy, politicization would not likely decrease in any significant way.

### C. Preemption Generally

The Supremacy Clause of the U.S. Constitution eliminates conflicts between federal and state law by establishing that the Constitution and laws of the United States will trump conflicting state law.<sup>224</sup> It is important at the start of a preemption discussion to distinguish between the preemption of state substantive law and the preemption of state court jurisdiction over federal claims. Both of these types of preemption have particular significance in the field of

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221. HARPER ET AL., *supra* note 29, at 99–105 (discussing the structure, authority, and history of the NLRB).

222. One recent example would be the recent battles in various states over whether to limit the rights of public sector unions at the state level. See A. G. Sulzberger & Monica Davey, *Union Bonds in Wisconsin Begin to Fray*, N.Y. Times, Feb. 22, 2011, at A1, available at <http://www.nytimes.com/2011/02/22/us/22union.html?pagewanted=all>; *Ohio Senate Votes Restrictions on Public Sector Unions*, REUTERS (Mar. 2, 2011, 4:57 PM), <http://www.reuters.com/article/2011/03/02/us-ohio-unions-vote-idUSTRE7217HJ20110302>. In Wisconsin in particular, the debate has turned particularly hostile and transformed the political landscape there. See Sulzberger & Davey, *supra*; Brendan O'Brien, *Republican Senators Face Recall Vote in Wisconsin*, REUTERS (Aug. 9, 2011, 5:50 PM), <http://www.reuters.com/article/2011/08/09/us-wisconsin-recalls-idUSTRE7783VT20110809>.

223. See sources cited *supra* note 222.

224. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”); Howard A. Learner, *Restraining Federal Preemption When There Is An “Emerging Consensus” of State Environmental Law and Policies*, 102 NW. U. L. REV. 649, 658 (2008).

labor law. Each of these two types of preemption will be discussed separately.

1. *Preemption of State Substantive Law*

Preemption is generally a question of congressional intent.<sup>225</sup> There is generally a presumption against preemption of state substantive law, especially implied preemption.<sup>226</sup> Federal courts find preemption in circumstances where “Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>227</sup> Preemption takes the form of express preemption or implied preemption.<sup>228</sup> Courts have further identified two types of implied preemption: field preemption and conflict preemption.<sup>229</sup> The Supreme Court has emphasized that the above categories of preemption are not rigidly distinct.<sup>230</sup> Thus, field preemption may be thought of as a species of conflict preemption.<sup>231</sup> However, practically speaking, it is often easier to conceptualize field preemption separately.

Field preemption occurs when the specific scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>232</sup> Field preemption can of course be express as well as implied.<sup>233</sup> Conflict preemption occurs when either: (1) “compliance with both federal and state regulation is a physical impossibility”;<sup>234</sup> or (2) state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>235</sup> Thus, the term conflict preemption is a bit misleading, as there need not be a

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225. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

226. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 146–52 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236–37 (1947).

227. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

228. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

229. *Learner*, *supra* note 224, at 659.

230. *English*, 496 U.S. at 79–80 n.5.

231. *See id.*

232. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

233. *See Henry Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 529 (1993).

234. *Id.* at 531.

235. *Id.*

true conflict between the state and federal law in the sense that compliance with each law is not possible.<sup>236</sup> This second prong of conflict preemption is particularly important with respect to *Garmon*<sup>237</sup> and *Machinists*<sup>238</sup> preemption.<sup>239</sup> *Garmon* preemption focuses on conduct protected by NLRA section 7 or prohibited by NLRA section 8 while *Machinists* preemption instead looks at conduct neither protected nor prohibited by these sections but still outside the scope of permissible state regulation.<sup>240</sup>

Predicting the result in preemption cases can often be difficult.<sup>241</sup> However, in the field of labor law, the operation of the various labor preemption doctrines as forms of field preemption reduces the number of close cases.<sup>242</sup> As one commentator articulates, courts largely ignore the normal presumption against implied preemption in most labor preemption cases.<sup>243</sup>

## 2. Preemption of State Court Jurisdiction over Federal Claims

Preemption of state court jurisdiction over federal claims is a distinct but related issue to the preemption of state substantive law. Courts are much more willing to find preemption of state substantive law than preemption of state court jurisdiction over federal claims.<sup>244</sup> While federal courts

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236. See *id.* at 529.

