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Citation
Benjamin Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 Harv. L. Rev. 1153 (2011).

Published version
http://www.harvardlawreview.org/media/pdf/vol124_sachs.pdf

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DESPITE PREEMPTION: MAKING LABOR LAW IN CITIES AND STATES

Benjamin I. Sachs

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DESPITE PREEMPTION: MAKING LABOR LAW IN CITIES AND STATES

Benjamin I. Sachs[*]

The preemption regime grounded in the National Labor Relations Act (NLRA) is understood to preclude state and local innovation in the field of labor law. Yet preemption doctrine has not put an end to state and local labor lawmaking. While preemption has eliminated traditional forms of labor law in cities and states, it has not prevented state and local reconstruction of the NLRA's rules through what this Article terms "tripartite lawmaking." The dynamic of tripartite lawmaking occurs when government actions in areas of law unrelated to labor — but of significant interest to employers — are exchanged for private agreements through which unions and employers reorder the rules of union organizing and bargaining. These tripartite political exchanges produce organizing and bargaining rules that are markedly different from the ones the federal statute provides but that are nonetheless fully enforceable as a matter of federal law.

By describing the phenomenon of tripartite lawmaking, this Article allows for a more complete understanding of the local role in contemporary labor law. But the existence of tripartite lawmaking also reveals important characteristics of federal preemption more generally. In particular, the potential for tripartite lawmaking within the confines of formally preemptive regulatory regimes points to the limits of preemption's ability to allocate regulatory authority among different levels of government and deliver a uniform, national system of law. State and local lawmaking that occurs through the tripartite dynamic also has a number of distinctive features that become visible once we recognize the existence of this form of lawmaking. As this Article suggests, moreover, tripartite lawmaking is likely not limited to the labor context but may occur wherever federal preemption coexists with the possibility for private ordering.

I. INTRODUCTION

It would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act[1] (NLRA). Although the statute contains no preemption clause, the Supreme Court has established a series of interlinking doctrines that are intended to foreclose state and local intervention into the rules of union organizing and bargaining.[2] Indeed, the prevailing view of contemporary labor law is that although the NLRA is a failed statute, the possibility for state and local innovation is choked off by one of the most

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[1] 29 U.S.C. §§ 151–169 (2006).

[2] Simply for expositional purposes, this Article will use both "local" and "state and local" to refer to all levels of subnational government — including states, counties, and cities.

expansive preemption regimes in American law. This conventional view, however, has left us with an incomplete picture of the role of the local in American labor law. The problem derives from the fact that we have overlooked something fundamental about the nature and logic of preemption.

As leading scholars in the field have shown, federal labor preemption is extraordinarily broad.[3] Preemption rules have, aside from a few narrow exceptions,[4] eliminated traditional forms of labor law in cities and states: there are no state statutes governing private sector union organizing, nor city ordinances policing labor-management relations.[5] This Article shows, however, that while preemption prevents states and cities from enacting labor law through traditional channels, it has not stopped state and local reconstruction of the federal rules through alternative means. That is, rather than *preventing* local intervention into matters of central concern to the federal regime, preemption *rechannels and reshapes* local efforts to intervene in matters reserved for federal control.

In the model of local lawmaking identified and developed here, union organizing and bargaining rules are reconstructed through tripartite political exchanges in which state and local governments, unions, and employers all play indispensable roles. In this form of lawmaking, which this Article terms "tripartite lawmaking" or "tripartism," governments act in areas of law that are entirely unrelated to labor organizing and bargaining but that are of acute interest to employers — areas ranging from medical malpractice rules, to telecommunications policy, to zoning and permitting decisions. These governmental actions, in turn, are exchanged for private contractual agreements through which unions and employers bind themselves to new rules for organizing and bargaining. Because the NLRA affirmatively protects contractual reordering of this kind, the results of these tripartite arrangements are codes of organizing and bargaining rules markedly different from the ones provided for in the federal statute

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[3] *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31, 1569–79 (2002); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 374–94 (1990); *see also* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 163–88 (2009).

[4] Primary among the exceptions to preemption doctrine that apply in the private sector is the "market participant" or "proprietary" exception, which this Article takes up in Part II. As noted below, the interventions discussed in this Article do not involve state and local governments acting through the proprietary exception.

[5] Because the NLRA exempts public employers from its coverage, states and cities are free to regulate public sector unionization and bargaining. *See* 29 U.S.C. § 152(2). This Article, however, is concerned with unionization and labor-management relations in the private sector.

but nonetheless fully enforceable as a matter of federal law.[6] And because local governments act in areas of law unrelated to labor, these departures from the federal regime are either invisible to preemption scrutiny or, at the least, exceptionally difficult to detect and preempt.[7]

This Article provides — in as much detail as possible, given the inherent opacity of these arrangements — a set of examples of such tripartite lawmaking. In one example, the City of New Haven, the Yale–New Haven Hospital, and the New Haven hospital workers' union engaged in three-way negotiations over the construction of a cancer facility. The union wanted new rules for organizing. The hospital needed zoning and development permits from the City. Following a series of meetings mediated by the New Haven mayor, a package deal was reached: the City issued the permits in exchange for the hospital's agreement to reorder contractually the rules of organizing. In another example, the Communications Workers of America and two telecom firms tied new organizing rules to state approval of the companies' merger. The other examples of tripartite lawmaking offered here involve the nursing home industry in California — where adoption of non-NLRA organizing and bargaining rules was predicated on changes to the state's Medicaid reimbursement system — and the renewable energy sector in Pennsylvania.[8]

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[6] In naming this process "lawmaking" despite its partial reliance on private contractual agreements between unions and employers, I follow, among others, Louis Jaffe. *See* Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 214–15, 220–21, 234–35 (1937).

[7] In cataloguing the various ways unions secure private agreements on organizing and bargaining rules, others have noted that unions at times rely on the exercise of their state and local political power. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 837–38 (2005); Estlund, *supra* note 3, at 1604; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 391 (2001). In the industrial relations literature, Professors Harry Katz, Rosemary Batt, and Jeffrey Keefe discuss the ways that the Communications Workers of America union integrates political and organizing strategies, including the approaches discussed below in section III.A.3. *See* Harry C. Katz, Rosemary Batt & Jeffrey H. Keefe, *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. REL. REV. 573 (2003). While Professor Roger Hartley discusses the relationship between private agreements and preemption, his investigation is limited to the question "of whether labor law preempts a decision by a state or local government to require a neutrality agreement from a private business wishing to enter into a business relationship with the governmental entity." Hartley, *supra*, at 405; *see also* Estlund, *supra* note 3, at 1604 (noting that "states and municipalities, when acting in their 'proprietary' capacity, have wide latitude to impose conditions on [state and municipal] contractors in the interest of labor peace"). As noted, and as explained below in greater detail, these actions are not the types of state and local intervention at issue here.

[8] The author of this Article worked in the legal department of the Service Employees International Union — the parent of the union locals involved in the New Haven cancer center agreement and the California nursing home agreement — from 2002 to 2006. The discussion of these agreements in this Article is based exclusively on information from public sources. *See* sections III.A.1–2, pp. 1174–87.

Tripartite labor lawmaking does not involve states and cities acting through the few remaining exceptions to the NLRA's broad preemption doctrine. These are not, for example, instances in which states and cities shape the labor practices of their own contractors, nor are they instances in which labor standards are incorporated into local procurement, investment, or financing policies.[9] Nor do these interventions constitute tinkering at the edges of labor law. To the contrary, the interventions described here achieve on a local scale precisely the elements of labor law reform that labor scholars and the labor movement have long sought, but failed to achieve, at the national level: card check recognition, limits on employer involvement in union campaigns, union access to employer property, and more effective enforcement of the duty to bargain.[10]

By providing a new and more accurate description of the way NLRA preemption operates, this Article thus allows us to understand better the role of the local in contemporary labor law. But the existence of tripartite lawmaking also reveals important characteristics of preemption itself.

At the most basic level, tripartite lawmaking presents significant difficulties for doctrinal preemption analysis. Preemption analysis requires courts to compare a challenged state or local action with the po-

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[9] That is, these are not instances in which states and localities act in their proprietary capacity. This exception to the general preemption doctrine is discussed below. *See infra* p. 1168. States and cities are indeed acting through the proprietary exception, and in significant ways. *See, e.g.*, Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 218 (3d Cir. 2004). Local governments are also acting through other exceptions to the preemption rules. For example, when a group of workers does not fall within the NLRA's definition of "employee," *see* 29 U.S.C. § 152(3), local governments are free to enact labor laws for these workers. In areas including home care and child care work, states are engaged in innovative experiments of this sort. *See, e.g.*, Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 382–87 (2007); Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008). These forms of state and local intervention are beyond the scope of this Article.

[10] This fact, among others, distinguishes the interventions described here from recent attempts to use state and local zoning and development procedures to exclude disfavored employers from a particular jurisdiction because of the employers' labor practices. *See* Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502 (2008). In their study of efforts to reform Wal-Mart's labor practices, Professors Catherine Fisk and Michael Oswalt contend that workers' rights advocates have turned away from unionization and toward exclusionary zoning rules and "fair share" health care legislation. *See id.* at 1503. They argue that "the strategies that would enable worker advocates to challenge Wal-Mart's labor practices most directly are largely foreclosed by inadequate federal protection of the right to unionize," *id.* at 1507, and that "[f]ederal preemption compounds the problem by preventing localities and states from enacting laws intended to facilitate unionization," *id.* at 1507 n.20. *See also id.* at 1511 ("[A]venues to improve low-wage jobs and benefits through unionization . . . [are] foreclosed by preemption."). Fisk and Oswalt's conclusion that preemption has prevented states and localities from intervening to rectify these shortcomings is a conclusion this Article contests.

tentially relevant federal law. But when the state or local action takes place in an area of law removed from the one governed by the federal statute — as it does in tripartite lawmaking — preemption review will often be impossible.[11] As such, tripartism limits preemption's ability to allocate regulatory authority among different levels of government and ensure a uniform, national system of law.

By frustrating traditional preemption scrutiny, moreover, tripartite lawmaking enables local departures from a formally preemptive federal statute. Accordingly, the normative desirability of the preemption regime cannot be judged — as it historically has been — simply by asking whether a uniform national policy is superior to a regime defined by state and local variation. A complete normative assessment of the preemption regime requires that we take account of tripartite lawmaking — that we consider both the type of local variation that tripartism enables and the legal and political processes through which tripartite law is made.

The implications that emerge are mixed. In the labor context, the fact that tripartite lawmaking allows for some substantive departures from the formally preemptive federal rules means that tripartism enables states and cities to respond to the NLRA's central pathologies. Thus, while NLRA rules do not adequately protect employee choice on the question of unionization,[12] tripartite labor lawmaking produces potential solutions: a rebalancing of speech rights for employees and organizers, restrictions on the form and content of employer intervention in union campaigns, and reconstructed mechanisms for employee decisionmaking. While the NLRA bargaining regime seems unable to facilitate agreement, tripartite lawmaking produces alternative approaches that might hold greater promise.[13] Aside from these substantive considerations, variation per se can be beneficial. Consistent with models of "learning by variation" and experimentalism, the reordered rules of organizing and bargaining that emerge from tripartism provide us with data with which we could improve the federal design.

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[11] Part V explores whether labor preemption doctrine might be expanded, or enforced more robustly, to capture and invalidate tripartite labor lawmaking.

[12] *See, e.g.*, Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 349–53 (1994); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 720–27 (2010). *See generally* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

[13] *See, e.g.*, Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 55–65 (2009). Employers critique other components of the federal regime, for example section 8(a)(2)'s prohibition of many forms of (nonunion) labor-management committees. *See, e.g.*, Estlund, *supra* note 3, at 1544–51. As noted immediately below, however, tripartism has provided a mechanism through which union critiques of the NLRA regime can be addressed by state and local governments. For this reason, it is those critiques that are the focus here.

On this front, however, tripartite labor lawmaking exhibits an important limitation. Because states and cities have substantially more regulatory leverage over employers than over unions, tripartite labor lawmaking has a predictable political valence: it involves the exchange of some governmental action that is favorable to employers for private agreements that redesign organizing and bargaining rules in a manner that facilitates unionization. Accordingly, tripartism enables substantive responses to only one group of flaws in the NLRA: flaws that skew the law in a nonunion direction. From a learning and experimentalist perspective, tripartism's uniform political valence produces a similar limitation, allowing us to learn about one — but only one — set of possible reforms.

Although tripartism is designed to, and does in fact, permit variation that preemption would otherwise preclude, tripartite arrangements also impact local lawmaking procedures in a set of unintended ways. For this reason, identifying tripartite lawmaking requires that we recognize not only the *fact* of local variation, but also the legal and political *processes* through which such variation is achieved. Here, this Article addresses four concerns. A first issue stems from the fact that tripartite lawmaking is an opaque form of lawmaking and accordingly presents political accountability problems. A second concern is that the formal separation between the public acts of local governments and the contractual orderings of private parties — a separation that is inherent in this form of lawmaking — can serve to insulate the functionally interdependent arrangement from constitutional and other forms of legal review. A third issue relates to the form of local political participation that tripartite lawmaking requires. Federalism scholars often critique broad preemption rules on the ground that they preclude political participation by citizens at the state and local level.[14] But, because preemption prevents only direct state and local interventions into the federal regime and allows for tripartite forms of intervention, preemption does not in fact render local political participation irrelevant. Rather, preemption reshapes local politics, leaving us with a kind of politics of indirection.[15] So, while workers and their allies participate actively in support of tripartite dealmaking, their participation cannot be focused on organizing and bargaining rights. Instead, workers must support the governmental objectives of employers. Fourth and finally, because tripartite labor lawmaking requires states and lo-

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[14] *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91–94 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–94 (1997).

[15] As discussed above, Fisk and Oswalt develop this insight in their analysis of Wal-Mart activism. *See* Fisk & Oswalt, *supra* note 10, at 1523–28.

calities to act in nonlabor areas of law, tripartism can have collateral effects on these other legal regimes.[16]

In sum, tripartite lawmaking allows for departures from the federal regime, but it enables this variation in a manner that raises some concerns. In fact, the existence of tripartite lawmaking suggests that the current preemption regime should be troubling irrespective of one's underlying position on preemption — irrespective, that is, of whether one believes that labor policy is appropriately set at the national or local level. Preemption's proponents should be concerned both by the variation that tripartism allows and by the costs inherent in this form of lawmaking.[17] And while preemption's opponents may value the variation that tripartism permits, they should understand this variation as far too constrained and should also wish to avoid the costs inherent in achieving variation through tripartite arrangements.

Practically, then, both proponents and opponents of federal labor preemption will have an interest in reforming the preemption regime in a manner that precludes, or alleviates the need for, tripartite lawmaking. Determining which specific type of reform is ideal — or whether reform is superior to the status quo — would require resolution of the debate between national uniformity and local variation in contemporary labor law.[18] This Article does not attempt to resolve that debate, but instead contributes to the discussion by suggesting and evaluating a range of possible legal reforms. One set of reforms, appealing to preemption's proponents, would attempt to eliminate tripartite lawmaking by either expanding or more rigorously enforcing preemption doctrine or by prohibiting private ordering. Another set of reforms, which this Article concludes has a better chance of success, would relax the preemption rules in order to remove the conditions that call for tripartism in the first place.

Finally, although this Article focuses on labor preemption and labor lawmaking, the analysis here indicates that the potential for tripartite lawmaking extends across multiple areas of law. Indeed, the conditions that enable tripartite lawmaking are quite common. Across geography and political orientation, state and local governments enjoy wide-ranging regulatory leverage over firms that operate within their jurisdictions. Where organized interests have significant political influence at the state and local level, this governmental leverage can be exchanged for firms' private agreement to the demands of the interest

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[16] As they become proxies for labor policy, these nonlabor areas of law can be altered in a unique manner distinct from more common forms of "logrolling."

[17] To the extent that preemption's proponents view the policy outcomes tripartism allows as positive, they will want to achieve these outcomes through reforms of the federal law.

[18] For some discussion of this topic, see, for example, Drummonds, *supra* note 3, at 101–03; Estlund, *supra* note 3, at 1599–1600; and Gottesman, *supra* note 3, at 399–407.

groups, even in the face of formally preemptive federal statutes. For instance, in the environmental context, firms and community groups are developing "Good Neighbor Agreements" through which the firms agree to go beyond federally mandated environmental standards. Because a firm's acceptance of the Good Neighbor Agreement can be secured in exchange for local governmental action in nonenvironmental areas of law, the potential for tripartite dealmaking and local departures from the federal regime is clear. "Community Benefits Agreements," which bind developers to provide certain goods in exchange for local governmental action on zoning and permitting approvals, present another mechanism for tripartism and the avoidance of a wide range of preemption rules — including Employee Retirement Income Security Act[19] (ERISA) and immigration preemption.

This Article accordingly suggests the broad conclusion that where federal preemption coexists with the possibility for private ordering — a combination not at all rare — the potential for tripartite lawmaking will exist as well. With tripartism, moreover, comes the possibility for local departures from formally preemptive federal laws and the undermining of preemption's ability to allocate exclusive regulatory authority to the federal government. And because the concerns regarding the processes through which tripartite law is made inhere in the structure of tripartism — and are not dependent on the specific subject matter of the tripartite agreement — these concerns will also follow tripartism into nonlabor areas of law.

This Article proceeds as follows. Part II outlines the current federal regime governing union organizing and bargaining, along with the doctrine of federal labor preemption. This Part also describes how federal labor law facilitates private reordering of the rules of organizing and bargaining, and it locates tripartite lawmaking among the several mechanisms through which unions secure employer consent to these new rules. Part III describes tripartite labor lawmaking and explores some analogues to it, including certain forms of European neocorporatism and the kind of governmental action implicated in the unconstitutional conditions context. Part IV begins by discussing the implications of tripartite lawmaking for preemption analysis and for variation in labor law, and then raises concerns regarding the legal and political process that tripartism involves. Part V takes up three possible responses to tripartite lawmaking. Part VI suggests extensions to other areas of law, and Part VII concludes.

