# AGAINST FEDERAL PREEMPTION OF STATE UNEMPLOYMENT REGIMES: ELIMINATING WAITING PERIODS FOR STRIKING WORKERS

*Peter Rawlings**

*The recent uptick in strike activity is a promising sign for the labor movement. However, participation in strikes often entails significant hardship for workers obliged to go without a paycheck. States can and should alleviate this problem by providing unemployment benefits to striking workers. Some states already provide such benefits, but these regimes impose weeks-long waiting periods before strikers may collect. While there is little dispute that these existing schemes are permissible, state legislation that substantially shortens or eliminates waiting periods could face a legal challenge that it is preempted by federal labor law. Confronted with such a statute, employers would likely argue that a state's immediate provision of benefits to striking workers wrongfully tilts the playing field in favor of employees in collective bargaining. This Note seeks to head off this argument, explaining why existing National Labor Relations Act preemption doctrine should not preclude states from providing immediate unemployment benefits to striking workers.*



* J.D., 2024, New York University School of Law; M.S.J., 2012, Northwestern University; B.A., 2008, Cornell University. Thanks to Professor Jon Dubin, in whose seminar this Note originated, for his support and encouragement. Thanks also to the editors of the *N.Y.U. Journal of Legislation and Public Policy* for their thoughtful comments and editorial assistance.

## Introduction

There has been a recent surge in union organizing and strike activity in the United States. 2023 saw more strikes by American labor unions than any year in the last two decades.[1] The United Automobile Workers ("UAW") struck the three largest domestic automakers simultaneously for the first time.[2] SAG-AFTRA embarked on a 118-day strike of Hollywood film and television studios, the longest-ever actor work stoppage.[3] The Writers Guild of America walked out for even longer, striking the studios for nearly five months.[4] Tens of thousands of nurses, emergency room technicians, and pharmacists struck Kaiser Permanente in the largest healthcare labor dispute in American history.[5] These high-profile events were far from the only strike activity. There were thirty-three major work stoppages involving 1,000 or more workers in 2023, according to the U.S. Bureau of Labor Statistics.[6] In all, roughly 459,000 workers were involved in major strikes, of whom 397,700 worked in service-providing industries, like education and health services.[7]

---

1. *See* Lauren Kaori Gurley, *Major Strikes in 2023 Set 20-Year Record, Labor Department Says*, Wash. Post (Feb. 21, 2024), https://www.washingtonpost.com/business/2024/02/21/strikes-2023-workers-labor-department/ [https://perma.cc/PML5-6YMR].

2. *See* Neal E. Boudette, *U.A.W. Goes on Strike Against Detroit's Big 3 Automakers*, N.Y. Times (Sept. 14, 2023), https://www.nytimes.com/2023/09/14/business/uaw-strike-plan.html [https://perma.cc/TG9C-RL2Y].

3. *See* Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, Variety (Nov. 8, 2023, 4:40 PM), https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/ [https://perma.cc/3M8A-ZRBV].

4. *See* Dani Anguiano, *Hollywood Writers Agree to End Five-Month Strike After New Studio Deal*, Guardian (Sept. 26, 2023, 9:31 PM), https://www.theguardian.com/culture/2023/sep/26/hollywood-writers-strike-ends-studio-deal [https://perma.cc/A55Z-YY99].

5. *See* Selena Simmons-Duffin & Scott Maucione, *After Historic Strike*, *Kaiser Permanente Workers Win 21% Raise Over 4 Years*, Nat'l Pub. Radio (Oct. 14, 2023, 2:11 PM), https://www.npr.org/sections/health-shots/2023/10/13/1205788228/kaiser-permanente-strike-contract-deal-reached [https://perma.cc/4F8B-38KL].

6. News Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Major Work Stoppages in 2023 (Feb. 21, 2024), https://www.bls.gov/news.release/archives/wkstp_02212024.pdf [https://perma.cc/URM9-3WB3].

7. *Id.*

Though labor unions have, in some instances, been able to win substantial gains by pressuring employers with increased strike activity,[8] going days, weeks, or months without work can impose significant hardships on workers. Record numbers of workers struggled to pay rent and faced eviction as a result of the months-long strikes of film and television studios.[9] Some autoworkers took out loans to cover their bills during the UAW's six-week strike.[10] Consequently, the recent wave of strike activity has galvanized pressure from the labor movement to provide improved unemployment benefits to workers that are out on strike.[11]

Legislators in numerous states have responded by introducing bills that would either extend unemployment benefits to strikers for the first time or allow strikers to claim benefits sooner after a work stoppage begins.[12] Lawmakers in nine states have introduced such proposals in the last two years.[13] Previously, only New York and New Jersey provided unemployment benefits to strikers by statute.[14] Last

8. *See* Jenny Brown, *2023 In Review: Big Strikes, Bigger Gains*, LAB. NOTES (Dec. 15, 2023), https://labornotes.org/2023/12/2023-review-big-strikes-bigger-gains [https://perma.cc/ZNU6-A3D7] (describing new contracts achieved by labor unions following recent strike activity).

9. *See* Kirsten Chuba, *Record Number of Hollywood Workers Facing Evictions, Seeking Rent Assistance Amid Strikes*, HOLLYWOOD REP. (Sept. 5, 2023, 1:35 PM), https://www.hollywoodreporter.com/business/business-news/hollywood-workers-evictions-rent-assistance-strikes-1235580178/ [https://perma.cc/4XFG-XVA5].

10. *See* Susan Tompor, *UAW Strike Hits at Wrong Time for Many Pocketbooks, Driving Some to Take Out Strike Loans*, DETROIT FREE PRESS (Oct. 20, 2023, 8:50 AM), https://www.freep.com/story/money/personal-finance/susan-tompor/2023/10/20/uaw-worker-turns-to-strike-loan-as-gm-walkout-hurts-pocketbook/71155782007/ [https://perma.cc/C4LB-2H7L].

11. *See* Alex N. Press, *Striking Workers Should Be Eligible for Unemployment Insurance*, JACOBIN (Sept. 7, 2023), https://jacobin.com/2023/09/striking-workers-unemployment-insurance-wga-sag-aftra [https://perma.cc/2YLR-JVYY] (describing how, amid lengthy recent strikes, "organized labor has renewed efforts to extend unemployment insurance eligibility to strikers").

12. *See* Dave Jamieson, *Striking Workers Could Soon Qualify for Unemployment Benefits*, HUFFINGTON POST (Feb. 23, 2024, 3:07 PM), https://www.huffpost.com/entry/striking-workers-unemployment-benefits_n_65d8ccd0e4b0189a6a7db5a5 [https://perma.cc/C7LW-9MER] ("Lawmakers in several states are considering the novel approach of extending unemployment insurance to workers who hit the picket lines, saying it would help level the playing field with deep-pocketed companies that can starve their workforces in contract fights.").