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

238. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976).

239. See Drummonds, *supra* note 211, at 163 n.295.

240. See *infra* Part IV.D.

241. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (noting that most commentators view the Court's "[m]odern preemption jurisprudence [as] a muddle"); Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 369 (2011) ("Although the language used to describe the various preemption analyses applied by the Court has remained stable for decades, the Court has struggled to provide commensurate levels of outcome predictability in its preemption decisions." (footnote omitted)).

242. See *infra* notes 253–256, 287 and accompanying text.

243. Drummonds, *supra* note 211, at 163 n.295.

244. Compare *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (recognizing that state courts have concurrent jurisdiction over federal claims under normal circumstances unless Congress expressly ousts them of that jurisdiction under the Supremacy Clause), with *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (recognizing that Congress can impliedly as well as expressly

will sometimes find that Congress has impliedly preempted state substantive law, federal courts will almost never find that Congress has impliedly preempted state court jurisdiction over federal claims.<sup>245</sup> Congress must almost always expressly oust state courts of jurisdiction to hear federal claims in order for a federal court to find Congress intended such a result.<sup>246</sup> Notably, due to some of the nuances of the well-pleaded complaint rule, even when Congress has expressly preempted state court jurisdiction over some types of federal claims, such as patent claims, state courts still have jurisdiction over cases in which the exclusively federal claim is only a counterclaim.<sup>247</sup> Federal courts, on the other hand, would not have subject matter jurisdiction based on the federal counterclaim alone.<sup>248</sup>

In the field of labor law, federal courts are more willing to find preemption of state court jurisdiction than they would be in most other areas of federal law.<sup>249</sup> The *Garmon* preemption doctrine and to a lesser extent the *Machinists* doctrine operate to divest state courts of jurisdiction over some types of disputes.<sup>250</sup> For purposes of this Article, the *Garmon* preemption doctrine will be the most significant of these three preemption doctrines.<sup>251</sup>

#### D. Labor Law Preemption

There are three key preemption doctrines in the area of labor law within the context of the NLRA scheme: (1) *Garmon* preemption; (2) *Machinists* preemption; and (3) Labor Management Relations Act (“LMRA”) section 301 preemption.<sup>252</sup> All of these preemption doctrines operate as

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preempt state substantive law).

245. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823–26 (1990); *supra* note 244.

246. See *Yellow Freight*, 494 U.S. at 823–26; *Tafflin*, 493 U.S. at 458–59.

247. See *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (“Nor can federal jurisdiction rest upon an actual or anticipated counterclaim. We so ruled, emphatically, in *Holmes Group*. Without dissent, the Court held in *Holmes Group* that a federal counterclaim, even when compulsory, does not establish ‘arising under’ jurisdiction.” (citation omitted) (citing *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002))).

248. See *id.*

249. See *infra* Part IV.D.

250. See *infra* Part IV.D.

251. See *infra* Part V.

252. 29 U.S.C. § 185 (2006); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202,

either express or implied field preemption.<sup>253</sup> *Garmon* and *Machinists* operate as implied field preemption under the conflict preemption principle of state law standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>254</sup> Section 301 preemption is a form of express field preemption.<sup>255</sup>

One cannot overemphasize how broad some of these labor preemption doctrines are. As one commentator puts it, “It would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act.”<sup>256</sup> However, Congress has not chosen to fully occupy the field of labor relations to the extent it could under the Commerce Clause, leaving some issues still subject to state regulation.<sup>257</sup> One odd characteristic of the area of labor preemption is that Congress has remained virtually silent for roughly fifty years on the issue of labor preemption even though the federal courts have expansively developed these labor preemption doctrines.<sup>258</sup> Some would argue that these labor preemption doctrines have little basis in congressional

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208–13 (1985).