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[19] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

II. A LABOR LAW NUTSHELL: MOTIVES FOR REFORM, PREEMPTION, AND PRIVATE ORDERING

A. The Call for State and Local Innovation

In order to ground the discussion that follows, it is useful to understand what motivates certain states and cities — and unions in those states and cities — to seek a redesign of the NLRA rules of organizing and bargaining. For more than three decades now, the labor movement and leading labor law scholars have been withering in their criticism of the NLRA. Writing in 1983, Professor Paul Weiler commented that "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution."[20] In 1984, the House Subcommittee on Labor-Management Relations released a report on "The Failure of Labor Law," observing that the NLRA "has ceased to accomplish its purpose."[21] And in 1996, Professor James Brudney argued that "[s]ixty years after the National Labor Relations Act . . . was passed, collective action appears moribund."[22]

The primary substantive critique of the NLRA is that the federal rules of organizing and bargaining render employees' statutory rights to form and join labor organizations, and to bargain collectively with management, ineffectual.[23] Scholars have repeatedly noted the central problems. When it comes to the rules of organizing, the regime provides employers with too much latitude to interfere with employees' efforts at self-organization, while offering unions too few rights to communicate with employees about the merits of unionization.[24] The NLRB's election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition.[25] The NLRB's remedial regime is also too weak to protect employees against employer retaliation.[26] And, with respect to the statute's goal of facilitating collective bargaining, the regime's "good faith" bargain-

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[20] Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

[21] STAFF OF H. SUBCOMM. ON LABOR-MGMT. RELATIONS OF THE H. COMM. ON EDUC. & LABOR, 98TH CONG., THE FAILURE OF LABOR LAW — A BETRAYAL OF AMERICAN WORKERS 1 (Comm. Print 1984).

[22] James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996) (footnote omitted). *See generally* Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993).

[23] *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–2700 (2008). *See generally, e.g.*, H.R. REP. NO. 110-23 (2007); Gottesman, *supra* note 22; Weiler, *supra* note 20.

[24] *See, e.g.*, Barenberg, *supra* note 12, at 933–34.

[25] *See, e.g.*, Weiler, *supra* note 20, at 1777 & n.24.

[26] *See, e.g.*, Gottesman, *supra* note 22, at 62 ("The NLRA does not protect workers meaningfully against employer reprisal for attempts to unionize . . . .").

ing obligation is rendered meaningless by the Board's inability to impose contract terms as a remedy for a party's failure to negotiate in good faith.[27]

These pathologies in the NLRA have given rise to repeated calls for reform, both among scholars and in Washington, but none of the proposed reforms have succeeded.[28] In 1977, for example, Congress took up legislation that would have, first, minimized the opportunity for employer interference in organizing drives by mandating a shortened schedule for union elections,[29] and, second, rebalanced communicational opportunities by providing union organizers "equal access" to the workplace.[30] The bill also would have strengthened the collective bargaining obligation by allowing the Board to impose make-whole remedies when employers violated their duty to bargain in good faith.[31] Although the House passed its bill by a vote of 257 to 163, the Senate version was blocked by a five-week filibuster and died after six failed cloture votes.[32] The most recent federal labor reform bill responded to the same concerns about employer interference in organizing drives and the weakness of the statutory bargaining obligation. Thus, to minimize employer involvement in union organizing efforts, the Employee Free Choice Act[33] would have required that the Board certify unions based on a card check, thereby allowing unions to avoid the NLRB's notoriously slow election process.[34] To ensure compliance with the bargaining obligation, the bill also dictated that if the parties are unable to reach agreement on a first contract within four months,

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[27] *See, e.g.*, Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 360–61 (1984); *see also* Fisk & Pulver, *supra* note 13, at 55–59.

[28] *See, e.g.*, Barenberg, *supra* note 12, at 928–46 (summarizing past proposals); *id.* at 946–83 (offering a new proposal for reform); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Gottesman, *supra* note 3; Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988); Clyde Summers, *Unions Without Majority — A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

[29] The bill was titled the Labor Reform Act of 1977. H.R. 8410, 95th Cong. (1977); S. 1883, 95th Cong. (1977). *See also, e.g.*, 1 THE DEVELOPING LABOR LAW 72 (John E. Higgins, Jr. et al. eds., 5th ed. 2006); Estlund, *supra* note 3, at 1540.

[30] *See* 1 THE DEVELOPING LABOR LAW, *supra* note 29, at 72 (citing 34 CONGRESSIONAL QUARTERLY ALMANAC 285 (1978)).

[31] *See id.*

[32] *See id.* In 1996, the Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1996), also passed both houses of Congress, but was vetoed by President Clinton. Estlund, *supra* note 3, at 1541. On September 27, 1995, the House voted 221–202–11 in favor of the bill. *See* 141 CONG. REC. 26,613–19 (1995) (Roll No. 691). On July 10, 1996, the Senate voted 53–46–1 in favor. *See* 142 CONG. REC. 16,470–76 (1996) (Rollcall Vote No. 191 Leg.). This bill would have amended section 8(a)(2) of the statute to permit the establishment of certain "employee participation programs." Estlund, *supra* note 3, at 1541 n.64; *see also* H.R. 743 § 3.

[33] Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

[34] For a discussion, see Sachs, *supra* note 12, at 668–72.

an arbitrator would determine the appropriate content of the contract.[35] Although the House of Representatives passed the Employee Free Choice Act in 2007, the bill was blocked by a threatened senatorial filibuster.[36]

Accordingly, it is the conjunction of these pathologies in the federal law and the inability to reform the statute in Congress that explains the motivation for state and local reforms. As Professor Michael Gottesman explains:

> The impetus for [a] reexamination of preemption law will be evident to those familiar with the present state of collective bargaining under the NLRA. . . . [T]he NLRA is not working effectively and the institution of collective bargaining is in decline. The defects in the law have been identified with some precision, but Congress has shown itself too politically paralyzed to make repairs.[37]

B. Prohibiting State and Local Reform: A "Rule of Total Federal Preemption"

Attempts at state and local reform, however, must contend with the doctrine of federal labor preemption. Although there is no express preemption clause in the National Labor Relations Act, the NLRA's preemption regime is unquestionably and remarkably broad.[38] Prompted in part by a series of articles by Professor Archibald Cox in the *Harvard Law Review*,[39] the Supreme Court has built a preemption

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[35] *See* H.R. 1409 § 3.

[36] *See, e.g.*, Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 17, 2009, at A1; Alec MacGillis, *Executives Detail Labor Bill Compromise*, WASH. POST, Mar. 22, 2009, at A2. In 2007, the bill died in the Senate after a cloture vote failed 51–48. *See* 153 CONG. REC. S8398 (daily ed. June 26, 2007).

[37] Gottesman, *supra* note 3, at 360 (footnotes omitted).

[38] *See, e.g.*, *id.* at 374–83. Labor preemption cases generally do not use the familiar typology of express, conflict, and field preemption. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100–07 (2000) (explaining these categories of preemption analysis). Because the NLRA has no preemption clause, labor preemption doctrine is clearly implied rather than express. As the analysis to follow will reveal, although the cases do not employ these terms, the Court's labor preemption rules reflect both conflict and field preemption principles. *See, e.g.*, Estlund, *supra* note 3, at 1571–73; Gottesman, *supra* note 3, at 357–59.

It is worth noting that the federal statute does explicitly allow states to depart from the federal regime by banning "union shop" agreements. Although federal law protects such agreements, which condition employment on an employee's agreement to pay union dues, section 14(b) of the federal law enables states to prohibit union shops through so-called right-to-work legislation. *See* 29 U.S.C. § 164(b) (2006). The interventions discussed in this Article involve neither union shop agreements nor right-to-work laws.

[39] The relevant Cox articles are Archibald Cox & Marshall J. Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Archibald Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); and Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972). For a discussion of Cox's influence on the Supreme Court's preemption doctrine, see Gottesman, *supra* note 3, at 389–91. As Gottesman noted, "There can be little doubt as to the persuasiveness of Cox' thinking to the Court." *Id.* at 390.

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.[40] In 1950, Cox first argued for what he called "an integrated public labor policy"[41] derived entirely from the National Labor Relations Act, and he warned that "enforcement of . . . state regulation will thwart the development of federal policy."[42] Four years later he argued for a "rule of total federal preemption,"[43] in order to ensure "uniformity."[44]

Shortly after Cox began writing, the Court set out what would become the conceptual framework for its future labor preemption cases. In 1953, the Court held that:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. . . . 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.[45]

Then, in its sweeping 1959 decision *San Diego Building Trades Council v. Garmon*,[46] the Court ruled that states may not regulate activity that is even "arguably" protected or prohibited by the federal law.[47] As such, employee activity protected (or arguably protected) by section 7 of the NLRA — including, for example, employees' rights to form and join labor unions or to bargain collectively with their employers — is off limits to state or local regulation. So, too, is employer speech about unionization, which enjoys protection under section 8(c) of the statute.[48] Similarly, because collective bargaining is both protected by section 7 and policed by section 8's unfair labor practice clauses, bargaining rules and obligations are also beyond the reach of state and local law.[49]

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[40] The Supreme Court has held that labor preemption doctrine applies equally to state and local government action. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986).

[41] Cox & Seidman, *supra* note 39, at 230.

[42] *Id.* at 228.

[43] Cox, *Federalism in the Law of Labor Relations*, *supra* note 39, at 1315.

[44] *Id.* at 1317. As Gottesman has written, "Cox invited the Court to preempt in the name of a comprehensive federal labor policy which he eloquently portrayed." Gottesman, *supra* note 3, at 390.

[45] Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953).

[46] 359 U.S. 236 (1959).

[47] *Id.* at 245.

[48] *See id.*; *see also* Gottesman, *supra* note 3, at 379 n.95 ("[Section 8(c)] likely would be a predicate for inferring federal 'protection' of such [employer] speech against state regulation.").

[49] *Garmon* preemption admits of two exceptions to the general rule. If the conduct at issue is "a merely peripheral concern of the [NLRA]," *Garmon*, 359 U.S. at 243, or if it "touch[es] interests . . . deeply rooted in local feeling and responsibility," the Court will "not infer that Congress

Although *Garmon* preemption is extremely broad,[50] in its 1976 decision *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Committee*,[51] the Supreme Court extended the reach of federal labor preemption even further. There, the Court took up the permissibility of state regulation of union activity that, while part of the collective bargaining process, was neither protected nor prohibited by the federal law.[52] The Court reasoned that Congress's decision to leave certain activity unregulated by the NLRA implied a congressional intent that these forms of union and employer conduct be left *entirely* unregulated.[53] Thus, according to *Machinists*, the absence of federal regulation implied that "Congress intended that the conduct involved be . . . left 'to be controlled by the free play of economic forces'"[54] and "not to be regulable by States any more than by the NLRB."[55]

Garmon and *Machinists* form the two primary strands of labor preemption doctrine, but two other cases extend the doctrine further still. The first is *Golden State Transit Corp. v. City of Los Angeles*,[56] which involved a strike by Teamsters Union employees at a Los Angeles taxi cab company. At the time of the strike, Golden State Transit needed to renew its operating license in order to continue providing taxi service. The renewal required approval by the Los Angeles Board of Transportation Commissioners and, ultimately, by the Los Angeles City Council.[57] Although Golden State was "in compliance with all terms and conditions of their franchise[],"[58] the city council rejected the renewal request.[59] The Supreme Court held that the council's de-

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had deprived the States of the power to act," *id.* at 244. Very few decisions have found that state action escapes preemption under the "peripheral concern" exception. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 30, at 2337–38. Picket-line violence is the classic example of conduct that meets the "local responsibility" exception, and may be prosecuted under state law. *See, e.g.*, *Garmon*, 359 U.S. at 244 n.2 (citing United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (upholding state damages award against union that threatened nonunion employer with violence)). States also generally remain free to enforce trespass laws during organizing drives and labor disputes. *See* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180 (1978).

50 *See, e.g.*, Gottesman, *supra* note 3, at 377–78 (noting that *Garmon*'s preemption of claims that are "arguably" protected by federal law is a "departure from the preemption rules applied with respect to other federal statutes," *id.* at 378); *id.* at 382.

51 427 U.S. 132 (1976).

52 *Id.* at 132–33. The case involved a union policy under which employees refused to work overtime. *Id.* at 134.

53 *Id.* at 141.

54 *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

55 *Id.* at 149.

56 475 U.S. 608 (1986).

57 *See id.* at 609–11.

58 *Id.* at 610 (citation omitted) (internal quotation marks omitted).

59 *See id.* at 611.

cision was designed to pressure Golden State to settle the Teamsters' strike and was, for this reason, preempted.[60] According to the Court, the Teamsters' right to strike, and Golden State's attempt to withstand the strike, were the kinds of economic weapons that Congress had intended to leave free of regulation and up to the "free play of economic forces."[61] By refusing to renew Golden State's franchise until the company settled the strike, Los Angeles "imposed a positive durational limit on the exercise of economic self-help"[62] and thereby impermissibly intruded into a collective bargaining process that Congress intended to be free of such regulatory intervention.[63]

The second case is the Court's most recent labor preemption decision, *Chamber of Commerce v. Brown*,[64] which struck down a California statute that prohibited employers from using state funds to "assist, promote, or deter union organizing."[65] Noting that "California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition," the Court held that it was "equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds."[66] That is, because employers' right to engage in noncoercive speech about unionization is protected by section 8(c) of the federal law, states may neither directly restrict employer speech rights nor explicitly predicate the receipt of state benefits on an employer's agreement to refrain from exercising these rights.[67]

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[60] The council's vote came after "the labor dispute and the franchise renewal issue had become clearly intertwined." *Id.* at 610. As the Court put it, "[t]he strike was central to the [franchise] discussion," with one city council member "charg[ing] Golden State with negotiating unreasonably" and another "accus[ing] the company of trying to 'brea[k] the back of the union'" during a council hearing on Golden State's renewal application. *Id.* at 611 (final alteration in original) (citations omitted). At a council meeting, moreover, four council members "conveyed the settlement condition to the parties as the council's 'bottom line' on the issue." *Id.* at 615 n.6.

[61] *Id.* at 614 (quoting Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm., 427 U.S. 132, 140 (1976)) (internal quotation mark omitted).

[62] *Id.* at 615.

[63] *See id.* at 619. In a subsequent chapter of the *Golden State* litigation, the Court also held that the taxi company was entitled, under 42 U.S.C. § 1983 (2006), to maintain a suit for compensatory damages from the City. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989).

[64] 128 S. Ct. 2408 (2008).

[65] *Id.* at 2416 (citing CAL. GOV'T CODE § 16646(b) (Deering 2010)).

[66] *Id.* at 2414–15.

[67] *See id.* at 2416–17. As the California law at issue in *Brown* placed "considerable pressure on an employer either to forgo his 'free speech right to communicate his views to his employees' or else to refuse the receipt of any state funds," *id.* at 2416 (quoting NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)), the Court held that the law "impermissibly 'predicat[es] benefits on refraining from conduct protected by federal labor law,'" *id.* at 2416–17 (alteration in original) (quoting Livadas v. Bradshaw, 512 U.S. 107, 116 (1994)).

As noted below, a broad reading of *Golden State* and *Brown* might have reached the City's conduct during the New Haven Cancer Center development campaign. *See* section V.A, pp.

While these cases establish a broad preemption regime, the Court has created one relatively significant exception to the rule: when a state or local government acts as a market participant, it enjoys the same freedom to structure its labor policies as a private party and is immune from preemption scrutiny. As the Court put it in its 1985 *Boston Harbor*[68] decision: "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*."[69]

Despite the potential breadth of the proprietary exception,[70] the Supreme Court and the courts of appeals have established its limits. To start, the basic fact that a state or city acts pursuant to its spending power, rather than through regulation, does not exempt the action from preemption review. Indeed, the Court has dismissed as a "distinction without a difference" the fact that a state acts by spending rather than regulating.[71] Instead, the applicability of the market participant exception requires that the state or locality demonstrate that its intervention is "specifically tailored to one particular job," and that the intervention is directly aimed at advancing the government's proprietary interest by, for example, "ensur[ing] an efficient project that would be completed as quickly and effectively as possible at the lowest cost."[72]

In sum, after surveying the labor preemption field, Professor Cynthia Estlund concluded that the Supreme Court's preemption cases

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1213–17. If so, this instance of tripartite labor lawmaking survives because of difficulties with preemption enforcement, as also discussed below, rather than because the government's action takes place outside the scope of the current preemption regime. For a discussion, see sections III.B, pp. 1190–93; and V.A, pp. 1213–17.

68 Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218 (1993).

69 *Id.* at 227.

70 The phrase "potential breadth" indicates that the proprietary exception, taken to a logical extreme, would swallow the entire preemption regime. Almost any state or city action that impacts labor-management relations will have some impact on state and local tax revenues. Thus, a state plausibly could argue that outlawing unions entirely would increase productivity and thereby increase state tax revenues. On the other hand, a city could contend that mandating unionization would increase labor peace and thereby increase city tax revenues. For this reason — as explained immediately below — the fact that a state or local rule has an impact on general state and local revenue streams is never enough to qualify for the proprietary exemption.

71 Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 287 (1986). The question for the Court is, instead, whether the spending power is used as a "legitimate response to state procurement constraints or to local economic needs," *Brown*, 128 S. Ct. at 2415 (quoting *Gould*, 475 U.S. at 291) (internal quotation marks omitted), or whether it is instead used as a mechanism for "setting [labor] policy," *id.* (quoting *Boston Harbor*, 507 U.S. at 229) (internal quotation mark omitted).

72 *Brown*, 128 S. Ct. at 2415 (quoting *Boston Harbor*, 507 U.S. at 232) (internal quotation marks omitted).