13. *See* Daniel Perez, *Extending Unemployment Insurance to Striking Workers Would Cost Little and Encourage Fair Negotiations*, ECON. POL'Y INST.: WORKING ECON. BLOG (Jan. 29, 2024, 11:48 AM), https://www.epi.org/blog/extending-unemployment-insurance-to-striking-workers-would-cost-little-and-encourage-fair-negotiations/ [https://perma.cc/7SF7-3ZRX] ("In just the past two years, lawmakers in nine states have introduced legislation aimed at granting or enhancing striking workers' access to UI.").

14. *See* Annie Nova, *These 2 States Offer Unemployment Benefits to Workers on Strike*, CNBC (Aug. 9, 2023, 12:32 PM), https://www.cnbc.com/2023/08/09/

year, California's legislature passed a statute that would have made the state the first in recent years to join New York and New Jersey in allowing strikers to receive unemployment benefits,[15] though Governor Gavin Newsom vetoed it.[16] Legislators in Connecticut,[17] Illinois,[18] Massachusetts,[19] Ohio,[20] Pennsylvania,[21] and Washington[22] have also introduced proposals in the last two years that would similarly permit strikers to receive benefits.

These proposals are significant not only in their extension of benefits, but in how quickly they permit workers to receive those benefits after going out on strike. New York, the state with the longest-standing provision, historically did not permit strikers to claim benefits until they spent seven weeks on strike.[23] Each of the recent spate of state proposals would allow workers to receive benefits after a much shorter waiting period. The bills in Massachusetts and Pennsylvania would require a thirty-day waiting period, while those in Connecticut, Illinois, and Ohio would require fourteen days, and the Washington proposal would shrink the waiting period to a single week.[24] Meanwhile, lawmakers in New York and New Jersey amended their existing statutes to reduce the waiting period in those states to fourteen days.[25] New York legislators have proposed further compressing the waiting period to one week.[26]

---

where-workers-on-strike-can-qualify-for-unemployment-benefits.html [https://perma.cc/2ZS6-KRTD] (noting that strikers only qualify for UI benefits in New York and New Jersey and describing pending proposals in other states).

15. S.B. 799, 2023-2024 Leg., Reg. Sess. (Cal. 2023).

16. *See* Shawn Hubler, *Newsom Vetoes Bill Allowing Workers to Collect Unemployment Pay While Striking*, N.Y. Times (Oct. 2, 2023), https://www.nytimes.com/2023/09/30/us/newsom-veto-unemployment-pay-strikes.html [https://perma.cc/W9SV-G432].

17. S.B. 938, 2023 Gen. Assemb., Jan. Sess. (Conn. 2023).

18. H.B. 4143, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

19. S. 1172, 193d Gen. Court, Reg. Sess. (Mass. 2023).

20. H.B. 334, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

21. H.B. 1481, 2023–2024 Gen. Assemb., Reg. Sess. (Pa. 2023).

22. H.B. 1893, 68th Leg., Reg. Sess. (Wash. 2024).

23. Prior to recent revisions, the New York statute provided that "[t]he accumulation of benefit rights by a claimant shall be suspended during a period of *seven* consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy[.]" N.Y. Lab. Law § 592 (McKinney 1977) (emphasis added).

24. *See* Perez, *supra* note 13, at tbl.1 (summarizing waiting periods in state proposals).

25. *See* S.B. 3215, 220th Leg., Reg. Sess. (N.J. 2022); S. 3006-C, 2025–2026 Leg., Reg. Sess. (N.Y. 2025). In New York, as of May 2025, the "suspension period" for strikers before accruing benefits is only one week. *See* N.Y. Lab. Law § 592(1)(a). However, because this suspension period does not run concurrently with the standard one-week waiting period, *id.* § 592(3), strikers must wait two weeks total before receiving benefits.

26. S.B. 4476, 2025–2026 Leg., Reg. Sess. (N.Y. 2025). This proposal would provide for the striker suspension period and the standard waiting period to run concurrently, putting strikers on the same footing as other beneficiaries.

The labor movement has welcomed these proposals and pressed for further shortening of the waiting period before strikers can collect benefits.[27] Advocates of these bills and amendments argue that reducing the waiting period both advances the primary aim of unemployment schemes by reducing financial distress among those out of work and improves labor relations by enabling workers to better enforce existing rights.[28] Employers, on the other hand, argue that these bills unfairly tilt the playing field in workers' favor during contract bargaining by giving benefits to strikers who are "voluntarily" out of work.[29]

Employer opposition to these efforts, coupled with the current hostility of the Supreme Court to unions and workers' rights,[30] means the labor movement and lawmakers advocating for these changes should anticipate legal pushback. Employers have already begun turning to the courts to counter the recent upsurge in union activity and more aggressive enforcement of labor law by federal regulators.[31] A similar reaction from employers is foreseeable if striker-friendly unemployment regimes proliferate.

---

27. *See, e.g.*, Press Release, N.Y. State AFL-CIO, Statement of New York State AFL-CIO President Mario Cilento on Unemployment for Striking Workers (Feb. 6, 2020), https://nysaflcio.org/press-releases/statement-new-york-state-afl-cio-president-mario-cilento-34 [https://perma.cc/FQ7A-ZUCZ] (applauding reduction of waiting period to two weeks as a "huge victory for unionized workers who until now had to endure an incredible hardship by waiting seven weeks to claim unemployment benefits"); *An Act Concerning Unemployment Benefits: Hearing on H.B. 5164 Before the Lab. & Pub. Emps. Comm.*, 2024 Gen. Assemb., Reg. Sess. (Conn. 2024) (testimony of Matthew Ginsburg, General Counsel, AFL-CIO) (advocating passage of bill reducing waiting period).

28. *See Hearing on H.B. 5164*, *supra* note 27 (testimony of Daniel Perez, State Economic Analyst, Econ. Pol'y Inst.).

29. *See, e.g.*, Press Release, Jacqueline Allison, Ass'n of Wash. Bus., Employer Groups Speak Out Against Unemployment Benefits for Striking Workers (Feb. 15, 2024), https://www.awb.org/employer-groups-speak-out-against-unemployment-benefits-for-striking-workers/ [https://perma.cc/N6AP-3ZFW] (criticizing H.B. 1893 as undercutting the aims of UI benefit schemes and upsetting the existing "give-and-take" between employers and employees in bargaining).

30. *See* Jamelle Bouie, Opinion, *There Is One Group the Roberts Court Really Doesn't Like*, N.Y. Times (June 6, 2023), https://www.nytimes.com/2023/06/06/opinion/roberts-court-glacier-labor-workers.html [https://perma.cc/LN2T-7NXY] ("It is difficult to overstate the hostility of the Roberts court to organized labor and the rights of American workers."); Elie Mystal, *This Is Not the End of the Supreme Court's War on Labor*, Nation (June 2, 2023), https://www.thenation.com/article/politics/glacier-supreme-court-unions-strike/ [https://perma.cc/B7VP-CX4D] ("Nobody should be surprised that this Supreme Court, controlled as it is by Republicans, is viciously anti-labor.").