253. Drummonds, *supra* note 211, at 163 & n.295.

254. *See id.*; *Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 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’t Relations Comm’n*, 427 U.S. 132, 140 (1976) (specifying the general contours of *Machinists* preemption); *San Diego Bldg. Trades Council, Millmen’s Union Local 2020 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.”).

255. *See Avco Corp. v. Machinists*, 390 U.S. 557, 559–62 (1968). These types of claims can always be heard in federal court as they are always removable, but state courts still have jurisdiction over them. *See Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6–8.

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

257. *See* 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 2327 (John E. Higgins, Jr. et al., eds., 5th ed. 2006 & Supp. 2010) [hereinafter DEVELOPING LABOR LAW].

258. *See Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting) (“From 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.”); Drummonds, *supra* note 211, at 164.

intent.<sup>259</sup>

Lastly, section 301 preemption deals with federal common law displacing state law interpretation of collective bargaining agreements.<sup>260</sup> This Article will not focus in any detail on section 301 preemption, since the state constitutional amendments providing a right to a secret ballot election do not implicate this type of preemption.

### 1. *Garmon Preemption*

With respect to the NLRA, *Garmon* preemption is the oldest and broadest of the preemption doctrines in the field of labor law.<sup>261</sup> In a nutshell, *Garmon* preemption prevents the state regulation of activities which clearly or that may fairly be assumed to be “protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8.”<sup>262</sup> Absent a few minor provisions within the NLRA, the statute does not expressly state the extent to which it displaces state law.<sup>263</sup> However, the Supreme Court has interpreted Congress’ preemptive intent under the NLRA quite broadly.<sup>264</sup> The Court felt that allowing States to regulate various forms of labor disputes “so plainly within the central aim of federal regulation involves too great a danger of conflict between the power asserted by Congress and requirements imposed by state law.”<sup>265</sup>

Instead, the NLRB should in the first instance determine whether section 7 or section 8 of the NLRB governs a particular activity.<sup>266</sup> As a later decision articulated, the NLRB has “primary jurisdiction” over these issues.<sup>267</sup> In its

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259. See sources cited *supra* note 258.

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

261. See *Drummonds*, *supra* note 211, at 165–66.

262. *San Diego Bldg. Trades Council, Millmen’s Union Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

263. See *DEVELOPING LABOR LAW*, *supra* note 257, at 2328; *HARPER ET AL.*, *supra* note 29, at 905.

264. See *Garmon*, 359 U.S. at 244; *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.”).

265. *Garmon*, 359 U.S. at 244.

266. See *id.* at 244–45.

267. *Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 25*, 430 U.S. 290, 295 n.5 (1977).

operation, the *Garmon* preemption doctrine preempts both state substantive law and state court jurisdiction over disputes that fall within the NLRB's primary jurisdiction.<sup>268</sup> Despite *Garmon*'s relative age, the Supreme Court and the lower federal courts still cite *Garmon* as a leading precedent for one of the three basic labor law preemption doctrines.<sup>269</sup>

As with the application of many other types of preemption, determining the exact scope of *Garmon* preemption does not lend itself to a precise analysis. As stated in *Garmon*, conduct "protected by § 7 of the [NLRA], or [that] constitute[s] an unfair labor practice under § 8" falls within the scope of *Garmon* preemption.<sup>270</sup> To fully understand how *Garmon* preemption operates, it is helpful to think of four categories of potential cases: those where the conduct involved in the dispute (1) is actually protected by section 7; (2) is actually prohibited by section 8 as an unfair labor practice; (3) is arguably protected by section 7; or (4) is arguably prohibited by section 8 as an unfair labor practice.<sup>271</sup> By definition, the first two categories fall within *Garmon* preemption absent some exception or the application of some of the limitations discussed in the following paragraphs.<sup>272</sup> Courts, however, do not apply *Garmon* preemption quite as rigidly when conduct prohibited by section 8 is involved.<sup>273</sup>

The basic analysis for the third and fourth categories of cases operates in the same manner. Whether the state law in question is one of broad "general application" or one "specifically directed towards the governance of industrial relations" is not dispositive in this preemption analysis.<sup>274</sup> However, common sense would dictate that the state law in question would more likely be preempted if it expressly governs labor relations.<sup>275</sup> The key inquiry is whether the

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268. See Drummonds, *supra* note 211, at 167; *supra* notes 262, 264–67 and accompanying text.