"virtually banish states and localities from the field of labor relations,"[73] and that "[m]odern labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict."[74] Most recently, Professor Henry Drummonds summarized the current view by writing: "[The] broad federal labor relations preemption doctrines ensnarl all states in a stifling and exclusive . . . federal labor law regime."[75]

C. Facilitating Private Reordering

Although the NLRA prohibits state and local governments from intervening in union organizing and bargaining, the law affirmatively facilitates the private reordering of organizing and bargaining rules by unions and employers. As construed by the NLRB, "[n]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations,"[76] and accordingly the Board "will enforce such agreements, including agreements that explicitly address matters involving union representation."[77] Thus, so long as their agreements do not waive or violate employee rights, unions and employers are free to depart from the NLRA's rules and to adopt alternative procedures regarding union organizing, recognition, and bargaining procedures.[78] For example, although employers are not statutorily obligated to recognize a union on the basis of signed authorization cards,[79] an employer may contractually agree with a union to do so.[80]

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[73] Estlund, *supra* note 3, at 1572. Estlund wrote prior to the Court's decision in *Brown*.

[74] *Id.* at 1571.

[75] Drummonds, *supra* note 3, at 99.

[76] Verizon Info. Sys., 335 N.L.R.B. 558, 559 (2001) (quoting Pall Biomedical Prods. Corp., 331 N.L.R.B. 1674, 1677 (2000)) (internal quotation marks omitted).

[77] *Id.*; *see also* Hous. Div. of the Kroger Co., 219 N.L.R.B. 388, 389 (1975) (reviewing clauses through which employer waived right to demand election and holding that "national labor policy favors enforcing their validity").

[78] *See, e.g.*, Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 564–65 (2d Cir. 1993). *See generally* Sachs, *supra* note 9, at 377–82 (observing a trend toward opting out of the NLRA regime in favor of private ordering). The prohibition on agreements that waive or violate employee rights is expressed in, for example, *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992); and *Local No. 3-193 International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1301 (9th Cir. 1980).

[79] *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974).

[80] *See, e.g.*, Terracon, Inc., 339 N.L.R.B. 221, 223 (2003); Stamford Taxi, Inc., 332 N.L.R.B. 1372, 1402 (2000); Snow, 134 N.L.R.B. 709, 710–11 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962); *see also J.P. Morgan Hotel*, 996 F.2d at 566. When an employer agrees to an alternative recognition process, courts will enforce that agreement by, for example, requiring that the employer bargain with the union if the union presents cards signed by a majority of employees. *See id.* Where the parties agree to an alternative recognition process, moreover, the Board will defer to that agreement and decline either party's request for a representation election. *See Verizon*, 335 N.L.R.B. at 559 n.7, 560.

Similarly, although the statutory regime affords employers significant opportunities to communicate anti-union messages to employees, employers may agree to waive or limit their own right to speak about unionization during organizing drives.[81] Employers also may — and frequently do — agree to allow union organizers access to the workplace, although employers almost never have a statutory obligation to provide for such access rights;[82] to provide unions with lists of employees' names and addresses prior to any legal obligation to do so;[83] and to submit first contract disputes to final and binding arbitration, although the NLRA never requires that employers reach agreement in collective negotiations with a union.[84]

When unions and employers agree to alternative organizing and bargaining rules, moreover, these agreements are "contracts between an employer and a labor organization," which, by virtue of section 301 of the Labor Management Relations Act,[85] are enforceable in federal district court.[86] And, indeed, federal courts have routinely enforced contracts through which unions and employers agree that union recognition will be based on a card check, that employers will remain neutral on the question of unionization (or will significantly restrict their communications on that question), and that union organizers will be entitled to access employer property for the purpose of convincing employees to support the organizing effort.[87]

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[81] *See, e.g.*, Serv. Emps. Int'l Union v. St. Vincent Med. Ctr., 344 F.3d 977, 984 (9th Cir. 2003); *Marriott*, 961 F.2d at 1469–70.

[82] *See, e.g.*, Brudney, *supra* note 7, at 826 & n.33.

[83] *Verizon*, 335 N.L.R.B. at 558.

[84] *See* 29 U.S.C. § 158(d) (2006) (bargaining obligation "does not compel either party to *agree to a proposal or require the making of a concession*" (emphasis added)).

[85] Labor-Management Relations Act, 1947 (LMRA), Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187). The NLRA, enacted in 1935, was amended in 1947 by the LMRA, which added, among other provisions, section 301. As is the convention, this article uses NLRA to refer both to the original statute and to the later-enacted amendments to that statute, including the provisions of the LMRA.

[86] 29 U.S.C. § 185(a). Courts will not enforce private agreements that call for employer recognition of a union absent some demonstration that a majority of employees support unionization. *See, e.g.*, *Marriott*, 961 F.2d at 1468; Local No. 3-193 Int'l Woodworkers of Am. v. Ketchikan Pulp Co., 611 F.2d 1295, 1298 (9th Cir. 1980).

[87] *See, e.g.*, Serv. Emps. Int'l Union v. St. Vincent Med. Ctr., 344 F.3d 977, 979, 984 (9th Cir. 2003) (agreement to arbitrate disputes over, inter alia, neutrality and access agreement); Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 563, 566–67 (2d Cir. 1993) (card check and neutrality agreement); *Marriott*, 961 F.2d at 1465–66, 1468, 1470 (same). Although not noted by the court, the agreement enforced in *St. Vincent Medical Center* contained an access clause that permitted "a reasonable number of [union] organizers . . . access to . . . public areas inside and outside the facility." Agreement between Catholic Healthcare W. & Serv. Emps. Int'l Union § II.E.6.b, at 6 (Apr. 4, 2001) (on file with the Harvard Law School Library). Although there are no reported instances of a court being called upon to resolve the specific question of whether an agreement to submit first contract negotiations to arbitration is enforceable under section 301 of the LMRA, it is a central principle of federal labor law that courts will enforce agree-

The private reordering of organizing and bargaining rules that the NLRA permits often occurs without state or local governmental intervention of any kind — through what we might think of as *bipartite labor lawmaking*. That is, by facilitating private ordering, labor law enables unions to use multiple sources of leverage to encourage employers to depart from the federal rules and adopt alternative ones; local political power is one source of leverage, but it is not the only one.[88] Indeed, the most straightforward way that unions secure such organizing agreements is through the traditional collective bargaining process: where unions already represent some segment of an employer's workforce, they can incorporate clauses in existing collective bargaining agreements requiring that additional employees of the same employer be organized according to privately negotiated rules like card check and neutrality.[89] In other instances, employers enter into private organizing agreements in order to avoid costs that unions could otherwise impose. These costs can come from traditional union actions like strikes and picketing. Or they can be imposed through less traditional tactics including "comprehensive campaigns" in which unions, for example, encourage pension funds to withhold investment capital from targeted firms.[90] Thus, the type of political exchange involved in tripartite labor lawmaking can be understood as an example of this broader phenomenon, an example in which unions leverage their state and local political power — rather than their economic power — to se-

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ments to arbitrate labor-management disputes. *See* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986).

88 *See, e.g.*, Brudney, *supra* note 7, at 837–38; Hartley, *supra* note 7, at 387–91.

89 *See, e.g.*, Estlund, *supra* note 3, at 1604 ("Unions may also have leverage within existing bargaining relationships, and may be able to negotiate neutrality agreements for those same employers' new locations."); Hartley, *supra* note 7, at 387–89. There is no reliable empirical data on the pervasiveness of this practice. The prevalence of these clauses in NLRB and appellate court litigation suggests that they are far from uncommon. *See, e.g.*, Verizon Info. Sys., 335 N.L.R.B. 558, 558–59 (2001); Pall Biomedical Prods. Corp., 331 N.L.R.B. 1674, 1674 (2000), *enforcement denied*, 275 F.3d 116 (D.C. Cir. 2002); United Mine Workers of Am., 231 N.L.R.B. 573, 574 (1977); Hous. Div. of the Kroger Co., 219 N.L.R.B. 388, 388 (1975); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Alan B. Reichard, Reg'l Dir. Region 32, NLRB 3–4 (Feb. 23, 2005), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2005/32-CA-21266-1.pdf (first contract dispute at one hospital facility settled when parties agreed to, inter alia, a "statewide organizing agreement," *id.* at 3).

90 *See* Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, *in* JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 139, 147 (Richard N. Block et al. eds., 2006). In other cases, the union's leverage comes from its ability to offer a benefit to employers. For example, when unionization is useful in securing business — through contracts from purchasing firms that are themselves unionized, or from customers who are attracted by the "union label" — unions can convince employers to enter into private organizing agreements that depart from the NLRA model. *See id.* Both Brudney and Hartley provide excellent summaries of the various ways in which organizing agreements are reached. *See* Brudney, *supra* note 7, at 835–40; Hartley, *supra* note 7, at 387–96.

cure employer agreement on an altered set of organizing and bargaining rules.

Regardless of the source of leverage used to secure these agreements, private organizing agreements erode some of the uniformity that labor law's preemption regime is committed to securing. In this respect, the NLRA is in tension with itself even in the absence of state and local intervention: while the preemption regime aims to ensure a uniform set of organizing and bargaining rules derived exclusively from federal law, the solicitude for private ordering implies that unions with sufficient bargaining power will be able to secure departures from these national defaults. But unions' ability to leverage state and local political power to secure private agreements on organizing rules is of particular relevance to the preemption regime. Indeed, the existence of this form of political exchange reveals that state and local governments are an important source of labor law variation and a viable forum for the types of reform that have been impossible to achieve at the federal level — possibilities that preemption is intended and understood to foreclose.[91]

In sum, the NLRA intends to prohibit state and local government intervention into the rules of organizing and bargaining, while at the same time allowing for private reordering of those rules. As the next Part will describe, although labor law intends to distinguish between reorderings effected by local governments and those effected by private parties, contemporary developments are characterized by the interdependence of these two sources of authority.[92]

III. TRIPARTITE LAWMAKING

There is no question that labor law's exceptionally expansive preemption regime precludes state and local governments from attempting directly to achieve at a local level the reforms that have been blocked in Congress. A state law or city ordinance mandating that private sector employers recognize unions based on a card check,[93] or

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[91] *See* Estlund, *supra* note 3, at 1579 ("[P]opular impulses [for reform] that are stymied at the federal level have no outlet at the state and local level . . . .").

[92] On the "interdependence" of the public and private, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 564–65 (2000). *See infra* note 237.

[93] A state or local law mandating card check recognition would directly conflict with 29 U.S.C. § 159(c)(1)(B) (2006). In 2010, four states approved constitutional amendments that are intended to prohibit employees from selecting a union through any method other than a secret ballot election, including through a card check process. *See* ARIZ. CONST. art. II, § 37; S.D. CONST. art. VI, § 28; UTAH CONST. art. IV, § 8. South Carolina voters approved a similar constitutional amendment in the 2010 general election, although the amendment has not yet been officially incorporated into the state constitution. *See* H.B. No. 3305, 2009–2010 Gen. Assemb., 118th Sess. (S.C. 2010) (enacted) (containing the text of the proposed amendment and indicating that it will be codified in article II, section 12 of the state constitution); *Statewide Results: 2010*

grant union organizers access to employer property,[94] or remain neutral during organizing drives,[95] would be flatly preempted by the NLRA. So too would a local law mandating that collective bargaining disputes be submitted to an arbitrator.[96] Neither could state and local governments achieve these same labor policy goals simply by substituting public spending restrictions for regulation: requiring employers to recognize unions based on cards, to remain neutral, or to grant access to organizers in order to access state funding streams would also run afoul of the preemption regime.[97] But understanding the way preemption operates in practice requires that we look beyond preemption doctrine itself.

To this end, this Part will describe in some detail the ways in which organizing and bargaining rules are being redesigned in states and cities today through political exchanges involving the public acts of local governments and the private agreements of unions and employers. The Part begins by providing four examples of tripartite labor lawmaking. It then clarifies the government's role in these examples, and it concludes with a discussion of partial analogues to tripartite lawmaking by drawing on both international and domestic sources.

A. State and Local Labor Law

This section describes four instances of tripartite labor lawmaking in U.S. states and cities and briefly notes where other examples, not developed here, may lie. Although tripartite lawmaking has several variants, each involves a political exchange. The arrangement is predicated on an employer, or group of employers, seeking state or local government action on an issue unrelated to labor relations and union organizing. The union party to the tripartite arrangement desires to

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General Election, S.C. STATE ELECTION COMM'N, http://www.enr-scvotes.org/SC/19077/40477/en/summary.html (last visited Jan. 30, 2011) (indicating that the amendment passed with an eighty-two percent majority). These amendments directly conflict with federal law and are plainly preempted by the NLRA, as the NLRB recently concluded. *See* Press Release, Nat'l Labor Relations Bd., Office of the Gen. Counsel, NLRB Advises Attorneys General in Four States that Secret-Ballot Amendments Are Preempted by Federal Labor Law (Jan. 14, 2011), *available at* http://www.nlrb.gov/shared_files/Press%20Releases/2011/R-2812.pdf.

94 Estlund imagines an alternative preemption regime in which states could potentially "create broader rights of access to the workplace for organizers" and "mandate card-check recognition," but recognizes that "[u]nder the broader preemption doctrine that we have instead, there is no room for these variations." Estlund, *supra* note 3, at 1578–79, 1579 n.230.

95 *See, e.g.*, Gottesman, *supra* note 3, at 379 n.95; *see also* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414–15 (2008) ("California plainly could not directly regulate noncoercive speech about unionization . . . .").

96 *See, e.g.*, Gottesman, *supra* note 3, at 361 n.23.

97 *See Brown*, 128 S. Ct. at 2415 ("It is equally clear that California may not indirectly regulate [noncoercive speech about unionization] by imposing spending restrictions on the use of state funds.").

replace the NLRA's rules with procedures that better facilitate unionization and collective bargaining. Tripartite lawmaking involves the exchange of the governmental actions sought by the employer for private contractual agreements through which the employer binds itself to the new rules of organizing and bargaining that the union seeks. In some examples, the state or local government is an explicit partner in tripartite negotiations: the government agrees to act in the way the employer desires if and only if the employer agrees to new organizing and bargaining rules. In other cases, the state or local government does not participate in three-way negotiations, but rather enacts the employer's desired reforms in response to the union's political influence — influence brought to bear because of the employer's agreement on organizing and bargaining rules. In all cases, the end result is a set of organizing and bargaining rules that differs dramatically from the NLRA's and that, as discussed above, is fully enforceable as a matter of federal labor law.

The examples of tripartite lawmaking presented in this Part are intended to serve four broad purposes. First, they reveal the existence of tripartism and describe its contours. Second, the examples suggest that the phenomenon of tripartite lawmaking may well be widespread. Although the opacity of these deals means it is impossible to determine exactly how prevalent they have become, tripartite labor lawmaking can flourish in any jurisdiction in which the government possesses regulatory authority over employers and in which unions enjoy significant local political power. These conditions, while not universal, are far from rare. Third, and irrespective of tripartism's current scope, by revealing the existence of and possibility for tripartite lawmaking, the examples clarify the way that preemption operates in practice and thereby allow for a new and more complete assessment of the preemption regime. And fourth, the examples enable us to identify extensions to other areas of law.

1. The New Haven Cancer Center. — Beginning in late 1998 and lasting for approximately a decade, the New England Health Care Employees, District 1199 engaged in a campaign to organize employees at the Yale–New Haven Hospital.[98] The campaign was conducted under traditional NLRA rules, and it was continually acrimonious.[99]

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[98] *See, e.g.*, Yale–New Haven Hosp. v. New England Health Care Emps., Dist. 1199 (2007) (Kern, Arb.), http://www.ynhhunion.org/newsletter/report-071022.pdf [hereinafter Kern Arbitration Award]; Affidavit of David Pickus in Support of Plaintiffs' Application for Preliminary Injunction ¶ 4, at 1, Serv. Emps. Int'l Union v. Yale–New Haven Hosp., Inc., No. 3:06-cv-01673-JCH (D. Conn. Oct. 23, 2006) [hereinafter Pickus Affidavit] (on file with the Harvard Law School Library); Garret Condon, *Yale Finds Itself in Fight over Cancer Center*, HARTFORD COURANT, May 22, 2005, at A1 (reporting that "[t]he current conflict with the union is only the latest chapter in an acrimonious, seven-year struggle").

[99] *See, e.g.*, Condon, *supra* note 98.

Part of the longstanding fight between the union and the hospital concerned the rules under which the organizing would proceed. Pointing to what it saw as flaws in the NLRA process, the union pressed the hospital to agree to an alternative set of organizing rules including "an enforceable agreement that prevents anti-union activity by the hospital."[100] Hospital management, however, contended "that the NLRB process is fair" and stated "that it would never agree to an election in which management was barred from telling its side of the story."[101] Despite years of effort, the union was unsuccessful in its attempts to reach agreement with the hospital on alternate organizing rules; it was similarly unsuccessful in its attempts to organize the Yale–New Haven employees.

Then, in November 2004, the hospital announced plans to build a $430 million cancer center.[102] Hospital officials believed that they would start work on the project in September 2005, but construction could not begin until the City of New Haven issued a series of permitting, construction, and zoning approvals. Construction would require, among other things, City approval for the demolition of a building on the planned cancer center site, the City's agreement to create a new zoning category, City approvals for construction of both underground tunnels and overhead walkways, and the transfer of City land to the hospital for use as a parking garage.[103]

The union sought to have the City tie approval of the cancer center development plans to the hospital's agreement on a privately negotiated set of organizing rules for existing hospital employees.[104] Accordingly, the union encouraged New Haven aldermen and the City's mayor, John DeStefano Jr., to withhold their approval of the project until the hospital agreed to "allow [the union] to conduct a union election outside the constraints of existing federal guidelines."[105] Mayor

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[100] *Id.*

[101] *Id.*

[102] *See, e.g.*, *id.*; Alison Leigh Cowan, *Connecticut Hospital's Plan for Cancer Center May Offer Union Leverage in Dispute*, N.Y. TIMES, Mar. 6, 2005, at 40.