31. *See* Michael Sainato, *'Dark Forces': How US Corporations Turned to Courts in Fight Against Unions*, Guardian (Jan. 26, 2024, 6:00 AM), https://www.theguardian.com/us-news/2024/jan/26/anti-union-lawsuit-conservative-courts-musk-starbucks-trader-joes [https://perma.cc/KQG8-8VJR].

Although the Supreme Court has previously upheld state statutes that provide unemployment benefits to striking workers,[32] both the specifics of the more recent legislation and the composition of the Court are quite different than before. The Supreme Court previously let stand the earlier New York statute that allowed strikers to collect unemployment after a seven-week waiting period, but the more recent, shorter waiting periods could undermine the logic on which that precedent has rested. State statutes not infrequently come into conflict with the National Labor Relations Act ("NLRA"), the federal law that protects private sector employees' right to organize and collectively bargain with their employers. When such conflicts arise, well-established doctrine provides that the state law is preempted by the NLRA if it unduly interferes with the "free play of economic forces" between employers and employees.[33] Put another way, courts have interpreted the NLRA as intending to leave both parties free to pressure each other in contract bargaining by using economic weapons like strikes and lockouts. Consequently, if a state statute puts a thumb on the scale for either side, courts will likely find it preempted because it interferes with the ostensibly free state of affairs that predated it. One can easily imagine the current Supreme Court agreeing with employers that allowing strikers to collect unemployment benefits after only one or two weeks would impermissibly tilt the field in unions' favor. Such a holding, which need not require overturning the Court's earlier precedent, could put an end to the burgeoning effort to expand welfare state benefits to more members of the labor movement.

This Note aims to head off such an attack, arguing that existing Supreme Court precedent suggests these new, more generous unemployment statutes ought not be preempted by the NLRA, no matter how short a waiting period they require. Conceivably, a state could even adopt a provision that allowed striking workers to obtain unemployment benefits without any waiting period at all and not implicate NLRA preemption doctrines. This argument will proceed in three parts. First, this Note will explain the contours of existing NRLA preemption doctrines, explaining why and when the Supreme Court has found different types of state action preempted. Then, it will lay out how existing Supreme Court precedent addresses state unemployment regimes providing benefits to striking workers and explore how the Court applies preemption doctrines in these circumstances. Lastly, this Note will apply these precedents to recent state legislation extending

32. *See infra* Section II.A.
33. *See infra* Section I.B.

unemployment to workers after a brief waiting period and to hypothetical legislation that would allow strikers to collect benefits with no waiting period at all. This Note will show that such legislation should not be preempted by the NLRA if one faithfully follows the reasoning in the Supreme Court's earlier decisions.

## I. NLRA Preemption Doctrines

Congress passed the NLRA in 1935, intending to promote a federal labor policy that would both protect workers' right to organize free of employer coercion and intimidation and facilitate collective bargaining between labor unions and employers.[34] The core of the NLRA is Section 7, which enshrines employees' right to organize and collectively bargain,[35] and Section 8, which articulates a number of unfair labor practices that violate the NLRA when committed by employers or unions.[36] The NLRA also established the National Labor Relations Board ("NLRB" or "Board"), a federal executive agency with the responsibility to effectuate federal labor policy and prosecute unfair labor practices.[37]

The NLRA, in establishing employees' right to engage in concerted activities in Section 7 and defining unfair labor practices by employers and unions in Section 8, can sometimes come into conflict with state regulation. Though the NLRA itself does not contain an express preemption clause, the Supreme Court has articulated broad preemption doctrines that preclude a wide variety of state and local regulation of areas related to worker organizing and collective bargaining.[38] The Court has held that, in adopting the NLRA, Congress "implicitly mandated two types of pre-emption as necessary to implement federal labor policy."[39] The first, known as *Garmon*[40] preemption, prevents states from regulating "activity that the NLRA protects, prohibits, or

34. *See National Labor Relation Act*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/8CUC-NU5W] (describing the purpose of the Act).

35. 29 U.S.C. § 157.

36. *Id.* § 158.

37. *Id.* § 160(a).

38. *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 Harv. L. Rev. 1153, 1164–65 (2011) ("[T]he Supreme Court has built a preemption doctrine meant to vest exclusive regulatory authority in the federal government and to preclude state and local governments from varying the rules of organizing and bargaining.").

39. Chamber of Com. v. Brown, 554 U.S. 60, 65 (2008).

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

arguably protects or prohibits."[41] The second, known as *Machinists*[42] preemption, forbids either the NLRB or states from regulating conduct that Congress intended to leave under the control of "the free play of economic forces."[43] It is this latter form of preemption that presents a potential roadblock to more generous state provision of unemployment compensation to striking workers. In other words, permitting strikers to immediately receive benefits could interfere with the "free play of economic forces" that Congress desired to leave undisturbed. Because *Machinists* preemption follows from *Garmon* doctrine, this Section will review each in turn.

### *A.* Garmon *Preemption*

The *Garmon* case began in 1952 with a union's request that a lumber yard operator sign a union shop contract that would have required the employer to hire only union members.[44] The employer took the position that a majority of its employees had indicated they did not want union representation and that to sign the contract would, thus, violate the NLRA.[45] The union proceeded to peacefully picket the lumber yard, carrying a banner and occasionally following the employer's trucks.[46] When the employer petitioned the NLRB to resolve the question of union representation, the Board declined on the grounds that the employer's business was smaller than the minimum jurisdictional threshold the Board had previously set.[47] The employer then brought a state tort action, and the California court enjoined the picketing and awarded $1,000 in damages.[48]

The Supreme Court, subsequently reviewing the matter, explained that state regulation must yield to federal regulation not only with respect to activities clearly protected by Section 7 or prohibited by Section 8, but also with respect to activities that posed even a potential conflict with these provisions.[49] The Court explained that, even in circumstances where the NLRA had not clearly authorized or forbidden a particular

41. *Brown*, 554 U.S. at 65 (quoting Wis. Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 286 (1986)).

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

43. *Brown*, 554 U.S. at 65 (quoting *Machinists*, 427 U.S. at 140 (internal quotation omitted)).

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

45. *See* Garmon v. San Diego Bldg. Trades Council, 45 Cal. 2d 657, 659 (1955).

46. *See* Garmon v. San Diego Bldg. Trades Council, 273 P.2d 686, 687 (Cal. Ct. App. 1954).

47. *See Garmon*, 45 Cal. 2d at 660.

48. *See Garmon*, 359 U.S. at 238.