269. HARPER ET AL., *supra* note 29, at 908.

270. *Garmon*, 359 U.S. at 244.

271. See HARPER ET AL., *supra* note 29, at 909–10 (using the same basic approach of further subdividing *Garmon* preemption into various categories).

272. See *infra* notes 274–84 and accompanying text.

273. See *infra* notes 280–82 and accompanying text.

274. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978).

275. See *id.* at 197–98, 198 & n.27. By the same token, laws of general applicability are less likely to generate rules or remedies which conflict with federal labor policy than the invocation of a special remedy under a state labor

controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the NLRB.<sup>276</sup> This rationale reflects the concern for protecting the NLRB's primary jurisdiction.<sup>277</sup> However, the primary jurisdiction rationale does not apply when the employee or union who could have presented the issue to the NLRB has not done so and the employer has no acceptable means of doing so.<sup>278</sup> Nevertheless, preemption under these circumstances may in some cases still be necessary in the third category of cases.<sup>279</sup>

The distinguishing factor between the third and fourth category is that courts are more willing to find preemption in the third category, a case where the conduct involved in the dispute is arguably protected by section 7. “[C]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited,” thus allowing a State more flexibility to exercise concurrent jurisdiction regarding conduct not protected by federal labor law.<sup>280</sup> A greater need for preemption exists because permitting States to exercise jurisdiction in certain contexts might create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct.<sup>281</sup> Even when through gamesmanship a party avoids presenting an issue to the NLRB by trying to litigate the issue in other venues, the Supreme Court has recognized that Congress may in some cases have preferred the costs inherent in a jurisdictional hiatus as opposed to the frustration of national labor policy that might accompany the exercise of state jurisdiction.<sup>282</sup>

There are some exceptions to *Garmon* preemption. The Supreme Court has emphasized that courts should not apply *Garmon* inflexibly, particularly when “the State has a

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relations law. *See id.*

276. *See id.* at 197.

277. *See generally id.* at 190–207.

278. *See id.* This problem arises because only if the union files an unfair labor practice charge against the employer can the NLRB assess the scope of protection under section 7 of the NLRA. *See DEVELOPING LABOR LAW, supra* note 257, at 2357.

279. *See infra* note 282 and accompanying text.

280. *Sears*, 436 U.S. at 200.

281. *See id.* at 203.

282. *See id.* at 201–03.

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."<sup>283</sup> To determine whether to depart from *Garmon* preemption in a given case, courts take into account three factors: (1) whether the underlying conduct is protected under the NLRA; (2) whether there is an "overriding state interest" that is also "deeply rooted in local feeling and responsibility"; and (3) whether a state cause of action would interfere with the effective administration of national labor policy.<sup>284</sup>

## 2. Machinists Preemption

*Machinists* preemption, on the other hand, implicates state regulation of conduct that Congress deems necessary to leave unregulated and rather left to the free play of economic forces.<sup>285</sup> This doctrine mandates that States cannot regulate conduct that, even though it does not fall within the protection of section 7 or any prohibition of section 8 of the NLRA, Congress intended to be "unrestricted by any governmental power to regulate" since the conduct qualifies as a permissible economic weapon consistent with the scheme of labor regulation Congress adopted.<sup>286</sup> Taking *Machinists* preemption together with *Garmon* preemption leads to the conclusion that Congress "has virtually banish[ed] states and localities from the field of labor relations."<sup>287</sup> Notable Supreme Court cases restricting a State's ability to regulate conduct on the basis of *Machinists* preemption include preemption of state law regarding the ordering of union employees to cease and desist a concerted refusal to accept overtime assignments,<sup>288</sup> the conditioning of a renewal of a franchise upon settlement of a labor dispute,<sup>289</sup> and the prohibition of the use of state funds to promote or deter union

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283. See *id.* at 188 (quoting *Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 25*, 430 U.S. 290 (1977)).