[103] *See, e.g.*, Garret Condon, *State Approves Cancer Center Plans*, HARTFORD COURANT, Sept. 8, 2005, at B4. Much of what was required for construction to begin can be seen in the Development Agreement that the City and Yale–New Haven Hospital ultimately signed in June 2006. *See* Development Agreement Between the City of New Haven and Yale–New Haven Hosp., Inc. § 3.02, at 10–12 (June 6, 2006) [hereinafter New Haven Development Agreement] (on file with the Harvard Law School Library). State approvals were also required, but these were issued by early September 2005. *See* Condon, *supra*.

[104] *See, e.g.*, Condon, *supra* note 103. The fact that the organizing agreement was intended to cover existing hospital employees, while the City's actions involved the new cancer center construction, reveals that the City had no proprietary interest in the organizing agreement. *See supra* p. 1168.

[105] Condon, *supra* note 103; *see also* Condon, *supra* note 98 ("[T]he health care workers' union and its supporters are pressuring the city to delay approval of the project . . . ."). The union was joined in its effort by several New Haven community organizations that sought other commit-

DeStefano and the aldermen were sympathetic to the union's position. Indeed, the City had embraced the broad goal of accountable development.[106] In 2004, for example, the Board of Aldermen adopted a resolution urging all developers in the City to negotiate community benefits agreements with resident groups.[107] And in March of 2005, the aldermen wrote to Yale–New Haven Hospital requesting specifically that it engage in negotiations with a community organization over such an agreement for the cancer center.[108] Electoral politics likely played a role in the City's position as well. During the cancer center development negotiations, for example, Mayor DeStefano was engaged in a close race for the Democratic gubernatorial nomination, and support from the union movement was critical to his election prospects.[109]

In any event, by March of 2005, Mayor DeStefano had "warned the hospital that a failure to solve labor problems . . . could lead the Democrat-controlled Board of Aldermen to put up obstacles to the project."[110] In May, Mayor DeStefano stated publicly that he was "pro building the cancer center and pro having a vote [on unionization] one way or another and having that vote be one where not any of the parties exert intimidation."[111] By November, the editorial page of the *Hartford Courant* commented that while Mayor DeStefano "has said he favors the cancer center project," he was not pushing hard for it "because New Haven politicians back a demand by District 1199 of the New England Health Care Employees Union . . . to unionize about 1,800 service workers at the hospital."[112] Indeed, the hospital's chief

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ments from the hospital through a "community benefits agreement." *See id.*; Cowan, *supra* note 102; Kim Martineau, *Cancer Center a Go in New Haven*, HARTFORD COURANT, Mar. 23, 2006, at A1. *See generally* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 509–17 (2009) (discussing community benefits agreements and their use in "labor-friendly redistribution," *id.* at 520).

106 *See generally* JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE (2005), http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf (describing the features of community benefits agreements and discussing recent examples); Schragger, *supra* note 105, at 508–12 (same). For an example of the City's embrace of accountable development, see Letter from City of New Haven Board of Aldermen to Joseph Zaccagnino, President and CEO, Yale–New Haven Hosp. (Mar. 16, 2005) [hereinafter Zaccagnino Letter] (on file with the Harvard Law School Library).

107 City of New Haven Bd. of Aldermen, Resolution Encouraging Developers to Enter into Community Benefits Agreements (May 17, 2004) (on file with the Harvard Law School Library).

108 Zaccagnino Letter, *supra* note 106.

109 *See, e.g.*, Marc Santora, *New Haven Mayor Declares Win in Primary for Governor*, N.Y. TIMES, Aug. 9, 2006, at B5 ("With strong support from organized labor, Mayor John DeStefano Jr. of New Haven declared victory last night in a close race for the Democratic nomination for governor of Connecticut . . . .").

110 Cowan, *supra* note 102.

111 Condon, *supra* note 98 (internal quotation mark omitted).

112 Editorial, *Cancer Center Stuck in Neutral*, HARTFORD COURANT, Nov. 6, 2005, at C2. In a later arbitration proceeding between Yale–New Haven Hospital and the union, the arbitrator concluded that "Mayor John DeStefano and the City of New Haven . . . were unwilling to issue

of staff was so frustrated by the delay in project approval by March of 2006 that he commented, "We couldn't build an outhouse at Yale–New Haven Hospital now and get it through the city planning process."[113]

When a public hearing on the cancer center development was finally scheduled for March 22, 2006, representatives from the City, the hospital, and the union met to negotiate a tripartite resolution.[114] The results of that negotiation were announced on March 23 at a city hall news conference and in an official press release from Mayor DeStefano's office titled "City, Yale New Haven Hospital and Union Reach Accord on Cancer Center."[115] The release quoted Mayor DeStefano as saying that the agreement "provides for all of our goals at once: state-of-the-art care for cancer patients and their families, good, stable jobs for residents of our City . . . and a fair and civil outcome on labor issues."[116] According to the Mayor, the agreement, which was to be sent to the Board of Aldermen for approval, contained three components. The first was a "land disposition agreement that governs the leasing and eventual transfer of property needed for the site."[117] The second was an agreement by the hospital to provide "a host of community benefits," including a voluntary payment to the City.[118] The third component was, finally, "an agreement between the hospital and Local 1199 that provides a fair process for a secret ballot election."[119]

Despite the relatively public approach that the Mayor's office took to these negotiations, when the City and the hospital formalized the Development Agreement approving the cancer center project, the Agreement reflected the first two components of this tripartite settlement, but not the third. Thus, through the Development Agreement, the City approved the project and committed to a specific project schedule,[120] and the hospital committed to its community benefit obligations — including several jobs programs, a youth initiative, and a

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zoning approvals within their purview absent movement by the employer toward a resolution of the union's organizing campaign." Kern Arbitration Award, *supra* note 98, at 2 (citation omitted).

113 Christopher Rowland, *Hospitals Expect Hardball Push to Unionize*, BOS. GLOBE, Mar. 24, 2006, at C1 (internal quotation marks omitted).

114 *See* Martineau, *supra* note 105 ("After pulling two near all-nighters, top executives for the hospital, the city and the unions reached a historic agreement Wednesday afternoon, just hours before a public hearing to discuss the project.").

115 Press Release, Office of the Mayor, City of New Haven, City, Yale New Haven Hospital and Union Reach Accord on Cancer Center (Mar. 23, 2006), *available at* http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID={592D8158-E1A9-40E6-A9C7-8CFA8AC55B29}.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *See* New Haven Development Agreement, *supra* note 103, § 3.02, at 10–12.

voluntary payment to the City.[121] No provision was made in the Development Agreement, however, for a union organizing process.[122]

Nonetheless, following the March settlement between the three parties, and under the mediation of Mayor DeStefano,[123] representatives of the employer and the union met in the Mayor's offices and "agreed to the terms of an election principles agreement."[124] Although the parties reached agreement on the new organizing rules on April 13, 2006,[125] implementation of the agreement was made contingent on New Haven issuing the requisite development approvals.[126] Those approvals were in fact issued on June 6, 2006,[127] and the agreement — formally titled the "Hospital and Union Representation Election Principles Agreement"[128] — became effective on June 7.[129]

The Election Principles Agreement established a series of union organizing rules that departed from the federal regime. For example, although the NLRA permits employers to hold one-on-one meetings with employees to discourage them from supporting unionization,[130] the Agreement here provided that "[h]ospital supervisors and managers . . . shall not initiate one-on-one conversations with Eligible Voters regarding the subject of unionization."[131] The employer also agreed, again in contradistinction to the requirements of the federal rules,[132] to provide union organizers with access to hospital property — indeed,

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121 *See id.* § 3.01, at 5–10.

122 *See id.* This formal separation between the acts of the local government and the private union-employer agreement is significant for several reasons, as discussed below at section IV.C, pp. 1202–10.

123 *See* Complaint at 3, Serv. Emps. Int'l Union v. Yale–New Haven Hosp., Inc., No. 3:06-cv-01673-JCH (D. Conn. Oct. 23, 2006) (on file with the Harvard Law School Library) (noting that Mayor De-Stefano acted as the "unofficial mediator" of the negotiations).

124 Kern Arbitration Award, *supra* note 98, at 2.

125 *Id.*; *see also* Affidavit of Ellen Dichner in Support of Plaintiffs' Application for Preliminary Injunction at 1, *Yale–New Haven Hospital*, No 3:06-cv-01673-JCH (on file with the Harvard Law School Library).

126 Kern Arbitration Award, *supra* note 98, at 2.

127 *See* New Haven Development Agreement, *supra* note 103.

128 The full agreement is available in Affidavit of Ellen Dichner in Support of Plaintiffs' Application for Preliminary Injunction, *supra* note 125, Exhibit A [hereinafter Election Principles Agreement].

129 Kern Arbitration Award, *supra* note 98, at 2 (noting that the agreement was in effect from June 7, 2006 to March 7, 2007, and stating that it was "[f]ollowing issuance of those approvals in early June 2006[that] the agreement went into effect"); *see also* Pickus Affidavit, *supra* note 98, at 2 (stating that effective date of agreement was June 7, 2006).

130 *See* Associated Milk Producers, Inc., 237 N.L.R.B. 879, 879–80 (1978). Between seventy-five and ninety-eight percent of employers in NRLB election campaigns do in fact hold one-on-one meetings. *See* Sachs, *supra* note 12, at 666 n.34.

131 Election Principles Agreement, *supra* note 128, Exhibit A at 4.

132 The federal rule was announced in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). *See generally* Estlund, *supra* note 12 (arguing that *Lechmere* constituted an overly broad understanding of a property owner's general "right to exclude").

the Agreement specified that the hospital would make available to the union a conference room for two-and-one-half hours each day for three days each week, and would provide union organizers access to the hospital atrium, cafeteria, break rooms, locker rooms, entrances, and parking lots.[133] In addition, although the NLRB does not "probe into the truth or falsity of . . . parties' campaign statements," and will not overturn elections on the basis of "misleading" speech,[134] both the hospital and the union here committed to communicating with employees in a "factual manner" and to disseminating only "accurate and factual information about their respective positions."[135] Disputes regarding the conduct of the organizing campaign were to be submitted to a private arbitrator selected by the parties, and the parties concomitantly agreed to waive their rights to have disputes resolved by the NLRB.[136]

Accordingly, through a tripartite political exchange involving the City's approval of the Yale–New Haven cancer center development plans, the hospital and the union redesigned the rules of organizing in an agreement with the force of federal labor law. The New Haven case also appears to be one of several in which tripartite exchanges center on the development permitting process. Another example is the

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[133] Election Principles Agreement, *supra* note 128, Exhibit A at 11.

[134] Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).

[135] Election Principles Agreement, *supra* note 128, Exhibit A at 5. The agreement also prohibited the parties from relying on "consultants or other representatives or surrogates to engage in activities inconsistent with the Agreement," *id.* at 7, thus barring reliance on so-called anti-union consultants — a practice not only permitted but nearly pervasive in NLRA organizing campaigns. *See* GORDON LAFER, AM. RIGHTS AT WORK, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS app. at 42 tbl.2 (2007) (reporting that employers rely on anti-union consultants in seventy-one to eighty-seven percent of NLRA election campaigns); John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197, 198 (2002) (estimating that annual spending on anti-union consultants is approximately $200 million); John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651, 656 (2006).

[136] Election Principles Agreement, *supra* note 128, Exhibit A at 8–9. The City's involvement in the organizing process at Yale–New Haven did not end with the signing of the Election Procedures Agreement and the grant of the development approvals. When, during the union's organizing campaign, the hospital violated the ban on consultants and one-on-one meetings contained in the Election Principles Agreement, Mayor DeStefano reinserted the City into the relationship between the union and the hospital. He told the *Hartford Courant*, for example, that the "City government was misled . . . in this instance by hospital management that signed this agreement, got what it wanted and did exactly what we agreed would not be done." Kim Martineau, *Unionizing Vote Called Off*, HARTFORD COURANT, Dec. 15, 2006, at B1 (internal quotation marks omitted). When transcripts from an arbitration hearing — conducted pursuant to the agreement — showed that the hospital had engaged in anti-union conduct prohibited by the agreement, Mayor DeStefano told the *New Haven Register* that the "hospital is endangering the delivery of their own project," and that he was "not inclined to be supportive of anything that enables the hospital when they are acting this way." Mary E. O'Leary, *Mayor Rips into Y-NH*, NEW HAVEN REG., Mar. 11, 2007 (internal quotation marks omitted). Although Mayor DeStefano did not specify what type of support he might withhold, his statements were made at a time when city approvals were still required for the cancer center's parking garage and office building. *See id.*

Hollywood and Highland development in Los Angeles where, again, the city council tied its approval of the project to, among other things, the developer's commitment to a card check and neutrality agreement for the workers who would staff the site's new hotel.[137] Although fewer details are available, it also appears that the Los Angeles City Council's approval of the Playa Vista Development was contingent upon the developer's agreement to enter into a neutrality agreement for the service workers to be employed at the site.[138]

2. The California Alliance to Advance Nursing Home Care. — Across the last decades of the twentieth century, unionization of nursing home employees was a contentious business.[139] Management fought unionization ferociously in these years, and nursing home unions had limited success organizing new workers through traditional NLRB election campaigns.[140] California proved to be one of the primary battlegrounds, and the difficulties faced by unions nationally were also encountered by the Service Employees International Union, the largest union of nursing home employees in the state.[141]

Across these same years, two primary problems concerned nursing home employers in California. The nursing home industry there, like the nursing home industry nationally, receives a substantial portion of its revenue from the state's Medicaid program — known as Medi-

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[137] The Los Angeles Community Redevelopment Agency contributed $98 million to the Hollywood and Highland Project, but the funds went to finance the construction of the Kodak Theater and the nearby parking garage. *See* Cooperation Agreement Between the Community Redevelopment Agency of the City of Los Angeles and the City of Los Angeles, Hollywood and Highland 1 (2002) (on file with the Harvard Law School Library). Again, therefore, there is no plausible claim that the City had a proprietary interest in the unionization of the hotel workers. Although, as in the New Haven Development Agreement, the Hollywood and Highland agreement made no mention of organizing rights, multiple accounts suggest the connection. *See, e.g.*, Greg Goldin, *Mall-ywood*, L.A. WKLY., Dec. 18, 1998, at 30 ("[Developers] agreed not to block unionization efforts at their hotel. Henceforth, Goldberg would become their biggest and most important booster."); Harold Meyerson, *A Vision for the City*, L.A. WKLY., Mar. 9, 2001, at 24 ("Progressive Council Member Jackie Goldberg okayed the construction of the massive Hollywood & Highland project on the condition[] that the hotel on the site not oppose the efforts of its workers to form a union . . . ."). Academic accounts of the project report the same arrangement. *See* Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 205–06 ("In Los Angeles, [the Los Angeles Alliance for a New Economy] worked closely with Councilwoman Jackie Goldberg to incorporate a community benefits package — which included provisions for . . . card check neutrality . . . — into the 1998 development agreement for a large entertainment and retail project in Hollywood."); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements*, PRAC. REAL EST. LAW., July 2008, at 19, 22 ("[I]n exchange for community support, the developer offered to . . . implement . . . a policy of union neutrality.").

[138] *See* Bobbi Murray, *Dream Deal*, L.A. WKLY., May 28, 1999, at 20.

[139] For an overview, see, for example, STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT: AN INSIDE STUDY OF THE AMERICAN LABOR MOVEMENT (2004).

[140] *See, e.g.*, Erin Johansson, Labor-Management Partnerships as a Means to Employer Neutrality 8 (Dec. 14, 2003) (unpublished manuscript) (on file with the Harvard Law School Library).

[141] *See, e.g.*, *id.*

Cal.[142] Because Medi-Cal funding streams were crucial for the nursing home industry, reimbursement rates — that is, the rates at which nursing homes were paid to care for Medi-Cal eligible residents — were a continual issue for the industry.[143] The second source of concern for California nursing homes throughout the 1990s and early 2000s was the liability costs associated with medical malpractice claims.[144] Thus, in 2002, the California Association of Health Facilities (CAHF) reported that liability premiums for its members grew from approximately $300 per patient bed in 1999 to $1350 per bed in 2002–2003, and predicted that costs would rise to $3000 per bed by 2006.[145] While the actual relationship between malpractice awards and liability insurance costs was contested,[146] the nursing home industry viewed malpractice lawsuits and state laws governing tort litigation as the primary culprits for rising costs. It accordingly sought reforms that would cap tort damage awards and change the rules of evidence

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[142] In California in 2001, for example, 68.8% of all "patient days" were accounted for by Medi-Cal-funded residents. *See* CHARLENE HARRINGTON ET AL., IMPACT OF CALIFORNIA'S MEDI-CAL LONG TERM CARE REIMBURSEMENT ACT ON ACCESS, QUALITY AND COSTS 22 tbl.1 (2008) (on file with the Harvard Law School Library). That year, the Medi-Cal system funded over $2 billion in nursing home payments, or 57.1% of nursing home revenues. *See id.* at 27 tbl.4.