49. *Id.* at 244–46.

practice, "to allow the States to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy."[50] Since the union's conduct was "arguably within the compass of § 7 or § 8 of the Act," and since the Board itself had not adjudicated the question, the Court held that the state's jurisdiction was displaced.[51]

### *B. Machinists* Preemption

The second key strand of judicially created preemption doctrine takes its name from the Supreme Court's 1976 *Machinists* decision.[52] There, the Court considered a state labor board's order enjoining a union and its members from refusing to work overtime as a part of a campaign to pressure the employer during contract negotiations.[53] In finding the state board's injunction preempted, the Court disregarded whether the union's conduct was arguably covered by the NLRA (thus preempting the state regulation under *Garmon*). Instead, it identified a second line of preemption analysis focused on "whether Congress intended that the conduct involved be unregulated" and "controlled by the free play of economic forces."[54] The Court reasoned that Congress "struck a balance of protection, prohibition, and laissez-faire in respect to union organization" that deliberately left some forms of economic self-help unregulated.[55] In the domains that Congress left to the "free play of economic forces," the Court reasoned, both the Board and the states were prohibited from trying to tip the scales by placing additional constraints on the use of economic weapons, such as work stoppages.[56]

Though the *Machinists* doctrine's emphasis on leaving economic battles between unions and employers free of state interference would leave a vast array of activity unregulated, the Court has also articulated several limits and exceptions to this approach. The *Machinists* doctrine does not preempt states from setting statewide "minimum labor standards," such as insurance terms in employer health plans.[57]

---

50. *Id.* at 244.
51. *Id.*
52. Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976).
53. *Id.* at 133–34.
54. *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).
55. *Id.* at 140 n.4 (quoting Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972)).
56. *Id.* at 149–50 (citing NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 478 (1960)).
57. *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 725 (1985) ("Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject

Likewise, a state's actions as a "market participant" are not preempted under the *Machinists* doctrine.[58] For instance, the Court has allowed a state agency's agreement to hire only union labor, accompanied by a ten-year no-strike commitment.[59] In these and similar circumstances, the Court has distinguished between the state's role as a regulator and its role as a "proprietor" or market actor.[60] The Court observed that "[w]e have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor."[61]

## II. Prior Supreme Court Treatment of Striker Unemployment Benefits

On several prior occasions, the Supreme Court has considered the conflict between federal law and the application of state unemployment regimes to striking workers. The Court has upheld state statutes that both extend and restrict unemployment benefits to strikers, propounding a view that Congress intended to give states a healthy amount of discretion in arranging their respective unemployment regimes. The Court has also taken alternative approaches to the clash between state and federal labor law in this area. For instance, in the chief case in which the Court struck down a state's application of its unemployment law to prevent a worker from claiming benefits, it did so on the grounds that the state's approach would wrongfully prevent workers from bringing unfair labor practice allegations before the Board, rather than because the state's approach would interfere with the free play of economic forces in collective bargaining.[62] This Section will explore three prior collisions of state unemployment regimes for strikers with the NLRA. The following Section will then apply the rationale undergirding these decisions to recent state legislation and a hypothetical "zero-waiting-period" statute that would allow strikers to access unemployment benefits immediately. These precedents suggest that a state's ability to authorize such benefit provisions is not foreclosed by NLRA preemption doctrines. Rather, these cases indicate that states have considerable flexibility in determining whether and when to provide benefits to strikers, flexibility

---

of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act.").

58. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 232 (1993).

59. *Id.*

60. *Id.* at 227 (describing the "distinction between government as regulator and government as proprietor").

61. *Id.*

62. *See infra* Section II.C.

which this Note contends is best used in service of programs that eliminate benefit waiting periods.

### *A.* New York Telephone Company

The Supreme Court first considered the argument that state legislation providing unemployment benefits to strikers would be preempted by the NLRA in the 1979 case *New York Telephone Company*,[63] a decision made three years after the *Machinists* decision. The *New York Telephone Company* case arose out of a 1971 nationwide strike by members of the Communication Workers of America ("CWA") against affiliates of Bell Telephone Co.[64] Roughly 400,000 CWA members struck across the country, aiming to pressure telephone companies to offer higher wages to offset then-recent inflation and to end "'antifeminist' wage scales" that paid women phone operators less than men.[65] For most workers, the strike lasted only a week, but in New York, roughly 38,000 CWA members stayed out on strike for seven months.[66] Because the New York statute at the time authorized the payment of full unemployment benefits to strikers after a seven-week waiting period, the bulk of strikers ultimately collected unemployment benefits for the latter five months of the strike.[67]

New York funded its unemployment benefit scheme by obliging employers to kick in contributions based on the benefits the state had provided to their former employees in years past. So, the provision of benefits to the CWA strikers resulted in a greater required contribution from New York Telephone than in previous years, prompting it to file suit to invalidate the statute and recoup the higher taxes it had paid into the unemployment system.[68] At the time, only New York and Rhode Island had statutes on the books that allowed strikers to obtain full benefits.[69] Although the Court rejected the challenge to New York's scheme, the case produced a fractured opinion that did not clearly preclude future preemption challenges to other forms of unemployment benefit provision.

---

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

64. *See* Philip Shabecoff, *Telephone Strike Scheduled Today*, N.Y. TIMES, July 14, 1971, at A1 (describing the commencement of the CWA strike).

65. *Id.* (listing union demands).

66. *N.Y. Tel. Co.*, 440 U.S. at 522.

67. *Id.* at 523.

68. *Id.* at 524–25.

69. *See* Linda Greenhouse, *Justices Uphold State on Paying Striking Workers*, N.Y. TIMES, Mar. 22, 1979, at A1 (noting that, in addition to New York, "only Rhode Island has a similarly all-inclusive law").

Before the Court, New York Telephone argued that the NLRA preempted state unemployment schemes that extended benefits to striking workers because such arrangements unduly interfered with the "free play of economic forces." By providing financial support to strikers, the company argued, the state upset the economic balance between labor and management, contravening the federal labor policy the NLRA was intended to promote.[70] In advancing this argument, New York Telephone cited the Court's then-recent decision in *Machinists*, as well as 1964's *Teamsters v. Morton*,[71] in which the Court had held that a state court could not award damages against a union for peaceful secondary picketing[72] because Congress omitted such picketing from a particularized list of secondary activities for which federal courts *were* authorized to award damages.[73] The Court in *Morton* had consequently found the state court's damages award was preempted under then-prevailing preemption doctrine.[74]

*New York Telephone Company* did not produce a clear majority opinion. A plurality of the Court, led by Justice Stevens, agreed with the employer that the "economic weapons" at stake were similar to those in *Morton* and *Machinists*.[75] However, the plurality distinguished the New York unemployment regime from the state action at issue in those cases because the New York statute "does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field."[76] The plurality described the unemployment statute as "a law of general applicability,"[77] and observed that "the general purport of the program is not to regulate the bargaining relationship between the two classes but

70. *N.Y. Tel. Co.*, 440 U.S. at 531 (noting that "petitioners rely heavily on the statutory policy . . . of allowing the free play of economic forces to operate during the bargaining process").

71. Loc. 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252 (1964).

72. Secondary picketing refers to pressure applied to an employer other than the primary employer with which unions have a labor dispute. The 1947 Taft-Hartley amendments and 1959 Landrum-Griffin Act amendments to the NLRA forbade certain forms of secondary pressure. *See* 29 U.S.C. § 158(b)(4)(B); *see also Secondary Boycotts (Section 8(b)(4))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4 [perma.cc/LG4G-DCLL] (describing prohibitions on secondary pressure).