284. See *id.* at 187–89.

285. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976).

286. See *id.* at 141 (quoting *NLRB v. Ins. Agents*, 361 U.S. 477, 488–89 (1960)).

287. Estlund, *supra* note 20, at 1572.

288. *Machinists*, 427 U.S. at 140–41.

289. *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 n.5 (1986).

organizing.<sup>290</sup>

However, States do retain some authority to regulate activity more loosely related to labor-management relations. Examples of permissible state regulation of conduct or state conduct itself falling outside of both *Garmon* and *Machinists* preemption include: (1) state tort or breach of contract claims based on promises of permanent employment made by an employer hiring replacement workers during a labor strike,<sup>291</sup> (2) minimum state labor standards regarding the terms of employment,<sup>292</sup> (3) state unemployment compensation schemes that impose additional waiting requirements for benefits when a person's unemployment results from a labor dispute,<sup>293</sup> and (4) situations where a State acts as a proprietor rather than as a regulator.<sup>294</sup>

#### V. POTENTIAL PREEMPTION OF STATE LAW PROVIDING A RIGHT TO A SECRET BALLOT ELECTION

Next, it is time to turn to the primary question raised in this Article, whether or not the state constitutional amendments protecting an employee's right to a secret ballot election would be preempted under the NLRA. In the letter the Acting General Counsel originally sent to the four Attorneys General to advise them that these constitutional amendments were preempted and in the complaint filed in Arizona district court, the NLRB stated its argument as to why these state constitutional amendments are preempted by the NLRA.<sup>295</sup> The letter and the complaint made the same basic argument, but the letter went into more detail and pointed to the relevant cases that control this issue.<sup>296</sup> In stating the legal basis for his position in this letter, the Acting General Counsel relied primarily upon *Linden Lumber*

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290. See generally *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

291. See generally *Belknap, Inc. v. Hale*, 463 U.S. 491, 500–06 (1983).

292. See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754–58 (1985).

293. *N.Y. Tel. Co. v. N.Y. Dep't of Labor*, 440 U.S. 519, 537 (1979).

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

295. See Complaint for Declaratory Judgment, *supra* note 18, at 2–4; Letter from Lafe E. Solomon, Acting General Counsel, NLRB, to Tom Horne, Ariz. Attorney Gen. 1–3 (Jan. 13, 2011), available at [http://www.nlr.gov/sites/default/files/documents/234/letter\\_az.pdf](http://www.nlr.gov/sites/default/files/documents/234/letter_az.pdf); NLRB, *supra* note 9 (linking to each of the four letters).

296. See Letter from Lafe E. Solomon, *supra* note 295, at 1–2; Complaint for Declaratory Judgment, *supra* note 18, at 2–4.

*Division, Summer & Co. v. NLRB*<sup>297</sup> and *NLRB v. Gissel Packing Co.*,<sup>298</sup> two U.S. Supreme Court decisions.<sup>299</sup> He argued that based on these decisions federal law provides employees two different paths to pursue their section 7 right to choose a bargaining representative, either through an NLRB conducted secret ballot election or voluntary recognition.<sup>300</sup> He further concluded that the state constitutional amendments in question allow only secret ballot elections as a method of employees choosing union representation and thus are preempted by operation of the Supremacy Clause.<sup>301</sup> The language of these state constitutional amendments directly seeks this result, so a further discussion of the specifics of each amendment is not necessary.<sup>302</sup>

Looking to the applicable provisions of the NLRA and applying the relevant cases, the Acting General Counsel's conclusion that these laws are preempted is quite persuasive. As he concluded, *Linden Lumber* and *Gissel* both contain the U.S. Supreme Court's acknowledgement that employees have two different paths to exercise their section 7 right to choose a bargaining representative.<sup>303</sup> Section 7 clearly states, "Employees shall have the right to self-organization, [and] to form, join, or assist labor organizations . . . ." Section 9(a) allows employees to exercise those section 7 rights by electing

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297. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 301 (1974).

298. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

299. See Letter from Lafe E. Solomon, *supra* note 295, at 1–2.

300. See *id.* at 2 ("The inevitable consequence of this Amendment is that Arizona employers are placed under direct state law pressure to refuse to recognize—or withdraw recognition from—any labor organization lacking an election victory."). The NLRB makes the same argument in the Arizona complaint. See Complaint for Declaratory Judgment, *supra* note 18, at 2–4 ("The NLRA permits but does not require secret ballot elections for the designation, selection, or authorization of a collective bargaining representative where, for example, employees successfully petition their employer to voluntarily recognize their designated representative on the basis of reliable evidence of majority support, in accordance with Sections 7 and 9 of the NLRA . . .").

301. See Letter from Lafe E. Solomon, *supra* note 295, at 2.

302. See sources cited *supra* notes 4–7 (providing the language of each respective state constitutional amendment).

303. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304–06 (1974) ("We recognized in *Gissel* that while the election process had acknowledged superiority in ascertaining whether a union has majority support, cards may 'adequately reflect employee sentiment.'"); *Gissel*, 395 U.S. at 596–98.

or otherwise “designat[ing] or select[ing]” a representative.<sup>304</sup> As discussed previously, the Supreme Court has interpreted section 9(a) as authorizing voluntary recognition as a valid alternative to an NLRB conducted election.<sup>305</sup> Of course, this right to use the voluntary recognition procedure has its basis only as a statutory right that Congress could amend or do away with as it pleases.<sup>306</sup> However, until Congress does so or the Supreme Court interprets section 9(a) differently, *Linden Lumber* and *Gissel* stand as the definitive interpretation of section 9(a). Thus, the labor policy at issue is clear and must now be put in the context of the relevant preemption doctrines.

*Garmon* preemption is the preemption doctrine implicated by these state constitutional amendments that protect the right to a secret ballot election. By their very nature, *Garmon* preemption and *Machinists* preemption will rarely apply to the same set of facts unless it is unclear whether the conduct at issue is protected by section 7 or prohibited by section 8.<sup>307</sup> *Garmon* preemption focuses on conduct protected by section 7 or prohibited by section 8 while *Machinists* preemption instead looks at conduct neither protected nor prohibited by these sections but still outside the scope of permissible state regulation.<sup>308</sup> Looking to the specific rights at issue leads to the conclusion that *Garmon* is the relevant preemption doctrine. First, the Supreme Court has already concluded that the conduct at issue is protected by section 7 of the NLRA, which by definition makes the issue fall within *Garmon* preemption.<sup>309</sup> Second, *Garmon* preemption focuses on issues “plainly within the central aim of federal regulation” that the NLRB should determine in the first instance.<sup>310</sup> *Machinists* preemption instead focuses more on issues that do not fall within the core of the NLRA scheme, specifically economic weapons neither expressly allowed nor prohibited under the NLRA that the States still do not have

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304. See 29 U.S.C. §§ 157, 159(a) (2006).

305. See *supra* Part I.A.

306. See 29 U.S.C. § 159(a).

307. See *supra* Part IV.D.

308. See *supra* Part IV.D.

309. See *supra* Part IV.D; *supra* note 303.

310. See *San Diego Bldg. Trades Council, Millmen’s Union Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

the ability to regulate.<sup>311</sup> The scope of employee rights to select a bargaining representative, a central issue in the NLRA framework of labor and management relations, more clearly falls within the concerns of *Garmon* preemption.<sup>312</sup> The process of selecting a bargaining representative is likewise not an economic weapon.<sup>313</sup>

Applying *Garmon* to these state constitutional amendments leads to the conclusion that these state constitutional amendments would be preempted. Putting this question into the context of the four categories of *Garmon* preemption cases discussed earlier in Part IV.D.1, a case involving this particular question would fall into the first category, conduct that is actually protected by section 7 of the NLRA. Employees taking advantage of the process of voluntary recognition to organize in the form of a labor union is protected by section 7 of the NLRA.<sup>314</sup> The U.S. Supreme Court has expressly recognized this fact in two decisions, *Linden Lumber* and *Gissel*.<sup>315</sup> A greater need for preemption exists when labor-related activity is protected under the NLRA rather than prohibited by it.<sup>316</sup>