[143] *See id.* at 1. Medi-Cal reimbursement rates, of course, were also of great import to nursing home workers, as wage and staffing levels depended to a large degree on these reimbursement rates. *See id.* at v (summarizing wage effects of changes in Medi-Cal reimbursement rates). Prior to reforms enacted in 2005, nursing homes in California were reimbursed according to a flat fee payment system. Under this system, reimbursement was set by a fee schedule, and if — as often was the case — the costs of care exceeded the approved fee, nursing homes were unable to recover the difference. *See, e.g.*, *id.*; *see also* CAL. HEALTHCARE FOUND., CALIFORNIA'S NURSING HOMES: A SYSTEM IN TROUBLE 1 (2003), *available at* http://www.chcf.org/~/media/Files/PDF/N/PDF%20NursingHomesFinanceIB.pdf. According to one press account, a 2003 accounting report concluded that California nursing homes spent "an average of $6.66 more per day to care for Medi-Cal patients than they were paid by the state." Kathy Robertson, *Bill Ensures Profit for Nursing Homes*, SACRAMENTO BUS. J., Aug. 20, 2004, at 1. In 2003, moreover, facing overall budget deficits, California proposed cutting Medi-Cal reimbursement rates by a full fifteen percent. *See, e.g.*, Sandy Kleffman, *Health Care Cuts Spark Objections*, CONTRA COSTA TIMES (Cal.), Jan. 15, 2003, at A1. The California Association of Health Facilities predicted that 300 to 400 nursing homes would be bankrupted by the cuts. *See id.*

[144] *See, e.g.*, HERBERT J. HOROWITZ ET AL., THE FINANCIAL HEALTH OF THE CALIFORNIA NURSING HOME INDUSTRY 31–32 (2006), *available at* http://www.chcf.org/~/media/Files/PDF/N/PDF%20NursingHomesFinanceReport.pdf; Thomas Peele, *$8 Million Crusade Eyed to Cut Elder-Care Suits*, CONTRA COSTA TIMES (Cal.), Nov. 9, 2002, at A3; Nancy Weaver Teichert, *California Nursing Homes Ask for Cap on Liability Awards*, SACRAMENTO BEE, Feb. 18, 2003.

[145] *See* HOROWITZ ET AL., *supra* note 144, at 31. Similarly, a report commissioned by the American Health Care Association concluded that liability loss costs for long-term care providers in California (including nursing homes) rose from $970 per bed in 1995 to $2320 per bed in 2001. *See id.*

[146] *See, e.g.*, Peele, *supra* note 144.

in medical malpractice proceedings.[147] In 2002, CAHF announced an $8 million lobbying effort designed to "limit lawsuit awards and restrict trial evidence."[148]

In December 2002, a coalition of eighteen nursing home employers and SEIU created an organization called the California Alliance to Advance Nursing Home Care, which came to be known simply as the California Alliance.[149] The Alliance members then executed a contract — titled the "Agreement to Advance the Future of Nursing Home Care in California"[150] — which contained a detailed set of rules for union organizing and collective bargaining that departed in substantial ways from the NLRA regime.[151] The Agreement, however, made the implementation of these new rules conditional on several legislative actions by the State of California. Namely, the privately negotiated organizing and bargaining process was to come into effect if, and only if, California enacted certain legislative reforms: first, amendments to the Medi-Cal reimbursement regime that would "substantially increase funding" and ensure nursing homes a "guaranteed . . . rate of return";[152] and, second, a "package of tort . . . reforms."[153] The Agreement styled these reforms as "benchmarks": if a benchmark was achieved — if the legislature enacted the parties' specified reform — the organizing and bargaining agreement would go into effect for a predetermined number of nursing homes operated by the signatory employers.[154]

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147 In 1975, California had capped noneconomic damages in medical malpractice suits at $250,000. *See* Medical Injury Compensation Reform Act of 1975 (MICRA), CAL. CIV. CODE §§ 3333.1–.2 (Deering 2005). But a 1991 state statute, the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), CAL. WELF. & INST. CODE §§ 15600–15660 (Deering 2006), and a set of state court decisions interpreting EADACPA, removed nursing homes from MICRA's protection. *See* Covenant Care, Inc. v. Superior Court, 86 P.3d 290 (Cal. 2004); Delaney v. Baker, 971 P.2d 986 (Cal. 1999).

148 Peele, *supra* note 144.

149 *See* Agreement to Advance the Future of Nursing Home Care in California 19 app. B (Feb. 6, 2004) [hereinafter California Alliance Agreement], *available at* http://www.consumerwatchdog.org/resources/AgreementAdvanceNHCareCA.pdf.

150 *Id.* at 3 (noting that the original Agreement was signed on December 9, 2002). Brudney makes reference to this agreement. Brudney, *supra* note 7, at 838 n.83.

151 *See* California Alliance Agreement, *supra* note 149, at 43 app. C ("Neutrality in Organizing Agreement").

152 *Id.* at 6.

153 *Id.* The Agreement did not define tort reform with specificity. For a discussion, see *infra* p. 1185.

154 *See* California Alliance Agreement, *supra* note 149, at 6–8. There were several other "interim" benchmarks included in the Agreement, which the parties were to seek while attempting to secure broader Medi-Cal rate reform. *See id.* at 7. Interim benchmarks included "the 2004–2005 SNF [Skilled Nursing Facility] Medi-Cal rate not being reduced from where it is presently frozen," "increasing the frozen 2004–2005 SNF Medi-Cal rate by a statewide average of at least 3%," and "California's government officially submitting a provider tax funding plan to CMS [Congressional Medicaid Service] that was approved in final form by a binding vote of the LMC Board."

With respect to both Medi-Cal rate reform and tort reform, the political calculus underlying the Alliance Agreement was straightforward. The nursing home industry had support from Republicans in the state legislature, but, particularly given Democratic control of the statehouse, the industry did not have sufficient political support to secure passage of either piece of legislation on its own.[155] Indeed, past efforts by the nursing home industry to secure rate reform and tort reform legislation had been unsuccessful.[156] The union, however, had wide support from Democratic lawmakers, and SEIU was considered among the strongest organizations in state Democratic politics at the time.[157] In the view of the Alliance employers, then, achieving Medi-Cal and tort reform required SEIU's political strength.

After executing the Alliance Agreement, the parties sought to secure enactment of the legislative reforms contained in the Agreement's benchmarks. The first campaign was for Medi-Cal rate reform, and it was a successful one. The Alliance drafted legislation that became Assembly Bill 1629 and secured its introduction in the legislature.[158] As called for in the Alliance Agreement, the bill proposed substantial changes to the reimbursement process for nursing home care.[159] Significantly, the legislation provided for an "operating allocation," which had originally been named a "rate of return," in accordance with the

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Id. at 8. It appears that all of these benchmarks were met. *See* SEIU UNITED HEALTHCARE WORKERS W., BUILDING A NATIONAL HEALTHCARE WORKERS' MOVEMENT 13 (2006), *available at* http://s3.amazonaws.com/seiuvoice.org/downloads/UHW_paper_on_Building_a_National_Healthcare_Workers_Movement_4-22-06.pdf ("We . . . fought off proposed Medi-Cal cuts of 15%, even winning a COLA . . . ."); Email from Beverly A. Boston, Special Assistant to the Grp. Dir., Ctr. for Medicaid & State Operations, Ctrs. for Medicare & Medicaid Servs. to author (Mar. 2, 2010, 17:26:39 EST) (on file with the Harvard Law School Library) (confirming that California submitted a provider tax funding plan in 2005 and that the plan was approved by the Centers for Medicare and Medicaid Services).

155 *See, e.g.*, Johansson, *supra* note 140, at 9.

156 *See id.*

157 On SEIU's political strength in California, see, for example, Ruth Milkman & Daisy Rooks, *California Union Membership: A Turn-of-the-Century Portrait*, *in* UNIV. OF CAL. INST. FOR LABOR AND EMP'T, THE STATE OF CALIFORNIA LABOR (2003), *available at* http://escholarship.org/uc/item/94x791km; and Harold Meyerson, *California's Progressive Mosaic*, AM. PROSPECT, June 18, 2001, at 17, 22. *See also Morning Edition: Powerful Interest Groups Target California Budget Deal* (NPR radio broadcast July 22, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=106876626 (reporting that SEIU is one of the most powerful interest groups in California politics).

158 According to the California Senate Health and Human Services Committee report, "In July 2003, SEIU submitted a revised proposal jointly with a group of nursing home providers who had joined with SEIU to form an Alliance to reform nursing homes. The proposal contained in AB 1629 is based on the actual cost of providing care . . . ." S. HEALTH & HUMAN SERVS., Committee Analysis, A.B. 1619, 2003–2004 Reg. Sess. (Cal. 2004) [hereinafter HHS Committee Analysis].

159 In place of the previous flat-fee payment system, the new legislation created a cost-based reimbursement regime. CAL. WELF. & INST. CODE § 14126.021 (Deering 2006); *see also* HARRINGTON ET AL., *supra* note 142, at 1.

Alliance Agreement's benchmark.[160] The legislation, accordingly, would ensure that nursing homes earned a five percent rate of return on all Medi-Cal funded residents.[161]

After the bill was introduced, the Alliance members pressed for its enactment.[162] In addition to engaging in traditional lobbying activities, the union mobilized thousands of members to push the legislation publicly.[163] The union and nursing home employers also jointly coordinated protest activities involving nursing home residents as a "call [to] state legislators to pass" Assembly Bill 1629.[164] And indeed, by the fall of 2004, the employers' political calculus had proved correct: the Medi-Cal Long-Term Care Reimbursement Act[165] became law, and the Alliance's support and lobbying efforts were widely credited with ensuring the legislation's passage.[166] As the *San Diego Union-Tribune* reported, "State lawmakers approved the . . . payment system in the closing days of their 2004 session with support from the nursing home industry and the Service Employees International Union . . . ."[167]

Enactment of the Long-Term Care Reimbursement Act satisfied the Alliance Agreement's first legislative benchmark: the Act had the effect of substantially increasing funding while also providing employers a guaranteed rate of return.[168] Thus, when California enacted the legislation, the Agreement's private organizing and bargaining rules went into effect at Alliance nursing home facilities. Under the Agreement, employers were required to remain entirely "neutral" on the question of unionization and to avoid all interventions into employee

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[160] *See* HHS Committee Analysis, *supra* note 158. Under this provision of the law, nursing homes were to be reimbursed, in addition to their actual operating expenses, an amount equal to five percent of total Medi-Cal costs. *See* WELF. & INST. § 14126.023(c)(3); HHS Committee Analysis, *supra* note 158; HARRINGTON ET AL., *supra* note 142, at 1.

[161] *See* Robertson, *supra* note 143 ("Assembly Bill 1629 also would assure operators of receiving annual nursing home profits of 5 percent . . . .").

[162] *See id.*; *see also* Matt Smith, *Gutted*, S.F. WKLY., Aug. 25, 2004.

[163] *See, e.g.*, *Statewide Coalition, Assembly Majority Leader Dario Frommer to Call on Governor: Keep Nursing Home Funding Reform Moving Forward to Protect Seniors!*, PR NEWSWIRE, May 17, 2005; *see also* SEIU United Healthcare Workers-West, The California Alliance Agreement: Lessons Learned in Moving Forward in Organizing California's Nursing Home Industry 1 (Jan. 4, 2007) (on file with the Harvard Law School Library).

[164] *San Jose Nursing Homes Protest Underfunding*, PR NEWSWIRE, Aug. 10, 2004; *see also* Smith, *supra* note 162.

[165] Medi-Cal Long-Term Care Reimbursement Act, ch. 875, 2004 Cal. Legis. Serv. (West) (codified in scattered sections of CAL. HEALTH & SAFETY CODE and CAL. WELF. & INST. CODE).

[166] *See, e.g.*, Kathy Robertson, *Study: Nursing Homes Not Improving*, SACRAMENTO BUS. J., Apr. 18, 2008 (reporting that SEIU "collaborated with nursing home companies to get the funding bill signed in 2004").

[167] Keith Darcé, *Who Benefited Most from Higher Medi-Cal Payments?*, SAN DIEGO UNION-TRIB., Apr. 11, 2008, at C1.

[168] A 2008 study concluded that nursing home operating margins increased by 747% between 2004 and 2006. HARRINGTON ET AL., *supra* note 142, at vi.

organizing efforts.[169] Specifically, the Agreement required that the employer "take all reasonable steps to insure that its . . . managers, supervisors, and other agents . . . do not attempt to influence employees' choice in any manner."[170] In lieu of an NLRB election, workers covered by the Agreement were to express their preferences on the union question either through a card check process or through a privately run secret ballot election, conducted according to rules and procedures established by the parties.[171] And, unlike the NLRA rules that provide union organizers no access to company property, the Alliance Agreement dictated that the employer must grant union organizers "reasonable access to non-working areas of [its] facilities . . . for the purpose of allowing them to communicate with employees."[172]

In addition to these organizing rules, the Alliance Agreement also changed the way collective bargaining was to proceed in the event that workers in a covered nursing home chose to unionize. In another departure from the federal regime, the Alliance Agreement established an interest arbitration procedure for first contract bargaining. Under this provision, if the parties did not reach "complete agreement" on all of the terms for the first contract of a newly unionized facility within ninety days of the first bargaining session, "unresolved issues" were to be submitted to an arbitrator for resolution.[173]

The Agreement's other legislative benchmark was the state legislature's enactment of a "mutually-agreed upon package of tort and regulatory reforms."[174] The Agreement did not specify the types of reforms that would satisfy the benchmark, and there is no record of the specific reforms upon which the Alliance members mutually agreed. It is clear, however, that the Alliance sought to secure tort reform in California. One union spokesperson, for example, stated that the current tort system was "an issue that constrains resources . . . [and] has to be tackled,"[175] and that "SEIU has helped the industry support tort reform."[176] Nonetheless, the Alliance ultimately abandoned its efforts

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169 *See* California Alliance Agreement, *supra* note 149, at 43.

170 *Id.* at 45.

171 *Id.* at 46. Under the card check option, no election is held. Instead, "the Union shall be considered the representative of the bargaining unit if it acquires the signatures of more than 50% of the employees . . . on valid authorization cards." *Id.*

172 *Id.* The Agreement goes on to define reasonable access: "'Reasonable access to non-working areas within the facility' is intended to mean that union representatives may be in those areas for up to two (2) hours each day during the day and evening shifts and one (1) hour during the night shift." *Id.*

173 *Id.* at 48.

174 *Id.* at 6.

175 Kathy Robertson, *Deal Between Union, Industry Could Pave Way for Tort Reform*, SACRAMENTO BUS. J., Aug. 20, 2004.

176 Matt Smith, *Partners in Slime*, S.F. WKLY., June 30, 2004.

to secure legislative enactment of these reforms.[177] Because the state did not enact a "mutually-agreed upon package of tort reforms," the Agreement's organizing and bargaining rules were not extended to additional nursing home facilities.

In sum, then, through a tripartite political exchange — this one involving state Medicaid rules — nursing home employers and the nursing home workers' union redesigned the rules of organizing and bargaining in an Agreement with the force of federal law.[178] The California union–nursing home alliance, moreover, became a model replicated in other states, including Washington and Oregon.[179] As in California, Washington nursing home employers viewed the state's Medicaid payment rates as inadequate,[180] yet lacked the ability to secure increases in Medicaid funding without support from Democratic legislators.[181] Accordingly, in 2005, six nursing home chains and SEIU Local 775 established Washington United for Quality Nursing Home Care.[182] The Washington alliance agreement tied the implementation of new organizing and bargaining rules to the enactment of state Medicaid legislation increasing reimbursements to nursing homes.[183] And

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[177] *See, e.g.*, William Johnson, *Deserting the Sick and Elderly, Some Unions Join Employers Seeking to Limit Lawsuits*, LABOR NOTES, Sept. 2004, at 3 (quoting SEIU spokesperson as stating that tort reform was "off the table" (internal quotation marks omitted)).

[178] An early, though smaller-scale, experiment with an Alliance-type agreement came in 1995 in Massachusetts. *See* Creating a New Partnership (Dec. 14, 1995) (on file with the Harvard Law School Library) (agreement between SEIU Local 509 and the Cooperative for Human Services, Renaissance Club, Inc., Better Community Living, Inc., and Cambridge and Somerville Cooperative Apartment Project, Inc.); *see also* James Green, *Improving Workforce Conditions in Private Human Services Agencies: A Partnership Between a Union and Human Service Providers*, 13 NEW ENG. J. PUB. POL'Y 187, 193 (1997) ("If the employers remained neutral, the union could help lobby the government . . . ."); *cf.* Brudney, *supra* note 7, at 837.

[179] Because less information is available about the Oregon agreement, I do not discuss it here. For the parts of the Washington agreement that are available, see Agreement to Advance the Future of Nursing Home Care in Washington (Jan. 19, 2006) [hereinafter Washington Alliance Agreement], *available at* http://www.consumerwatchdog.org/resources/AgreementAdvanceNHCareWA.pdf. For the parts of the Oregon agreement that are available, see Alliance Agreement Between SEIU Local 503 and Oregon Nursing Home Signatories (July 6, 2006), *available at* http://www.consumerwatchdog.org/resources/AgreementAdvanceNHCareWA.pdf.

[180] *See* Ralph Thomas, *Union, Nursing Home Alliance Team Up*, SEATTLE TIMES (Mar. 20, 2007, 3:03 PM), http://seattletimes.nwsource.com/html/localnews/2003601276_seiu05m.html ("[N]ursing-home operators say the Medicaid payment rates set by the Legislature fall far short of actual costs.").

[181] *See id.* (quoting nursing home CEO as stating "[w]e've been very unsuccessful in getting adequate reimbursement from the Legislature").

[182] *See id.* A complete copy of the Washington United for Quality Nursing Home Care agreement has not been made available publicly. The several pages that are available make clear that the structure of the Washington agreement mirrored that of the California one. *See* Washington Alliance Agreement, *supra* note 179. Thus, the agreement is structured according to "benchmarks," *id.* at 3, and contains a neutrality agreement, *see id.* at 2 (table of contents).