73. *Loc. 20*, 377 U.S. at 260 ("Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages.").

74. *Id.*

75. *N.Y. Tel. Co.*, 440 U.S. at 531.

76. *Id.* at 532.

77. *Id.* at 533.

instead to provide an efficient means of insuring employment security in the State."[78]

In addition to this general policy view, the plurality articulated several more reasons why the New York statute differed from other state statutes that impermissibly intruded into federally preempted territory by seeking to regulate labor-management relations. Firstly, the statute did not directly oblige employers to pay striking workers, but rather disbursed funds through a public agency that mixed employer-provided moneys with other public funds.[79] Secondly, the New York unemployment program was structured to comport with a federal statute, Title IX of the Social Security Act of 1935, and was financed in part by federal funds.[80]

The plurality reasoned that the history of the Social Security Act made clear that Congress intended for various states to have "broad freedom" in setting up the type of unemployment compensation regime they want,[81] and "[i]t is therefore appropriate to treat New York's statute with the same deference that we have afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'"[82] The opinion also observed that Congress had rejected proposals at the time of the Social Security Act's adoption that would have prohibited states from providing benefits to strikers.[83] Thus, the plurality reasoned, incidental effects on collective bargaining dynamics were tolerable to further Congress's aim of giving states wide leeway to craft unemployment regimes as they saw fit.[84]

In one terse concurring opinion, Justice Brennan avoided engagement with the preemption doctrine and based his agreement in the judgment solely on the legislative histories of the NLRA and Social Security Act.[85] Justice Blackmun, in a separate concurrence joined by Justice Marshall, contended that the plurality had errantly deviated

78. *Id.*

79. *Id.* at 534–35 ("[U]nemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate a public purpose.").

80. *Id.* at 536 ("[T]he federal statute authorizing the subsidy provide[d] additional evidence of Congress' reluctance to limit the States' authority in this area.").

81. *Id.* at 537.

82. *Id.* at 539–40 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

83. *Id.* at 542–43.

84. *Id.* at 546 ("[T]he fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power.").

85. *Id.* at 546–47 (Brennan, J., concurring) ("[T]he legislative histories of the NLRA and the Social Security Act . . . provide sufficient evidence of congressional intent to decide this case . . . .").

from the Court's holding in *Machinists* by requiring the petitioner to show a "compelling congressional direction" to establish preemption.[86] Blackmun reasoned that the plurality's formulation got it backwards. He framed the plurality opinion as giving state action an "assumed priority" by holding that there can be no federal preemption absent a clear indication to the contrary from Congress.[87] The Court in *Machinists* held just the opposite, Blackmun explained. There, the Court gave priority to the federal side of the ledger, finding that "there *is* pre-emption unless there is evidence of congressional intent to tolerate the state practice."[88] Though Blackmun thought the plurality misunderstood and misapplied the *Machinists* doctrine, he nevertheless concurred in the judgment because there was sufficient evidence of congressional intent—namely, the legislative history of the Social Security Act—to tolerate New York's approach to the provision of unemployment benefits.[89]

The dissent, authored by Justice Powell, agreed with New York Telephone's contention that provision of benefits to strikers impermissibly interfered with the bargaining process.[90] Powell also disputed the notion that the Social Security Act's legislative history reflected an intent by Congress to allow strikers to receive unemployment compensation.[91] The dissent rejected the proposition that the Social Security Act's policy of leaving states to set their own eligibility criteria "relieved the States of constraints imposed by other federal statutes such as the NLRA."[92] Powell thus reasoned that *Machinists* and the Court's earlier preemption decisions compelled a finding that the New York statute, by "alter[ing] the balance of collective bargaining in this major way," contravened federal law.[93]

Reviewing the various opinions offered in *New York Telephone Company* leaves one with some uncertainty as to the proper standard to apply in evaluating future potential challenges to state unemployment schemes. The proper interpretation of the Court's holding has received scant attention in the literature. Arguably, the Court's decision does not rest on preemption doctrine at all, but only on an understanding, seemingly shared among the plurality and concurring opinions, of the

86. *Id.* at 548 (Blackmun, J., concurring).
87. *Id.* at 549 ("[T]he plurality appears to be saying that there is no pre-emption unless 'compelling congressional direction' indicates otherwise. The premise is therefore one of assumed priority on the state side.").
88. *Id.*
89. *Id.* at 546–47.
90. *Id.* at 556 (Powell, J., dissenting).
91. *Id.* at 561.
92. *Id.* at 565.
93. *Id.* at 567.

Congressional intent undergirding the Social Security Act. The *Marks* rule provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[94] In *New York Telephone Company*, these narrowest grounds appear to be those articulated by Justice Brennan, who reasoned that "the legislative histories of the NLRA and the Social Security Act . . . provide sufficient evidence of congressional intent to decide this case," without relying on interpretations of preemption doctrine.[95]

This view finds some confirmation in the Court's recent restatement of its *New York Telephone Company* holding in a 2008 preemption case concerning a state law prohibiting employers from using state funds to promote or deter union organizing. [96] There, the Court noted that, in *New York Telephone Company*, it had upheld the state's unemployment statutes "on the basis that the legislative histories of the NLRA and the Social Security Act . . . confirmed that 'Congress intended that the States be free to authorize, or to prohibit, such payments.'"[97] That is, the Court characterized the holding of the case as resting on the legislative history of the federal statutes.

### *B.* Baker v. GM Corporation

The Court has rendered two other chief decisions concerning the preemption of state statutes governing strikers' eligibility for unemployment benefits. In *Baker v. GM Corporation*, the majority found a Michigan statute that rendered strikers ineligible for benefits if they participated in "financing" the strike that caused their unemployment was not preempted by the NLRA.[98] The Court analyzed the Michigan statute "in the light of our conclusion in *New York Telephone Co.* that Congress expressly authorized 'a substantial measure of diversity,' among the States concerning the payment of unemployment compensation to workers idled as the result of a labor dispute."[99] The Court reasoned that, though federal law unquestionably protects employees' right to strike, "it is equally clear . . . that federal law does not prohibit the

94. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
95. *N.Y. Tel. Co.*, 440 U.S. at 547 (Brennan, J., concurring).
96. Chamber of Com. v. Brown, 554 U.S. 60 (2008).
97. *Id.* at 75 (quoting *N.Y. Tel. Co.*, 440 U.S. at 544).
98. Baker v. Gen. Motors Corp., 478 U.S. 621, 638 (1986).
99. *Id.* at 635 (citing *N.Y. Tel. Co.*, 440 U.S. at 546).