Looking at the strength of this particular preemption argument, it is relatively clear that the processes through which employees choose their bargaining representative falls “plainly within the central aim of federal regulation.”<sup>317</sup> Here, several states are attempting to modify the exercise of employees’ section 7 right to select a bargaining representative, labor-related activity that is protected under the NLRA.<sup>318</sup> One of the NLRB’s key functions is to conduct union representation procedures and resolve disputes that arise out of them.<sup>319</sup> Allowing states to dictate what rules the NLRB must follow in a particular state on questions of union representation would completely disrupt the NLRB’s primary

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311. See *supra* Part IV.B.

312. See *Garmon*, 359 U.S. at 244.

313. See *supra* Part IV.B.

314. See sources cited *supra* note 303.

315. See sources cited *supra* note 303.

316. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 200 (1978); *supra* notes 280–282 and accompanying text.

317. See *Garmon*, 359 U.S. at 244.

318. See *id.*; sources cited *supra* notes 4–7 (containing the text of the state constitutional amendments at issue).

319. See 29 U.S.C. § 159 (2006).

jurisdiction over these kinds of issues.<sup>320</sup>

Furthermore, the right to choose a representative for employees is one of the first rights enumerated in NLRA section 7, the key source of employees' right to organize under the NLRA.<sup>321</sup> Additionally, the right of employees to choose a representative is subject to extensive regulation by Congress and the NLRB as evidenced by the level of detail in section 9 of the NLRA that deals with NLRB election procedures<sup>322</sup> as well as existing and proposed NLRB regulations that regulate this process.<sup>323</sup> The rights employees may exercise and procedures they must follow when selecting a bargaining representative are core aspects of the NLRA.<sup>324</sup> Permitting these state constitutional amendments to coexist with the NLRA would create "too great a danger of conflict between the power asserted by Congress and requirements imposed by state law."<sup>325</sup>

None of the factors courts utilize to determine whether to depart from *Garmon* preemption under a particular set of circumstances weigh in favor of an exception to preemption here.<sup>326</sup> The three factors are as follows: (1) whether the underlying conduct is protected under the NLRA; (2) whether there is an "overriding state interest" that is also "deeply rooted in local feeling and responsibility"; and (3) whether a state cause of action would interfere with the effective administration of national labor policy.<sup>327</sup> First, the underlying conduct, employees taking advantage of the process of voluntary recognition to organize in the form of a labor union, is protected under the NLRA as discussed in the previous paragraphs. It is necessary to distinguish the Supreme Court decision *Brown v. Hotel & Restaurant Employees Local 54* where the Court stated that the section 7 right to select bargaining representatives is not absolute and

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320. See *supra* Part IV.D.1.

321. See 29 U.S.C. § 157 (2006).

322. See generally 29 U.S.C. § 159.

323. See 29 C.F.R. pt. 101-02 (2011); *supra* Part I.C.

324. See generally 29 U.S.C. §§ 157, 159; *San Diego Bldg. Trades Council, Millmen's Union Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

325. *Garmon*, 359 U.S. at 244.

326. See *Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 25*, 430 U.S. 290, 298 (1977).

327. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 199-00 (1978).

that some state law on the issue may permissibly exist due to some federal statutory exclusions.<sup>328</sup> That decision dealt with some relatively narrow issues, the qualifications and responsibilities of union officials.<sup>329</sup> *Brown* did not deal with the basic procedures employees may use to select a bargaining representative, an NLRB conducted election, or voluntary recognition.<sup>330</sup> Therefore, it is unlikely that *Brown* would foreclose a finding of preemption under these circumstances.<sup>331</sup>

Second, no such overriding state interest deeply rooted in local feeling and responsibility exists. Federal regulation of union representation procedures has taken place to some extent since World War I and comprehensively starting in 1933.<sup>332</sup> Given this lengthy history of federal regulation of union representation procedures, it is difficult to articulate a plausible “overriding state interest” that is “deeply rooted in local feeling and responsibility.”<sup>333</sup> Furthermore, the timing of the passage of these state constitutional amendments as well as the currency of the controversies over voluntary recognition, the *Dana Corp.* decision, and the potential passage of the EFCA undercut the argument that this issue has historically been one of state concern.<sup>334</sup>