[183] *See* Thomas, *supra* note 180.

with SEIU's political support,[184] the effort was again successful: the state legislature passed a $10 million Medicaid reimbursement increase for nursing homes, which "the union and operators had set as their 'Phase I' goal in the agreement."[185] With the legislative benchmark achieved, the agreement's organizing and bargaining rules went into effect at alliance nursing homes.[186]

3. The Communications Workers of America and the SBC-PacTel Merger. — The next example involves the Communications Workers of America (CWA) — the largest union of telecommunications workers in the United States[187] — and Pacific Telesis Group (PacTel). Prior to the breakup of the Bell system in the early 1980s, the union represented approximately 650,000 employees of the major telephone companies.[188] In the post-divestiture period, however, the union began to suffer huge membership losses.[189] Traditional organizing campaigns conducted under NLRA rules were largely unsuccessful. Between 1985 and 1997, CWA added a mere 6104 members through these drives.[190] Accordingly, beginning in the 1990s, the union actively sought alternatives to the NLRA's organizing rules. For the telephone industry, the 1990s were an era that called for reconsolidation, and the Regional Bell Operating Companies — which had emerged from the breakup of the Bell system — actively sought merger approvals from state public utilities commissions.[191]

An illustrative example came in the middle of the decade when Southwestern Bell Company (SBC) sought to acquire PacTel in a merger that required approval by the California Public Utilities Commis-

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184 Again, SEIU engaged not only in traditional lobbying activity, but also in public demonstrations designed to push the Medicaid legislation. The union held a rally in February 2007, *see* Thomas, *supra* note 180, and union members met with state legislators during "Purple Presence" and "Lobby Day," *see What Do the Budget Cuts Mean for Home Care in Washington State?*, SEIU HEALTHCARE 775NW, http://www.seiu775.org/issuesandaction/wa/What_do_the_budget_cuts_mean_for_home_care_in_Washington_State_.aspx (last visited Jan. 30, 2011). As one Washington nursing home employer stated, "SEIU provided the experience, contacts and media savvy that those of us in long-term health care simply didn't have." Dan Richman, *Union Struggles Evolving*, SEATTLE POST-INTELLIGENCER, Sept. 4, 2006, at D1.

185 Thomas, *supra* note 180.

186 The specific organizing and bargaining rules are unavailable. The agreement's table of contents, which is available, refers to an employer neutrality commitment. *See* Washington Alliance Agreement, *supra* note 179, at 2. Press accounts state that the employer members of the Washington alliance "bless[ed] the union's organizing efforts," Thomas, *supra* note 180, and that the employers "let[] the union organize workers," Richman, *supra* note 184.

187 *See About CWA*, COMMC'NS WORKERS OF AM., http://www.cwa-union.org/pages/about_cwa (last visited Jan. 30, 2011).

188 Katz, Batt & Keefe, *supra* note 7, at 576.

189 *See id.*

190 *Id.* at 580 tbl.2.

191 *Id.* at 577, 579; *see also* COMMC'NS WORKERS OF AM., CWA AT SOUTHWESTERN BELL: FIVE YEARS TO CARD CHECK (1997).

sion (CPUC) and the Nevada Public Service Commission (NPSC).[192] District 9 of the CWA, which represented PacTel employees in California, originally opposed the merger.[193] In the summer of 1996, however, after CWA filed notices of opposition with the California and Nevada utilities commissions, representatives from the union met with PacTel and SBC in Phoenix, Arizona. At this meeting, SBC agreed that if CWA would support SBC's merger with PacTel, the company would consent to a card check and neutrality organizing process for PacTel workers in California and Nevada.[194]

Following the Phoenix meeting, CWA reversed its position on the SBC-PacTel merger in both California and Nevada. In California, the union filed a letter with the CPUC in which it "withdr[ew] its opposition to the merger, and stat[ed] that CWA ha[d] decided to fully support the merger application."[195] Then, in March 1997, CWA District 9 Vice President Tony Bixler sent letters to each of the CPUC Commissioners in which he expressed CWA's position that the proposed merger was "fair and reasonable to employees."[196] Similarly, on March 24, Bixler met directly with three of the five CPUC Commissioners, again to state that "CWA had opposed the merger but has come to support it

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192 *See* Pac. Telesis Grp., 71 C.P.U.C. 2d 351 (1997); Petition for Leave to Intervene, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-5036 (Pub. Serv. Comm'n Nev. June 25, 1996) (on file with the Harvard Law School Library); *see also* COMMC'NS WORKERS OF AM., *supra* note 191, at 20; Katz, Batt & Keefe, *supra* note 7, at 587. Brudney and Hartley reference other instances in which CWA intervened in local regulatory processes to achieve organizing goals. *See* Brudney, *supra* note 7, at 838 n.84; Hartley, *supra* note 7, at 391.

193 *See* Prehearing Conference Statement of Communications Workers of America, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-04-038 (Cal. Pub. Utils. Comm'n June 13, 1996) (on file with the Harvard Law School Library); Petition for Leave to Intervene, *supra* note 192.

194 *See* COMMC'NS WORKERS OF AM., *supra* note 191, at 20–21; Telephone Interview with CWA Official (Nov. 25, 2009). Representatives from CWA Region 6, which represented SBC employees, also attended. *See id.*

195 Pac. Telesis Grp., 71 C.P.U.C. at 361.

196 *See* Augmented Notice of Ex Parte Communications, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-04-038 (Cal. Pub. Utils. Comm'n Mar. 21, 1997) (on file with the Harvard Law School Library) (reproducing letters from Tony Bixler to Commissioners Bilas, Knight, Conlon, and Duque). At the time CWA sent these letters, two CPUC administrative law judges had recommended that the merger be approved, but conditioned that recommendation on a requirement that Pacific Bell refund $590.5 million to ratepayers. *See Quickly Accepting Conciliatory California PUC Terms, SBC, Pacific Telesis Close on $16.5 Billion Merger*, TR DAILY, Apr. 1, 1997. The original refund condition had been rejected by SBC and PacTel as prohibitive of the merger. *See id.* As such, CWA's involvement at this point in the proceedings took the form of support for the merger and opposition to the $590.5 million refund condition. *See* Letter from Tony Bixler, Vice President, CWA Dist. 9, to Richard A. Bilas, Comm'r, Cal. Pub. Utils. Comm'n 2 (Mar. 13, 1997), *in* Augmented Notice of Ex Parte Communications, *supra* ("CWA supports the SBC-Pacific Telesis merger . . . [and] [w]e urge the Commission to mitigate what we see as the more punitive aspects of the ALJs' Proposed Decision."); *id.* ("[T]he enormous size of the ordered customer rate reductions is very troubling.").

as good for employees" in California.[197] The CPUC approved the SBC-PacTel merger on March 31, 1997.[198] Events followed a similar course in Nevada, with the NPSC approving the merger on December 31, 1996.[199]

In accordance with the agreement reached in Phoenix, PacTel and CWA entered into a card check and neutrality agreement in April 1997.[200] Although the language of the CWA-PacTel agreement is not available, according to the union a "similar agreement" was signed between CWA and SBC for employees in Arkansas, Kansas, Missouri, Oklahoma, and Texas in March 1997.[201] Under that agreement, SBC agreed to provide CWA with lists of eligible employees and access to company property,[202] and to recognize the union based on a card check.[203] With respect to conduct during organizing campaigns, the agreement required the employer to "remain neutral and . . . neither assist nor hinder the Union on the issue of Union representation."[204]

4. A Note on Gamesa Corporation. — Although far fewer details are available, a final — if partial — example comes from the manufacturing sector and an agreement between the United Steelworkers of America (USWA) and the Gamesa Corporation. Between 2004 and 2006, Gamesa — the world's second-largest wind energy company[205] — opened two production facilities in Pennsylvania.[206] Much has been written about Gamesa's motivation to locate in Pennsylvania, but press accounts focus on state legislation requiring that eighteen percent of Pennsylvania's electricity come from alternative energy

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197 Docket Sheet, Document # 970310622, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-04-038 (Mar. 25, 1997) (on file with the Harvard Law School Library) (reporting that "[o]n 3/24/97, Tony Bixler, CWA, met with Cmmrs. Knight, Neeper, and Duque in separate meetings in SF").

198 *See* Pac. Telesis Grp., 71 C.P.U.C. at 360; *see also Quickly Accepting Conciliatory California PUC Terms*, *supra* note 196. The CPUC not only approved the merger one week after Bixler visited with Commission members, but also cut by more than half the amount that SBC was required to refund to ratepayers. *See id.*

199 *See* Order, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-5036 (Pub. Serv. Comm'n Nev. Dec. 31, 1996) (on file with the Harvard Law School Library).

200 *See* COMMC'NS WORKERS OF AM., *supra* note 191, at 22.

201 *See id.* The Memorandum of Agreement is available at *id.* at 24 app. [hereinafter SBC-CWA Memorandum of Agreement].

202 *See* SBC-CWA Memorandum of Agreement, *supra* note 201, ¶¶ 3(a)–(b), at 24.

203 *See id.* ¶¶ 3(d)–(e), at 25.

204 *Id.* ¶ 4(a), at 25.

205 *See* Joan Fitzgerald, *Getting Serious About Good Jobs*, AM. PROSPECT, Nov. 2006, at 33, 36.

206 *See id.*; Jim Grossfeld, *Leo the Linchpin*, AM. PROSPECT, Oct. 2007, at 34, 36; Mischa Gaus, *Getting Detroit Back to Work*, LABOR NOTES (May 15, 2009, 8:24 AM), http://www.labornotes.org/node/2252 ("The Spanish wind-turbine manufacturer [Gamesa] moved into the shell of the old U.S. Steel Fairless Works outside of Philadelphia . . . .").

sources (like wind power) by 2020[207] — legislation that essentially "create[d] a market" for Gamesa's product.[208] Part of the story of how and why Gamesa located in Pennsylvania, however, involves the USWA and the influence that union had in state politics generally and with Governor Ed Rendell in particular. Although little is known about this part of the Gamesa story, one press account describes the role played by the USWA this way: "The Steelworkers union traded political support for the governor for his help in retooling the 'brown belt' of abandoned factories dotting the state."[209] Another, reporting on the influence of USWA president Leo Gerard, described the USWA role this way:

> Though Gerard demurs from taking credit for Gamesa, it's no secret that what helped clinch the deal was the state's commitment to have 18 percent of Pennsylvania's electricity come from clean technologies by 2020. That commitment wouldn't have happened without the support of the USW. Perhaps the best measure of the Steelworkers' role in helping Gamesa settle in Pennsylvania is the fact that the company did everything but roll out a red carpet when the union's organizers came to call.[210]

Indeed, when Gamesa agreed to locate in Pennsylvania, it also agreed to replace the NLRA's organizing rules with private ones, including a card check recognition process and employer neutrality.[211]

B. The Government's Role

In each of the instances described above, organizing and bargaining rules were redesigned through a political process in which local governments, unions, and employers played a role. In each example, state and local government actions in areas of law unrelated to labor were exchanged for private compacts through which unions and employers adopted alternatives to the NLRA rules. Although these are unifying

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[207] The Alternative Energy Portfolio Standards Act is codified at 73 PA. CONS. STAT. ANN. §§ 1648.1–.8 (West 2008). For press accounts, see, for example, Brad Bumsted, *Analysis: Rendell Future Might Be in Wind*, PITTSBURGH TRIB.-REV., Apr. 4, 2007; Allison M. Heinrichs, *Growing Pains Ahead as State Develops Wind Power*, PITTSBURGH TRIB.-REV., Aug. 3, 2008; Jim McKay, *What's the Alternative?*, PITTSBURGH POST-GAZETTE, Oct. 23, 2005, at K-1; Paula Reed Ward, *Windmills to Power Cambria County Economy*, PITTSBURGH POST-GAZETTE, Jan. 15, 2005, at A-9.

[208] Fitzgerald, *supra* note 205, at 37.

[209] Gaus, *supra* note 206.

[210] Grossfeld, *supra* note 206, at 36.

[211] *See, e.g.*, *Gamesa Technology Corporation, Inc.*, AM. RIGHTS AT WORK, http://www.americanrightsatwork.org/labor-day-list/2008-companies/gamesa-technology-corporation-inc-20080819-623-365-365.html (last visited Jan. 30, 2011) ("Known for its progressive relationships with European labor unions, it was a logical decision for the company to embrace a neutrality agreement and voluntarily recognize the decision of a majority of its employees to choose union representation."). As one report concluded, "Gamesa's investment netted the union not just jobs . . . but a card check recognition agreement covering its 600 workers." Gaus, *supra* note 206.

features of this form of labor lawmaking, the government's role varies across the different examples. More specifically, the *reasons* for the government's action are clearer in some forms of tripartite lawmaking than in others.

In the New Haven Cancer Center agreement, the local government, the union, and the employer engaged in tripartite negotiations, and the government's actions were quite clearly tied to union-employer agreement on organizing rules: the local government acted, at least in part, because its actions had the effect of reordering the rules of organizing and bargaining. But in other instances, the reasons for the government's actions are less clear. In the California Alliance and the CWA-PacTel agreements, for example, the state governments acted in areas of law with no ostensible connection to labor policy, and without any signal that labor policy motivated their decisions. While the unions and employers clearly reordered their organizing rules because of the governmental actions, it is less clear whether the governments acted because their actions would have this effect. Thus, while all cases of tripartism depend upon the public acts of local governments, determining whether local governments are acting in nonlabor areas of law *because* their decisions contribute to the reordering of union organizing and bargaining rules will clarify the local governments' role.

Part V takes up the question of whether inquiring into governmental motive might be an appropriate means of enhancing labor preemption doctrine. This section, however, merely examines whether the reordering of organizing and bargaining rules is a but-for motivation for the state and local government action. Although such inquiries are notoriously fraught endeavors,[212] then-Professor Elena Kagan has offered a way to approach the but-for inquiry into legislative motive that is appropriate here.[213] As Kagan explains, determining "whether a particular factor played a but-for role in a [legislative] decision-making process" requires "reckoning how many legislators the [relevant] consideration swayed and comparing that number to the margin of victory."[214]

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[212] Determining legislative intent raises a host of problems. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ."); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1286 (2006) ("A multimember body such as a legislature has no unitary intent, critics emphasize, and they therefore regard the search for legislative intent as unintelligible."); Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 861 ("[L]egislators are likely to hide bad legislative intent and it often will be difficult to ferret it out from committee reports and other usual tools of legislative history."). *See generally* Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

[213] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 439 (1996).

[214] *Id.* at 439–40.

In our context, we cannot make this assessment by examining either the government enactments themselves or their legislative histories.[215] Indeed, such an examination would reveal nothing about whether labor policy concerns swayed a sufficient number — or any number — of decisionmakers. Nonetheless, the union-employer agreements on organizing and bargaining rules offer a promising proxy for legislative motive. With these private agreements, employers have accepted rules that make it distinctly more likely that unions will succeed in organizing their employees. The employers have acceded to such changes because, by doing so, they ensure the union's political cooperation in securing some employer-favorable state or local government action.[216] Two sets of conclusions are thus implicit in employers' decisions to enter into these agreements: First, the employers believe that absent their consent to new organizing and bargaining rules the union would not exert its political influence in the manner called for by the agreement. Second, the employers believe that if the union exerts its political influence in the manner called for by the agreement, a sufficient number of government decisionmakers will be swayed to support the employers' position. In short, then, the private agreements reflect the employers' belief that injecting labor policy concerns into the relevant governmental process will sway enough decisionmakers to change the outcome. If this were not true, the employers would have no clear incentive to accept the alternative rules of organizing and bargaining.

Of course, the employers in any of these cases might be mistaken, and using their assessment of the political balance of power in a city or state is not a perfect mechanism for determining a but-for cause of governmental action. But, in each instance of tripartite labor lawmaking, sophisticated employers, with long experience trying to achieve political goals in these jurisdictions, determined that the outcomes they desired depended on union assistance, and that union assistance depended on the private reordering of the rules of organizing and bar-

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[215] Kagan admits that many of the same problems of proof that attend the standard intent inquiry plague the but-for inquiry as well. It is unlikely, for example, that many legislators will state publicly that they are voting for invalid purposes, and legislators may mask their genuine motivations with statements evincing a contrary purpose. *Id.* at 440; *see also* Hasen, *supra* note 212, at 861. Rather than abandoning the motive inquiry, however, Kagan proposes a proxy for legislative history–type evidence: Kagan argues that motive should be determined "obliquely" by looking at the terms of the legislation itself. Kagan, *supra* note 213, at 441. Unlike Kagan, we cannot rely on the terms of the state and local actions themselves in order to determine motive. Looking at the New Haven development agreement or the orders approving the SBC-PacTel merger, for example, would reveal nothing about whether labor policy concerns underlay the governments' actions. As discussed immediately below, however, we do have a different proxy that, though imperfect, provides us with a pragmatic means to assess governmental motive.

[216] *See, e.g.*, *supra* pp. 1182–83 (describing the political calculus in the California Alliance Agreement).

gaining. If these assessments are correct, there is a reasonable basis to conclude that the effects on labor were a but-for cause of local governments' nonlabor actions.[217]

C. Some Partial Analogues

While certain features of tripartite lawmaking may be unique to our setting, partial analogues can be found in other modes of governance. Before turning to examine the implications of tripartism and possible responses to it, a consideration of these analogues will help complete the descriptive picture of tripartite lawmaking.

Perhaps the closest example is "neo-corporatism."[218] In general terms, under neo-corporatism, public policy is developed through cooperative negotiation between interest organizations and the state.[219] Because there are generally three key players in these systems of governance — labor, employers, and the government — the systems are often called "tripartite corporatism" or "tripartism."[220] Sweden provides the classic iteration. As Professor Jonas Pontusson has explained, postwar lawmaking in Sweden involved a "political exchange": Swedish unions agreed to moderate the wage demands they made in collective negotiations with employers in exchange for governmental action on labor market policies; the government, in turn, went forward with its labor market policies based on the commitment to restrained collective bargaining demands.[221] Thus, according to a standard formulation of the Swedish tripartite model: "At the same time as it assigned pivotal importance to wage bargaining as a means to promote income equalization and structural change, the model spec-

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[217] It is also possible that, in some cases, a but-for cause of government action is the union's political demands generally, irrespective of the reasons behind the union's demands. That is, state or city legislators might act simply because the union movement presses them to do so, and might never be aware — or may not care — that a union is pressing for government action because of a private agreement on organizing rights. Where this is the case, the state and local government has a less specific motive for participating in tripartite labor lawmaking: a but-for motive of its participation is support for the labor movement's agenda writ large, not support specifically for new rules of organizing and bargaining. Nonetheless, even in these instances, the government acts *because of* the union's political intervention, and the union intervenes *because of* the private agreement on organizing rights. As such, the reordering of organizing rules continues to play a "but-for role in a [legislative] decision-making process." Kagan, *supra* note 213, at 439–40.