States from deciding whether or not to compensate the employees who thereby cause their own unemployment."[100]

In dissent, Justice Brennan noted that states' ability to regulate in this area "is not boundless" and conflicts that arose "in ways that Congress did not intend to permit" would still lead to preemption.[101] Brennan cited the Court's 1967 decision in *Nash v. Florida Industrial Commission*, a case in which federal law preempted a state law denying an employee benefits because her unemployment was the result of an ongoing labor dispute with her employer.[102] In *Baker*, Brennan observed that Congress, in allowing states flexibility to design their unemployment regimes, may have intended to tolerate a degree of collision between a state statute and the NLRA, as with the unemployment statute at issue in *New York Telephone Company*.[103] However, Brennan reasoned, the Michigan law, like the statute in *Nash*, posed too great a conflict with the NLRA to be within the realm of reasonable collision that Congress would have contemplated.[104] The Michigan statute, Brennan insisted, "interferes with rights protected by the NLRA in a much more pervasive manner than a disqualification of actual strikers."[105]

### *C.* Nash v. Florida Industrial Commission

In *Nash*, the other chief decision touching on the potential preemption of state unemployment regimes by the NLRA, the state statute at issue disqualified from benefits any individual whose unemployment was due to a "labor dispute in active progress."[106] There, the petitioner had been out on strike before returning to work pursuant to an agreement between the union and her employer.[107] However, five weeks after she returned to work the employer laid her off, purportedly because of a slowdown in production, though the petitioner argued the layoff was retaliation for her union activities.[108] The employee then filed an unfair labor practice charge with the NLRB.[109] The state subsequently denied her claim for unemployment benefits because her then-pending unfair labor practice allegation meant that she was in a "labor dispute" with the employer

100. *Id.* at 637.
101. *Id.* at 639–40 (Brennan, J., dissenting).
102. Nash v. Fla. Indus. Comm'n, 389 U.S. 235 (1967).
103. *Baker*, 478 U.S. at 640–41 (Brennan, J., dissenting).
104. *Id.*
105. *Id.* at 645.
106. *Nash*, 389 U.S. at 236–37.
107. *Id.* at 236.
108. *Id.*
109. *Id.*

within the meaning of the statute, and thus ineligible.[110] The Court reasoned the state's denial of benefits in this fashion was "coercive" and "has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board."[111] Consequently, the Court invalidated the statute as applied under the Supremacy Clause of the U.S. Constitution.[112] Though this is a different preemption rationale than the NLRA-related doctrines articulated in *Garmon* and *Machinists*, the decision in *Nash* helps to illuminate the bounds of permissible state action in light of the federal labor policy Congress has intended to effectuate with the NLRA.

## III. More Generous Provision of Benefits to Strikers Is Not Preempted

To understand why federal law ought not preempt states' efforts to allow workers to more quickly collect unemployment benefits after going out on strike, one must carefully consider the specific rationales that undergird the Supreme Court precedents described in Section II. As this Section will show, whether one relies on the text and history of federal unemployment statutes, or the NLRA preemption doctrines, state-level legislation to immediately provide strikers with unemployment benefits is clearly within bounds.

### *A. The Social Security Act*

The clearest holding of *New York Telephone Company* is that the legislative histories of the Social Security Act and NLRA evince a desire by Congress to permit states to freely choose whether and to what extent to authorize unemployment benefit payments.[113] This view, expressed in the concurring opinions in the case, does not involve application of the *Machinists* preemption doctrine, with its concern for the "free play of economic forces." Rather, this view rests on the Court's excavation of the legislative history of the 1935 Social Security Act.

The unemployment provisions of the Social Security Act are contained in Titles III[114] and IX.[115] The Federal Unemployment Tax Act ("FUTA"), in conjunction with this statute, imposed a federal payroll tax on covered employers that could, in turn, be offset by employer contributions paid pursuant to an approved state unemployment

110. *Id.*
111. *Id.* at 239.
112. *Id.* at 240.
113. *See supra* Section II.A.
114. 42 U.S.C. §§ 501–04.
115. *Id.* §§ 1101–03.

insurance law.[116] The federal statute authorized the Secretary of Labor to oversee and approve states' individual unemployment programs, with states to receive federal payments to administer the programs.[117] The statute permitted states a wide range of discretion, so long as they kept to minimum requirements specified in the FUTA.[118] For instance, to gain approval, state programs must not deny unemployment benefits to otherwise eligible individuals who refuse new work "if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality,"[119] or if the new position is vacant on account of a labor dispute.[120] There is no stated restriction on the waiting periods states must require for striking workers. In effectuating these statutes, the federal government acts as an "overseer," assuring these standards are met, but the states operate the programs with a great deal of autonomy and otherwise set their own eligibility requirements.[121]

As the Court explained in *New York Telephone Company*, by adopting the statutory structure that it did, Congress indicated that it "intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish."[122] In reviewing the legislative history of the Social Security Act in that opinion, the plurality explicitly rejected the "specific claim that involuntary unemployment must be 'the key to eligibility' under Title IX-qualified programs."[123] The Court reasoned that where Congress intended to require or forbid a particular condition for the receipt of unemployment benefits, it did so explicitly, and thus the absence of an explicit condition is "a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area."[124]

The Court previously undertook more exhaustive excavations of the legislative history and purpose of the unemployment-benefit provisions of the Social Security Act that confirm this view. In *Ohio Bureau of Employment Services v. Hodory*, the Court considered a constitutional

116. 26 U.S.C. § 3302.
117. 42 U.S.C. § 502.
118. 26 U.S.C. § 3304.
119. *Id.* § 3304(a)(5)(B).
120. *Id.* § 3304(a)(5)(A).
121. *See* Daniel N. Price, *Unemployment Insurance, Then and Now 1935–85*, 48 SOC. SEC. BULL., no. 10, Oct. 1985, at 24 ("[T]he States operate their programs directly and they determine eligibility conditions, the waiting period to receive benefits, benefit amounts, minimum and maximum benefit levels, duration of benefits, disqualifications, and other administrative matters.").
122. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 537 (1979).
123. *Id.* at 537 n.28.
124. *Id.* at 538.

challenge to an Ohio statute barring unemployment compensation to employees who found themselves out of work because of a non-lockout labor dispute.[125] There, the plaintiff alleged the statute was contrary to the Social Security Act and FUTA.[126] A unanimous Court, reviewing the legislative history, disagreed, concluding that Congress's decision not to craft legislation on whether strikers should be disqualified was evidence that the Social Security Act and FUTA were not meant to restrict states' freedom to craft legislation in this area.[127] The same logic that permitted Ohio the discretion to bar strikers entirely from benefits cuts the other direction, too, supporting the view that states can make their unemployment regimes for strikers as parsimonious or generous as they wish.