Third, a state cause of action for violation of a state right to a secret ballot election in a union election would interfere with the effective administration of national labor policy.<sup>335</sup> If these state constitutional amendments were given effect, it is entirely conceivable that parties would seek to battle out these issues in state courts rather than before the NLRB in order to circumvent the terms of the NLRA itself and federal precedent interpreting the NLRA. It might even be possible that a state agency would attempt to enforce these laws against the NLRB in a way that would require the NLRB to follow state law when certifying a union under the NLRA.

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328. See *Brown v. Rest. Emps. and Bartenders Int'l Union Local 54*, 468 U.S. 491, 506 (1984).

329. See *id.* at 504–09.

330. See *id.* at 509.

331. See *id.*

332. See *supra* Part IV.A.

333. See *Farmer v. United Bhd. of Carpenters and Joiners of Am. Local 25*, 430 U.S. 290, 298 (1977).

334. See *id.*; *supra* Part Introduction–I.A–B, II–III.

335. See *Farmer*, 430 U.S. at 298; *supra* Part I.A.

This type of situation would be one that would interfere with the effective administration of national labor policy, as it would hamper the NLRB in carrying out one of its basic functions.<sup>336</sup>

The law in this area has enough clarity that it is this author's position that the NLRB will succeed in its actions against any of these four states on the issue of whether these state constitutional amendments are preempted. One must always remember that preemption in the field of labor law goes further than in most every other area of law.<sup>337</sup> Given the breadth of labor preemption, it is difficult to make a convincing case that these state constitutional amendments that impact such a central issue in the NLRA statutory scheme can survive the NLRA's broad preemptive effect.

#### CONCLUSION

Putting aside the controversy over the EFCA, *Dana Corp.*, and voluntary recognition in general, the preemption issue regarding these state constitutional amendments is relatively straightforward. Furthermore, any other result would undermine the benefits that preemption provides in the area of labor law. Given the politically polarizing nature of labor policy, it is not a stretch of the imagination to predict that States would adopt wildly disparate labor standards on a countless range of issues if the NLRA did not preempt laws such as these state constitutional amendments. The resulting hodgepodge of laws from the States would carry with them the cost of confusion in trying to comply with the law, constant change from fifty different legislatures and court systems, and inconsistency in management and workers' rights.<sup>338</sup> The current system, while certainly not perfect, avoids many of these problems that would hurt both management and labor unions. The United States would be a less favorable business climate to domestic and foreign businesses absent the NLRA's preemptive effects.

The controversial nature of these topics does reveal, however, the deeply rooted politicization that has taken hold of federal and state labor policy. While broad preemption

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336. See sources cited *supra* note 335.

337. See *supra* Part IV.C–D.

338. See *supra* note 211 and accompanying text.

does result in consistency and uniformity in the field of labor law, some commentators argue that the entire area of law has stagnated because of it.<sup>339</sup> They have proposed that the States should play a larger part in the formation of labor policy because of the NLRB's ineffectiveness at administering the federal labor law scheme and the constant Congressional turmoil over labor policy.<sup>340</sup> Likewise, the NLRB itself has been continually criticized for reversing its prior decisions for questionable reasons arguably motivated more by politics than policy.<sup>341</sup> This general situation undermines the benefits of consistency and uniformity that federal preemption should help achieve. Some of these problems may be an unavoidable part of the political process, but labor law nonetheless ranks near the top of the list as one of the most politically controversial areas of law. While such a climate may ultimately result in more gains for management or for labor, it frustrates one of the underlying goals of the NLRA, industrial peace.<sup>342</sup>

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339. See, e.g., Drummonds, *supra* note 211, at 97–103; Estlund, *supra* note 20, at 1527–31.

340. See sources cited *supra* note 339.

341. See, e.g., Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163–69 (1985).

342. See 29 U.S.C. § 151 (2006); HARPER ET AL., *supra* note 29, at 86–87.