[218] *See* Lucio Baccaro, *What Is Alive and What Is Dead in the Theory of Corporatism*, 41 BRIT. J. INDUS. REL. 683, 683–85 (2003).

[219] *See* Gerhard Lehmbruch, *Liberal Corporatism and Party Government*, 10 COMP. POL. STUD. 91, 93–95 (1977).

[220] *See, e.g.*, Jonas Pontusson, *Labor, Corporatism, and Industrial Policy: The Swedish Case in Comparative Perspective*, 23 COMP. POL. 163, 163, 168 (1991).

[221] *Id.* at 168.

ified very clearly the kinds of policies that the government had to pursue in order for the unions to be able to assume this role."[222]

Professor Lucio Baccaro identifies several contemporary variants of the neo-corporatist policy-making process, which he refers to as "concertation."[223] He explains, for example, that economic policy in Ireland since the 1980s has been shaped by "social partnership agreements between government, unions and employers"[224] in which unions committed to restrain collective bargaining demands in exchange for the government's commitment to provide tax cuts and social welfare benefits.[225] Similarly, in 2002, the Italian government, the Italian national employer association, and two major union confederations negotiated the "Pact for Italy," in which the unions accepted the employers' demand for more flexible discharge rules in exchange for the government's commitment to reduce taxes.[226]

There are obvious differences between tripartite corporatism and concertation, on the one hand, and the model of tripartite lawmaking described here. Most obviously, the neo-corporatist or concertationist state need not act in a nonlabor area of law in order to effect labor policy; instead, the state acts directly on labor, economic, and welfare policy in exchange for union restraint in collective bargaining. Moreover, the union-employer agreements involved in neo-corporatism are classic collective bargaining agreements — setting wages and other terms of employment — rather than negotiated alternatives to the rules of organizing and bargaining themselves. And finally, neo-corporatist bargaining is fully transparent and conducted in the open, there being no legal need to mask the arrangement. Nonetheless, neo-corporatism, concertation, and the form of labor lawmaking described here involve a similar kind of tripartite political exchange in which the

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[222] JONAS PONTUSSON, SWEDISH SOCIAL DEMOCRACY AND BRITISH LABOUR 42 (1988); *see also* JOHN B. WILLIAMSON & FRED C. PAMPEL, OLD-AGE SECURITY IN COMPARATIVE PERSPECTIVE 81 (1993) ("[T]he 'historic compromise' has resulted in an exchange of industrial peace and wage restraint for a comprehensive set of welfare state programs . . . . The Swedish version of corporatism has involved minimal government involvement in bargaining between the employers' organizations and the unions, but it has been the government that has enacted the social welfare program[s] which have constituted a key component of the historical compromise."). Professor Peter Swenson argues that this conventional account is partly inaccurate, pointing to, inter alia, the ways in which Swedish employers supported many of the policies labor sought. *See* PETER A. SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN 122, 269 (2002).

[223] Lucio Baccaro & Marco Simoni, *Policy Concertation in Europe: Understanding Government Choice*, 41 COMP. POL. STUD. 1323, 1323 (2008); Baccaro, *supra* note 218, at 683. The term is not original to Baccaro. *See, e.g.*, Oscar Molina & Martin Rhodes, *Corporatism: The Past, Present, and Future of a Concept*, 5 ANN. REV. POL. SCI. 305, 313–19 (2002).

[224] Baccaro, *supra* note 218, at 686.

[225] *See* Lucio Baccaro & Marco Simoni, *Centralized Wage Bargaining and the "Celtic Tiger" Phenomenon*, 46 INDUS. REL. 426, 428–29 (2007); Baccaro, *supra* note 218, at 686–87.

[226] *See* Baccaro, *supra* note 218, at 689.

private orderings of unions and employers and the public acts of the state come, in one manner or another, to constitute a single governance package.

The domestic context offers several other partial analogues. In advancing its goals indirectly, for example, tripartism resembles certain forms of conditional government actions that are the subject of the unconstitutional conditions doctrine.[227] In one well-known case, constitutional limitations made it uncertain whether the federal government could mandate directly that states set their drinking age at twenty-one. So in 1984, Congress achieved this same policy goal through indirect means: it withheld a portion of federal highway monies from any state that allowed sale of alcohol to persons under twenty-one years of age.[228] Similarly, the Constitution prohibits the government from directly restricting abortions, but Congress has indirectly achieved some such restrictions by barring Medicaid funding for abortions[229] and by providing for regulations barring family planning clinics that receive certain federal funds from recommending abortion.[230] Thus, as in tripartite lawmaking, the conditional funding context involves a form of government indirection that can be deployed to circumvent relevant legal and constitutional strictures.

Nonetheless, the analogy is far from perfect. In the conditional funding context, the government acts indirectly, but it still acts *transparently* because connection between the condition on the benefit and the benefit itself is explicit in the government's action. Thus, following the above examples, Congress explicitly directed the Secretary of Transportation to withhold a percentage of otherwise available highway funds from states "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."[231] Similarly, the so-called Hyde Amendment expressly prohibited "the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances."[232] And section 1008 of the Public Health Service Act stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[233]

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[227] *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[228] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (upholding the funding restriction).

[229] *See* Harris v. McRae, 448 U.S. 297, 300–08 (1980).

[230] *See* Rust v. Sullivan, 500 U.S. 173, 178–81 (1991).

[231] *Dole*, 483 U.S. at 205 (alteration in original) (quoting 23 U.S.C. § 158 (2006)) (internal quotation marks omitted).

[232] *Harris*, 448 U.S. at 302 (citing Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979)).

[233] *Rust*, 500 U.S. at 178 (alteration in original) (quoting 42 U.S.C. § 300a-6 (2006)) (internal quotation marks omitted).

Such transparency is, by design, absent in tripartite lawmaking. Unlike in the conditional funding context, the connection between government action and union organizing and bargaining rules is never explicit in the context of tripartism.[234] Indeed, if the tripartite arrangements described here followed the model used in the conditional funding setting, they would be invalidated on preemption grounds.[235] Rather than directly conditioning the receipt of some government benefit on an employer's agreement to new organizing and bargaining rules, then, tripartite arrangements exchange government action in one area of law for private agreements on organizing and bargaining. The private agreements involved in these arrangements are thus crucial to tripartism because of tripartism's demand for opacity — they are the transmission mechanism that allows for an *opaque* connection between government action in a nonlabor area of law and reordered labor organizing and bargaining rules. Because the government action at issue in the unconstitutional conditions cases is transparent, private ordering of the sort involved in tripartite lawmaking is absent from, and indeed irrelevant to, the conditional funding context.

This descriptive difference between tripartism and unconstitutional conditions points to an analytic one: the difficulty with preemption analysis under tripartism is distinct from the difficulty with constitutional analysis under conditional benefit cases. As the discussion in Part V elaborates, in the tripartism context, a primary difficulty for preemption analysis is detection.[236] It is difficult to know when these deals have been made — in particular, it is difficult to uncover the connection between the government's action and the private agreement on organizing and bargaining rules — and thus it is difficult for courts to invalidate tripartite deals on preemption grounds. Detection, however, is not a problem in the unconstitutional conditions context.

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[234] In some instances, most notably the New Haven example, the relevant connections between the public and private acts have been publicized by political leaders involved in the arrangement. *See* section III.A.1, pp. 1174–80. Even there, however, the official actions of the government — the permit grants, the zoning approvals, and the like — made no mention of the labor agreement.

[235] For example, if New Haven made it an official requirement of its permitting process that developers agree to new rules for organizing, the requirement would be flatly preempted. If California changed its Medicaid rules to allow higher reimbursement for employers that agreed to card check, those rules would be preempted as well. In fact, the Supreme Court has rejected the importation of unconstitutional conditions standards into labor preemption cases, noting that governmental action that might survive this form of constitutional review can still fail preemption review. *See* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2417 (2008). Thus, in many respects, labor preemption doctrine is more restrictive of government action than is the unconstitutional conditions doctrine.

[236] As Part V also discusses, detection is not the sole problem that tripartism presents for preemption analysis. For example, without importing some form of motive inquiry into preemption doctrine, some examples of tripartite lawmaking would survive preemption scrutiny even if detected. *See* section V.A.1, pp. 1213–16.

Again, because conditional benefit arrangements are transparent, the problem for constitutional analysis is not discovering when such arrangements have been made, but developing a theory for assessing which conditions are permissible and which are not.[237]

IV. PREEMPTION REVISITED

Understanding tripartite labor lawmaking is important, most basically, because it provides us with a more complete picture of the role of the local in contemporary labor law. But the developments described here also illuminate some important characteristics of preemption itself. This Part will discuss the difficulties for traditional preemption analysis that tripartism poses, the potential for local variation and experimentalism that tripartism creates (along with the limits of this potential), and the influence on state and local lawmaking that tripartism exercises.

A. Tripartism and Preemption Analysis

The possibility for tripartite lawmaking presents, first and foremost, some obvious difficulties for the successful operation of preemption doctrine. In labor law as elsewhere, preemption analysis calls on courts to compare a federal law or policy with a challenged state or local action. The specific type of comparison courts engage in will vary with the type of preemption analysis.[238] In "conflict preemption" cases, courts look to whether the state or local action conflicts with or stands as an obstacle to the congressional purposes expressed in the federal statute at issue.[239] And in "field preemption," courts determine whether the federal statute occupies its field and thereby precludes

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[237] For some discussion, see, for example, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 72–90 (1996); and CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 291–318 (1993).

At an even higher level of generality, the tripartite form of lawmaking described here reflects the now well-documented interdependence of public and private governance. *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). In the administrative law context, Professor Jody Freeman details private participation in ostensibly public administration: private actors "set standards, provide services, . . . deliver benefits[, and] . . . help implement, monitor, and enforce compliance with regulations." Freeman, *supra* note 92, at 547. Professor Michael Vandenbergh offers another form of interdependence in administrative law, documenting how firms' environmental conduct is often structured by contracts — like insurance, credit, or acquisition agreements — bargained in response to public regulation. *See* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2030–35 (2005). In the model of tripartite lawmaking described above, the public and private are indeed interdependent, albeit in a manner distinct from the ways these authors describe.

[238] *See, e.g.*, Dinh, *supra* note 38, at 2100–07.

[239] *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227–29 (2000).

state or local intervention in the same field.[240] Labor law's various preemption rules incorporate — at different moments — each of these various forms of review.[241]

But in tripartite lawmaking, where the relevant state or local action takes place in a substantive area of law completely removed from the one governed by the federal statute, preemption analysis will struggle. Comparing the local action and the federal law will reveal no conflict. And the local act and the federal regime will occupy different fields. It is only by identifying the entire tripartite political exchange — which requires not only that courts identify the parties' private agreement, but also that they establish the connection between the government action and the private agreement — that preemption regimes can hope to capture these forms of lawmaking. As discussed in more detail below, however, this is an exceedingly difficult — and often impossible — task. And by hindering preemption analysis, tripartism undermines preemption's central project of allocating exclusive regulatory authority to the federal government and ensuring a uniform system of law.

This conclusion does not imply that tripartism renders doctrinal preemption analysis hopeless. As Part V addresses, when a state or local government publicly expresses support for the tripartite bargain — as occurred in the New Haven example — it may be possible for courts to capture the tripartite arrangement through more muscular enforcement of existing rules. Incorporating a robust motive inquiry into the doctrine might allow courts to smoke out the connections between local government enactments and private agreements and thus to invalidate an even broader range of tripartite lawmaking.[242]

The challenge, however, is that increasing enforcement of existing rules or bringing a motive inquiry to preemption analysis would both likely produce a dynamic effect. In short, the parties to tripartite lawmaking, including state and local government officials, could relatively easily adjust to more aggressive preemption rules by making sure that their private agreements stay private and by masking the connections between the public and private components of their deals. For example, should labor preemption rules[243] be read to capture instances like the New Haven agreement, we might expect city officials in the future to seek similar outcomes without the attendant publicity. A mayor, that is, might make his demands clear to the relevant employer — and, of course, to the relevant union — without a press con-

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[240] *See, e.g.*, Dinh, *supra* note 38, at 2105–07.

[241] *See, e.g.*, Estlund, *supra* note 3, at 1569–79.

[242] *See* section V.A.1, pp. 1213–16.

[243] The rules elaborated in *Golden State* and *Brown* are of greatest potential relevance here. *See supra* pp. 1166–67.

ference at city hall. Unions and employers also could change aspects of the way their agreements are constructed in order to make disclosure less likely. Thus, instead of proceeding under the SEIU Alliance Agreement model — which connects in a single document the agreement on organizing rules and the nonlabor government action — the parties could execute two separate agreements, one concerning organizing rights and one concerning legislative cooperation, and then rely on other means of connecting the two.[244]

B. Tripartism and Experimentalism

Although current preemption rules provide greater national uniformity than we would have without a doctrine of federal preemption, by hindering traditional preemption analysis, tripartite lawmaking enables some state and local departures from the federal regime and thus some measure of variation. In the labor context, this dynamic provides states and cities with the opportunity to correct some of the NLRA's most profound failings. For example, while the NLRA fails to balance communicational opportunities for union and employer speech,[245] the private agreements negotiated as part of tripartite labor lawmaking might correct this imbalance.[246] As many have observed, the NLRA's failure to adequately police employer interventions in union campaigns has interfered with the exercise of employee choice on the union question.[247] By restricting these employer interventions — either by requiring employer neutrality or by limiting the contexts in which employers can communicate opposition to unionization — tripartite labor lawmaking can enhance the possibility for free employee choice.[248] Similarly, while the NLRA's bargaining obligation is undermined by the Board's nearly meaningless remedial arsenal,[249]

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[244] Given a sufficient level of trust between the parties, an oral agreement might provide the relevant connection. As noted below, by forcing the parties to hide their arrangements, a more robust preemption regime would make tripartite agreements more difficult to achieve and could thereby reduce their prevalence. *See* section V.A.1, pp. 1213–16.

[245] *See, e.g.*, Barenberg, *supra* note 12, at 934; Estlund, *supra* note 12, at 307, 331 n.162.

[246] For example, they might provide union organizers access to employer property and ensure that unions have accurate lists of eligible voters at the start of organizing efforts. *See, e.g.*, California Alliance Agreement, *supra* note 149, at 46 (organizer access); *id.* at 45–46 (employee list); Election Principles Agreement, *supra* note 128, Exhibit A at 11 (organizer access); *id.* at 10 (employee list).

[247] *See, e.g.*, Sachs, *supra* note 12, at 664–67, 680–91; Weiler, *supra* note 20, at 1770.

[248] *See, e.g.*, Election Principles Agreement, *supra* note 128, Exhibit A at 4 (ban on one-on-one meetings); California Alliance Agreement, *supra* note 149, at 43 (neutrality commitment); *see also* Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 19 (2010), http://www.harvardlawreview.org/media/pdf/123_estlund.pdf ("Employer 'neutrality' in the organizing process arguably dissolves . . . the asymmetric stickiness of the nonunion default.").

[249] *See, e.g.*, Weiler, *supra* note 27, at 360–61.

the kind of arbitration requirements for first contract bargaining contained in some of tripartism's private agreements is precisely the device that scholars recommend as a fix for "catastrophic underenforcement of the statutory right of employees to bargain."[250]

In addition to these possibilities for substantive improvement, variation of the sort produced by tripartite lawmaking can provide some per se benefits.[251] Primarily, by facilitating departures from the federal regime, tripartite lawmaking can contribute to a form of experimentation or "learning through variation."[252] For decades now, labor law has been beset by seemingly intractable debates over a series of fundamental questions: How should the rules of union organizing be structured so as to ensure genuine employee choice? How far should the property rights of employers be abrogated in order to balance the organizational interests of workers and the business interests of firms? How should collective bargaining be structured and policed to ensure efficient and just outcomes? The resolution of these questions depends, in some measure, on normative and political premises that are unlikely to be affected by experimental evidence. But these questions also turn in part on empirical issues: Does employer neutrality promote or hinder informed employee decisionmaking on the union question? What are the actual effects of interest arbitration provisions on contract bargaining in the private sector? The private agreements that emerge from tripartite lawmaking offer us some evidence that can help answer these questions and, as such, provide us some opportunities for learning about the best future course for labor law reform.[253]

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[250] Fisk & Pulver, *supra* note 13, at 47; *see also id.* at 48.

[251] Variation also may impose some per se costs: most obviously, corporations operating across state and city lines have to accommodate different rules of union organizing and bargaining, whatever the substance of those rules may be. *See, e.g.*, Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29 (2007); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 693 n.36 (1991). It is worth noting, as Professor Eileen Silverstein has, that corporations already face diverse state rules on a range of matters, including those in the closely related field of employment standards. *See* Eileen Silverstein, *Against Preemption in Labor Law*, 24 CONN. L. REV. 1, 33–43 (1991).

[252] *See, e.g.*, Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 485 (2008); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288 (1998). Estlund provides an example in the labor context: "In a federal system, state-by-state variations might ordinarily be expected, and might permit a kind of experimentation around the edges of the national scheme. Successful 'experiments' might have spread to other localities, and might even have provided credible models for national reform." Estlund, *supra* note 3, at 1569. For examples from the general federalism literature, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988); and Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–57 (2004).