In *Hodory*, the plaintiff had argued that language in a report to the Senate committee evaluating the Social Security Act and FUTA indicated Congress's intent that "involuntariness" was the key to eligibility and that payment was thus required for any worker who was "involuntarily" unemployed.[128] The report stated: "To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed."[129] However, the broader context of that report, which was prepared by the Committee on Economic Security,[130] prompted the Court to take a different view. For instance, the report suggested "the States shall have broad freedom to set up the type of unemployment compensation they wish, . . . [and] all matters in which uniformity is not absolutely essential should be left to the States."[131] Of particular relevance to the contemporary state statutes that are the subject of this Note, the report also explained that "[t]he States should have freedom in determining their own *waiting periods*, benefit rates, maximum-benefit periods, etc."[132] These and other statements in the legislative history of the federal statutes' adoption demonstrates

125. Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471 (1977).
126. *Id.* at 475.
127. *Id.* at 488–89.
128. *Id.* at 482.
129. Comm. Econ. Sec., Report of the Committee on Economic Security: Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., at 1328 (1935) [hereinafter "CES Report"].
130. The President's Committee on Economic Security was formed by President Roosevelt in 1934 and was composed of five cabinet-level officials, led by Secretary of Labor Frances Perkins. It was tasked with making recommendations on economic and social insurance proposals then under consideration. *See The Committee on Economic Security*, Soc. Sec. Admin., https://www.ssa.gov/history/reports/ces/cesbasic.html [https://perma.cc/W5Q9-2976].
131. CES Report, *supra* note 129, at 1326.
132. *Id.* at 1327 (emphasis added).

that Congress, in creating the system it did, intended to allow states discretion in setting eligibility criteria and "did not intend to restrict the ability of the States to legislate" in the disputed area.[133]

In addition to the fact that there is no explicit restriction in the FUTA itself that would preclude approval of a state program that provided benefits to striking workers after even zero weeks out of work, the Court's reading of the legislative history provides strong support for a state's discretion in this area. States are to have "broad freedom" to arrange their unemployment regimes as they see fit, within the bounds of the provisions set forth in the plain language of the federal statutes.[134] In particular, the legislative history embodied in the report of the Committee on Economic Security suggests Congress especially desired that states should be able to choose their own waiting periods.[135]

Whether one takes a textualist- or legislative history-oriented approach to interpretation of the Social Security Act and FUTA, the result is the same: These federal statutes simply do not prevent a state from implementing however short a waiting period they want before providing unemployment benefits to residents that are out of work, including striking workers. If more support were needed, one could also point to the FUTA's explicit conditions for approval of state programs which provide that compensation is not to be denied to an otherwise eligible worker who refuses to accept work as a strikebreaker.[136] Though this provision is not addressed in the Committee on Economic Security's report, or in other Supreme Court cases exploring the legislative history of the statute, one could reasonably interpret this provision as evincing a desire by Congress to ensure that state unemployment schemes do not undermine labor pressure or strike activity against employers. So, applying the clearest holding of *New York Telephone Company*, one which evaluates state provision of unemployment benefits to striking workers through the lens of the Social Security Act's intended purposes, states should have no difficulty adopting regimes that provide benefits to striking workers with no additional waiting period required.

### *B.* Machinists *Doctrine*

The fractured nature of the *New York Telephone Company* decision may also leave open the question whether and to what extent the NLRA could collide with state provision of benefits to strikers. The plurality in that case contended that because New York's challenged statute was a

133. *Hodory*, 431 U.S. at 484.
134. CES Report, *supra* note 129, at 1326.
135. *Id.* at 1327.
136. 26 U.S.C. § 3304(a)(5)(A).

generalized scheme for providing benefits to all unemployed workers, and did not directly regulate the bargaining relationship between employers and unions, it did not run afoul of the NLRA preemption doctrine articulated in *Machinists*.[137] However, both the concurring and dissenting opinions took issue with this view.[138] Justice Powell argued that the plurality was only able to disregard the applicability of *Machinists* "by ignoring the fact that the petitioners are not challenging the entire New York unemployment compensation law but only that portion of it that provides for benefits for striking employees."[139]

Presented with a new challenge to New York's reworked statute that requires only a two-week waiting period before strikers can claim benefits, or a hypothetical future law with no waiting period at all, a more employer-friendly Court would likely not shy away from the opportunity to pick up this line of reasoning and consider NLRA preemption of the statute under *Machinists*. As explained in Section I, that doctrine is premised on an interpretation of the NLRA that prevents states from regulating areas intended by Congress to be left to the "free play of economic forces."[140] To safeguard such statutes from *Machinists* preemption could require a demonstration that providing strikers immediate unemployment benefits does not unduly interfere with authorized economic warfare between employers and labor unions.

A state unemployment scheme that provides immediate benefits does not neatly fit among the previously recognized exceptions to *Machinists* preemption.[141] A state is not acting as a "market participant" when it provides unemployment benefits.[142] Indeed, the entire impetus for unemployment regimes is arguably to provide a replacement payment to workers who are not receiving one through the labor market. For a similar reason, such statutes are also not the sort of "minimum labor standard" regulation that is exempt from preemption.[143] Those standards typically entail a state's setting of terms for residents' arrangements with

137. N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 532–33 (1979).
138. *See id.* at 547–48 (Blackmun, J., concurring); *id.* at 557 (Powell, J., dissenting).
139. *Id.* at 557 (Powell, J., dissenting).
140. Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).
141. *See supra* Section I.B.
142. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) (applying market participant exception).
143. *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985) (applying minimum labor standard exception).

employers, such as minimum wages[144] or health plan requirements.[145] Unemployed residents are, by definition, out-of-work, so the exception for minimum labor standards would likely not apply.

However, other decisions provide support for the proposition that such state statutes would not be preempted under the *Machinists* doctrine. Though the Court in *Baker v. GM Corporation* did not extensively engage with *Machinists* preemption, that decision provided that "federal law does not prohibit the States from deciding whether or not to compensate the employees who [by striking] cause their own unemployment."[146] There, the Court applied that precept to uphold a statute denying benefits to strikers against a preemption challenge.[147] But the very same precept cuts the other direction, too. On this view, previously articulated by the Court in unambiguous language, the NLRA simply does not prohibit a state from making whatever decisions it wants about unemployment compensation for strikers.

This is a sensible conclusion, and one that finds support in analogous Board precedent suggesting that employers may be obliged to continue providing health benefits to workers that are out on strike.[148] In the United States, many people receive health insurance through an employer, rather than from the state.[149] As the Board has explained, "[a]lthough it is well established that an employer is not required to finance a strike against itself, it is equally well established that it may not withhold accrued benefits from strikers based on their participation in the strike."[150] The Supreme Court has endorsed the Board's view.[151] Though an employer's termination of benefits is not necessarily unlawful under the test devised by the Court—an employer may come

144. *See, e.g.*, Rest. L. Ctr. v. City of New York, 90 F.4th 101, 106 (2d Cir. 2024) (noting "states regularly set minimum wage requirements even though wages are a quintessentially bargained for employment condition" under *Machinists* minimum labor standard exception).

145. *See, e.g.*, *Metro. Life*, 471 U.S. at 755 (finding state law mandating health plans provide mental health coverage not preempted under *Machinists*).

146. Baker v. Gen. Motors Corp., 478 U.S. 621, 637 (1986).

147. *Id.* at 637–38.

148. *See, e.g.*, Youngstown Steel Door Co., 288 N.L.R.B. 949, 950–51 (1988) (finding an employer violated that Act by withholding health benefits from a disabled striker).

149. *See* Katherine Keisler-Starkey et al., U.S. Census Bureau, Health Insurance Coverage in the United States: 2022 2–3 (Sept. 2023) (finding 54.5% of Americans receive employer-based health insurance).

150. Hawaiian Telecom, Inc., 365 N.L.R.B. 348, slip op. at 3 (2017).

151. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 35 (1967) (ordering enforcement of a Board order finding the employer violated the NLRA by terminating strikers' benefits while offering them to replacement workers).

forward with a legitimate business justification for the termination[152]—neither is it always permissible.[153] Thus, the NLRA would appear to permit states discretion to establish their own provisions concerning the extension of health benefits to strikers, without necessarily disrupting the economic balance between unions and employers. Indeed, several states have already adopted legislation that would either allow strikers to specially enroll in state-sponsored health insurance plans,[154] or squarely prohibit employers from denying strikers health care coverage.[155] The same logic should also hold for unemployment benefits.

Additionally, even crediting the contention that immediate provision of unemployment benefits to workers potentially disrupts the balance of negotiating power between unions and employers, empirical evidence suggests that this disruption is not severe. In most states, unemployment benefits replace less than half of a worker's prior salary.[156] In many states, the benefit is much lower, especially for jobs disproportionately filled by women and workers of color, such that unemployed workers relying on the benefit to replace their prior income can quickly slide into poverty.[157] Benefits on this order are simply not a meaningful disruption to the balance of economic power between workers and their employers. Going on strike, even with the palliative of immediate unemployment benefits, would still be an economically risky decision for a worker to make and could leave them in a financially precarious position. Thus, even if a future Court were to apply a *Machinists* analysis to a zero-waiting period state unemployment regime for strikers, the Court should not find such a statute to be preempted, as it does not meaningfully interfere with the free play of economic forces between unions and employers.

## Conclusion

Existing Supreme Court precedent provides ample grounds to support the legality of state efforts to provide more immediate

152. *See id.* at 34 (explaining that "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct").

153. *See id.* (explaining analytic framework).

154. Connecticut enacted such a statute in June 2023. *See* Public Act. No. 23-172, 2023 Gen. Assemb., Reg. Sess. (Conn. 2023).

155. State legislators in Pennsylvania introduced a bill to this effect in December 2023. *See* H.B. 1911, 207th Gen. Assemb., Reg. Sess. (Pa. 2023).

156. Josh Bivens et al., Econ. Pol'y Inst., Reforming Unemployment Insurance 7 (2021), https://files.epi.org/uploads/Reforming-Unemployment-Insurance.pdf [https://perma.cc/3CPU-HNL8] ("UI benefits typically only replace about 40% of workers' prelayoff wages and vary tremendously by state.").

157. *Id.*

unemployment benefits to strikers. The Court has explained that its view of the permissibility of states' decisions as to whether and how to provide unemployment benefits to strikers is filtered through the aims expressed by Congress in the Social Security Act and FUTA. Those statutes, both in their text and legislative history, make clear that federal legislators intended to allow states broad discretion in crafting unemployment regimes. The Court has confirmed that states can use that extensive discretion to entirely preclude strikers from receiving benefits. The same extensive discretion would permit states, conversely, to maximally extend benefits to strikers and allow them to collect payments as soon as any other worker. Though one can foresee a conservative challenge that would contend such a scheme would impermissibly disrupt the economic balance of power that Congress intended to leave undistributed in the NLRA, the Court's prior decisions indicate states are to be afforded wide leeway in this area.[158] And in any event, the equal treatment of strikers with other unemployed workers with respect to these welfare state benefits does not impinge on the market dynamics of bargaining to a great enough extent to sustain an NLRA preemption challenge.

Not only can states permissibly provide immediate unemployment benefits to strikers, but they should. Income inequality in the United States is at a record high.[159] The top ten percent of households in terms of wealth own seventy-three percent of the country's wealth, while the bottom half own only two percent.[160] A strong labor movement and high union membership have historically gone some way in counteracting

158. *See* N.Y. Tel. Co. v. N.Y. Dep't of Lab., 440 U.S. 519, 545–46 (1979) (explaining that unemployment programs are "an area in which Congress has decided to tolerate a substantial measure of diversity"). Under the current Trump Administration, one could also foresee a separate, more sweeping conservative challenge to the NLRA writ large, which could potentially render the question of the legislation's preemption of state unemployment regimes moot. *See* Robert Iafolla, *Employers Intensify Constitutional Attacks Against Labor Board*, BLOOMBERG L. (Aug. 12, 2024, 5:00 AM), https://news.bloomberglaw.com/daily-labor-report/employers-intensify-constitutional-attacks-against-labor-board [https://perma.cc/5SSN-XU8X]; Alexander T. MacDonald, *Why the Firing of Gwynne Wilcox Could Be an Inflection Point for the NLRB—and Administrative Government*, FEDERALIST SOC'Y (Jan. 30, 2025), https://fedsoc.org/commentary/fedsoc-blog/why-the-firing-of-gwynne-wilcox-could-be-an-inflection-point-for-the-nlrb-and-administrative-government [https://perma.cc/3LGA-QNA2].

159. *See, e.g.*, Alexandre Tanzi, *US Income Inequality Rose to Record During Biden's First Year*, BLOOMBERG (Sept. 13, 2022), https://www.bloomberg.com/news/articles/2022-09-13/us-income-inequality-rose-to-record-during-biden-s-first-year [https://perma.cc/NX64-YLYW] (reporting data from the U.S. Census Bureau).

160. *See* Matt Bruenig, *Wealth Distribution in 2022*, PEOPLE'S POL'Y PROJECT (Oct. 23, 2023), https://www.peoplespolicyproject.org/2023/10/23/wealth-distribution-in-2022/ [https://perma.cc/7CUX-6PAW] (reporting on data from the 2022 Survey of Consumer Finances).

this sort of inequality.[161] After decades of decline, the labor movement is showing signs of a resurgence, as evidenced in part by the recent wave of strike activity. Fostering that momentum requires regulatory and policy support.[162] State lawmakers can extend that support by taking the straightforward, and clearly permissible, step of providing immediate unemployment benefits to striking workers.

161. *See, e.g.*, Heidi Shierholz, *Working People Have Been Thwarted in Their Efforts to Bargain for Better Wages by Attacks on Unions*, ECON. POL'Y INST. (Sept. 9, 2019), https://www.epi.org/publication/labor-day-2019-collective-bargaining/ [https://perma.cc/29U6-B32K] (reporting data from Historical Statistics of the United States and from Thomas Piketty and Emmanuel Saez).

162. *See* Alí R. Bustamante, *Labor Unions Are Having a Renaissance, but Policy Must Keep Pace*, ROOSEVELT INST. (Sept. 2, 2023), https://rooseveltinstitute.org/2023/09/02/labor-unions-are-having-a-renaissance-but-policy-must-keep-pace/ [https://perma.cc/T2YZ-Q83L].