[253] Professors Adrienne Eaton and Jill Kriesky have conducted this type of research based on private recognition agreements. *See* section II.C, pp. 1169–72. *See generally* Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62

The type of variation that tripartism permits is, however, limited in an important way. This limitation stems from the fact that tripartite labor lawmaking has a predictable political valence — namely, a pro-union one. The reason for this valence is that states and cities have wide-ranging regulatory leverage over employers. To take just the examples developed here, many employers are dependent on cities and states for zoning and development permits, merger approvals, funding streams, and structuring the rules and costs of litigation.[254] Among many other examples, state and local health regulation, environmental regulation, licensing requirements, tax policy, and transportation policy can all be critical to firms' viability. In contrast, states and cities have little regulatory leverage over unions.[255] Indeed, any state or local law that burdened unions' viability — that interfered, for example, with unions' ability to organize workers or bargain collective agreements — would be invalid.[256] And, as opposed to the relationships they have with employers, states and cities have far fewer points of interaction with unions that are independent of the NLRA's subject matter.

As a result of this regulatory asymmetry, the kind of tripartite lawmaking possible under preemption will almost always involve the exchange of state or local action favorable to employers for private agreements that shift the rules of union organizing and bargaining in a manner that facilitates unionization. From a substantive perspective, this dynamic implies that tripartite lawmaking allows for the correction of only those NLRA pathologies that skew the law in a nonunion direction. Other types of needed repairs — fixes that unions would not have an incentive to seek — will not be facilitated by tripartism. From an experimentalist perspective, tripartism's uniform

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INDUS. & LAB. REL. REV. 157 (2009); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001).

254 *See* Part III, pp. 1172–97.

255 To be sure, there is much that states and cities can do to further the interests of employees generally and thus to further the interests of union *members* — for example, minimum wage legislation, safety regulation, and health care policies can all be of import. But with respect to unions organizationally, states and localities have little to no regulatory authority. One exception concerns project labor agreements on public construction projects — agreements through which states and cities ensure that union workers are hired to complete public jobs. Thus, jurisdictions might condition their willingness to enter into project labor agreements — and similar types of arrangements — on unions' private agreements with employers to move the rules of organizing in a nonunion direction. The fact that the NLRA already skews the organizing process in a nonunion direction, however, *see, e.g.*, Barenberg, *supra* note 12, at 959–62, suggests that the incentives to construct this kind of tripartite arrangement will not be strong and hence that the existence of such tripartite deals is unlikely to be prevalent. Even granting this possibility, however, the asymmetry in regulatory leverage — and thus in the political valence of tripartism — remains.

256 *See* Estlund, *supra* note 12, at 339 & n.204. One exception is state property and trespass rules, which can be enforced in a manner that disables union organizers from accessing employer property. For a discussion, see *id.* at 336–43.

political valence creates a similar limitation: tripartism may allow us to learn about reforms to the NLRA rules that unions desire, but it will not provide us with any data about changes that unions do not seek.[257]

C. Preemption's Progeny: The Impact of Tripartism on State and Local Lawmaking

Tripartism is designed to, and does in fact, allow local lawmaking to continue in the face of a robust federal preemption regime. In doing so, tripartism facilitates departures from the federal rules of union organizing and bargaining that preemption intends to preclude. But the existence of tripartite lawmaking requires that we take account not only of the fact of local variation under preemption, but also of the legal and political processes through which such variation is achieved. This section addresses four concerns related to the *form* of tripartite lawmaking that is possible under preemption: the opacity of tripartite arrangements and the attendant implications for political accountability, the ability of tripartite lawmaking to avoid certain forms of legal and constitutional review, the production of what I will call a "politics of indirection" at the state and local level, and finally, the collateral effects on other areas of law.[258]

1. Opacity and Accountability. — The first concern stems from the opacity of tripartite lawmaking. Because the government's role in these arrangements is often difficult — if not impossible — to observe, tripartite lawmaking can create problems for political accountability.

Again, preemption precludes state and local governments from enacting labor law directly, and thus there is never any recognizable labor legislation or regulation associated with tripartism. Instead, lo-

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[257] This limitation on learning is compounded by the relative opacity of the private agreements through which the rules of organizing and bargaining are restructured. *See* section IV.C.1, pp. 1202–04. These agreements are, after all, private, and the unions and employers that sign them are generally under no obligation to disclose their agreements to the public. *Cf.* Vandenbergh, *supra* note 237, at 2069–73 (noting similar transparency problems in the context of "second-order" private agreements in the environmental context). Preemption scrutiny, moreover, may provide parties with an incentive to keep these agreements private. *See infra* pp. 1215–16. As such, although the agreements that are available publicly offer a source of data highly relevant to some central labor law debates, the private nature of the agreements makes this form of variation less than ideal from an experimentalist perspective.

[258] A qualification is in order: the claim here is not that tripartite labor lawmaking would never occur in the absence of federal preemption. As discussed below, given the right balance of political power in a particular jurisdiction, unions might rely on tripartite political arrangements to achieve departures from the NLRA even absent preemption. *See* section V.B, pp. 1217–20. As such, the analysis here proceeds on the basis of more modest claims. First, because states and cities would be free to enact labor reforms directly in the absence of federal preemption, tripartite lawmaking is more likely to occur under preemption than it would be absent preemption. Second, and irrespective of the first claim, because preemption *permits* tripartite lawmaking, we cannot fully assess the merits of the preemption regime without assessing this form of lawmaking.

cal governments enact laws that on their face have nothing to do with labor policy,[259] or enter into development agreements that make no mention of unions or the rules of organizing,[260] or issue public service commission decisions that are likewise silent as to their labor implications.[261] As such, even a comprehensive examination of all state and local government actions would tell voters nothing about their representatives' contributions to the redesign of organizing and bargaining rules. Instead, in order to identify instances of tripartite lawmaking, voters would need, first, public access to the private recognition agreements through which unions and employers reorder the rules of organizing, and second, some way of establishing the connection between the government action and the private agreements. But neither type of data is generally available: unions and employers have no obligation to disclose their private organizing agreements, and these contracts generally become public only by happenstance.[262] Establishing the connection between the government action and the private agreements is also often difficult. In some instances, like the SEIU Alliance Agreements, the contracts themselves make this connection. But in

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[259] *See, e.g.*, Medi-Cal Long-Term Care Reimbursement Act, CAL. WELF. & INST. CODE § 14126 (Deering 2006).

[260] For example, although the New Haven Development Agreement contained the City's approval of the project along with a series of "community benefit" provisions — including several jobs programs, a youth initiative, and a voluntary payment to the City — the document was silent with respect to the union-employer agreement on organizing rights. *See* New Haven Development Agreement, *supra* note 103, §§ 3.01–.02, at 5–12. Similarly, the Hollywood and Highland Development Agreement lists a series of community benefits commitments by the developer — including provisions for living wage jobs and job training — but does not include the card check and neutrality commitment. *See* Disposition and Development Agreement Between Trizechahn Hollywood, LLC and the City of Los Angeles, at ii (1998) (on file with the Harvard Law School Library) (table of contents).

[261] The California and Nevada orders approving the merger of SBC and Pac-Tel reflect the telecommunication companies' commitments regarding job levels and customer refunds, but are silent as to the CWA-SBC agreement on organizing rules. *See* Pac. Telesis Grp., 71 C.P.U.C. 2d 351 (1997); Settlement Stipulation at 3, Joint Application of Pac. Telesis Grp. & SBC Commc'ns, Inc., No. 96-5036 (Pub. Serv. Comm'n Nev. Sept. 25, 1996) (on file with the Harvard Law School Library).

[262] The New Haven Election Principles Agreement, for example, is available only because it was attached as an exhibit to an affidavit filed in a district court preliminary injunction hearing approximately six months after the agreement was signed. *See* Election Principles Agreement, *supra* note 128. The CWA-SBC agreement is referenced only in an internal union publication. *See* COMMC'NS WORKERS OF AM., *supra* note 191, at 24 app. The SEIU Alliance Agreements were made public by Consumer Watchdog, an organization that claims to "provid[e] an effective voice for taxpayers and consumers." *About*, CONSUMER WATCHDOG, http://www.consumerwatchdog.org/about (last visited Jan. 30, 2011); *see also* California Alliance Agreement, *supra* note 149. To be sure, references to some of these agreements — though not all — were made in press accounts. *See* Matt Smith, *Union Disunity*, S.F. WKLY., Apr. 11, 2007 (California Alliance Agreement); *see also* Martineau, *supra* note 136 (Election Principles Agreement); Press Release, Office of the Mayor, City of New Haven, *supra* note 115 (same). None of those accounts, however, revealed the specifics of the organizing and bargaining rules agreed to by the parties.

others, the organizing agreements are as silent about their connection to governmental action as the governmental action is about its connection to private organizing agreements. Press coverage — like that available in the New Haven cancer center context — can mitigate these opacity concerns, but coverage is often minimal to nonexistent.[263]

2. Avoiding Legal and Constitutional Review. — A second, and related, concern stems from the fact that tripartite lawmaking by necessity involves an interdependent relationship between public governmental actions and private union-employer agreements on organizing rights. The problem is that the formal separation between the public and private components of tripartism can serve to immunize the overall arrangement from certain forms of legal review.

Of course, one form of legal review that the structure of these arrangements avoids is preemption itself, but the ability of these deals to minimize the chance for other types of scrutiny is also apparent. For example, there is nothing constitutionally suspect about the New Haven Development Agreement itself, nor about the Yale–New Haven Election Procedures Agreement itself. But, when the two agreements are understood as a single package — which is, in fact, how they emerged — constitutional questions arise. Namely, under the Takings Clause of the Fifth Amendment, municipalities may not impose "exactions" on proposed development projects unless the municipality first determines that "those exactions have a substantial nexus to impacts of the developments that would otherwise justify rejection of the development proposal, and unless the exaction is roughly proportional in amount to those impacts."[264] Thus, had New Haven incorporated the Election Principles Agreement into the hospital's Development Agreement duties,[265] the City's actions would have been subject to an exactions review, and the City would have been required to satisfy the Fifth Amendment's nexus and proportionality requirements. Finding that the Election Principles Agreement in fact constituted an exaction would require an expansive reading of existing case law. But whether the Agreement in fact constituted an exaction is beside the point here:

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[263] Although the New Haven agreement was covered relatively extensively, the California Alliance agreement was reported primarily in *SF Weekly* and the *Sacramento Business Journal*. *See* sources cited *supra* notes 162–76. Similarly, while there was extensive reporting on the SBC-PacTel merger, not a single press account mentioned the connection between the merger approval and the SBC-CWA card check and neutrality agreement. For an example of press coverage of the merger, see *Quickly Accepting Conciliatory California PUC Terms*, *supra* note 196.

[264] Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 19 (2010) (discussing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)).

[265] As noted above, *see supra* pp. 1177–78, the Development Agreement did not contain, and made no reference to, the Election Principles Agreement. *See* New Haven Development Agreement, *supra* note 103.

by formally separating the development and organizing agreements, the City was able to avoid the question.

The existence of a private intermediary between the subject and object of governmental action — a private intermediary between, for example, a city and a developer — should not be sufficient reason to insulate these agreements from constitutional review.[266] Indeed, this role of a private intermediary is familiar to numerous forms of public-private governance: in many contexts, the private component in a public-private arrangement shields the overall partnership from constitutional and other types of legal review.[267] Thus, when government delegates the operation of prisons, or military operations, or welfare programs to private parties, the democratic deficits that such delegations can create raise substantial concerns.[268] Scholars have rightly worried, for example, that these arrangements will result in "constitutionally-exempt parties gaining authority over government programs and program participants,"[269] and accordingly have demanded ways of restoring constitutional accountability.[270]

3. A Politics of Indirection. — In addition to requiring this interdependent relationship between the public acts of local governments and the private agreements of unions and employers, tripartite labor lawmaking requires that local governments act in nonlabor areas of law. This requirement raises a third concern: namely, just as local government action must be directed away from labor issues and into other areas of law, so too must local politics. In other words, political action for labor rights must be rechanneled to support the nonlabor issues that are of interest to employers.[271]

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[266] *See* Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, *in* GOVERNMENT BY CONTRACT, *supra* note 237, at 291, 295. Writing in a related context, Professor Vicki Been has argued as much. *See* Been, *supra* note 264, at 27–28.

[267] *See generally* GOVERNMENT BY CONTRACT, *supra* note 237.

[268] *See, e.g.*, *id.* at 5.

[269] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374 (2003).

[270] *See, e.g.*, *id.* at 1456–86. *See generally* Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* GOVERNMENT BY CONTRACT, *supra* note 237, at 310.

[271] The fact that tripartism requires unions and workers to support the political agendas of employers also could be viewed as productively aligning the interests of the parties. That is, preemption prevents unions from enacting labor law reform directly, and thus tripartism requires that unions work collaboratively with employers to enact a package of reforms that advances the interests of both sides. Collaboration in local politics, moreover, might lead to more collaborative and less confrontational labor-management relations in the workplace, a state of affairs many have long sought. *See generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993) (providing a historical, and critical, account of the place of labor-management cooperation in U.S. labor law); *see also* NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288, 291 (6th Cir. 1982) (regarding as "enlightened" a view of the NLRA that permits certain forms of labor-management cooperation). However, two brief points bear mention. First, this opportunity for collaboration, while presented by tripartism, is in no way unique to tripartism: unions and employers may exchange

Federalism scholars, of course, have consistently pointed to the benefits that flow from political participation by citizens at the state and local levels.[272] On this view, preemption is a problem because it renders state and local decisionmaking, and with it state and local political participation, irrelevant. Under preemption, the argument goes, the only politics that matter are federal politics, those directed at far-off Washington and distant from the everyday lives of the citizenry.[273] As Professor Neil Siegel puts it, "If direct federal regulation removes states from the regulatory scene, there is no meaningful sense in which they can . . . advance political participation . . . ."[274]

The model of tripartite lawmaking developed here suggests that, with respect to labor preemption, federalism scholars have this one only partly right. Labor preemption, that is, does not in fact make state and local politics irrelevant to the development of labor law. Even under the NLRA's extraordinarily broad labor preemption regime, state and local decisionmaking — and thus state and local political participation — remains essential. As noted above, many thousands of union members and their allies participated extensively in the campaigns surrounding the New Haven Cancer Center and Medicaid rate reform in California.[275] But, while labor preemption does not

political support for each other's legislative agenda even where preemption does not foreclose either side from pursuing that agenda unilaterally. Second, while exchanges of this type may serve to align and advance the interests of unions and employers in beneficial ways, the deals may also come at the expense of third parties who are excluded from the bargain. *Cf.* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 834–36 (2006); Thomas Stratmann, *Logrolling*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 322, 328–32 (Dennis C. Mueller ed., 1997) (noting the costs that third parties or minorities may bear when a legislature engages in logrolling).

[272] Professor David Shapiro thus writes that "one of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized." SHAPIRO, *supra* note 14, at 91–92. Professor Barry Friedman argues that "state and local governments appear to serve as breeding grounds for democracy." Friedman, *supra* note 14, at 391; *see also* Hoke, *supra* note 251, at 712 ("A vigorous republican federalism would repose substantial political authority in subnational governments because of their greater access to ordinary citizens and their participatory efforts.").

[273] *See, e.g.*, Friedman, *supra* note 14, at 389–90 ("When we despair of the operations of our national government, we tend to . . . bemoan the apathy and lack of participation of average citizens. . . . [S]tate and local government does provide many more avenues for citizen participation than does the national government." (footnote omitted)). Although their own view of preemption's effects is more nuanced, as described below, Fisk and Oswalt capture this position nicely by writing: "Preemption, in effect, functions as a form of repression. It tells citizens that it is pointless to organize politically at the local level and engage in democratic action to create a better society because all power is held by a seemingly remote federal authority." Fisk & Oswalt, *supra* note 10, at 1535.

[274] Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1651 (2006).

[275] Participation ranged from citizen involvement in lobbying, to letter writing and public protest. *See* sources cited *supra* notes 98 (New Haven Cancer Center), 163–64 (Long-Term Care

render local politics irrelevant, it does give rise to a politics of indirection.[276] While workers and their allies participated actively in the campaigns described above, their participation was channeled away from reforming the union organizing process and toward supporting government policies desired by employers. Thus, instead of demanding that New Haven enact reforms that would make unionization easier, unions, workers, and their allies mobilized around zoning and permitting decisions. The Communications Workers pressed California and Nevada not to improve their labor laws, but to allow SBC to merge with PacTel. And in California, the union and its members pressed for Medicaid changes and tort reform.[277]

Professor Catherine Fisk and Michael Oswalt describe a similar dynamic in their work on Wal-Mart activism. They explain how activists who hoped to compel Wal-Mart to improve its health care and labor policies were stymied both by ERISA and by federal labor preemption.[278] Unable to use state law to require Wal-Mart to offer health insurance or to make it easier for workers to unionize, advocates have instead turned to zoning and land use processes in an attempt simply to keep Wal-Mart away from certain jurisdictions.[279] Accordingly, Fisk and Oswalt recognize that preemption does not render state and local politics irrelevant but that it nonetheless results in a channeling of political energies and participation that involves "sublimating basic issues of dignity and justice for zoning."[280] As they put it, "[s]ite fights do offer the opportunity for civic engagement . . . . Yet, the usual topics of land-use planning — square footage, sign size and placement, traffic flow — are far removed from the issues that spark most anti-Wal-Mart activism: wages and health benefits."[281] Moreover, this channeling of political energies can be problematic

Reimbursement Act). The California legislation also produced significant opposition and led to a countermobilization by nursing home advocacy groups. *See, e.g.*, Letter from Virginia Knowlton, Dir. of Pub. Policy, Prot. & Advocacy, Inc., to Arnold Schwarzenegger, Governor of Cal. (Aug. 31, 2004), *available at* http://www.disabilityrightsca.org/news/AB_1629_(Frommer)_Governor_letter.pdf.

276 *See* Fisk & Oswalt, *supra* note 10, at 1523–28 (describing the "startling redirection" of political participation, *id.* at 1523).

277 In all cases, of course, by pressing for policies that their employers desire, workers may indirectly contribute to their own interests by enabling their employers to sustain employment levels, pay higher wages, and the like. In the Medicaid rate reform campaigns, this dynamic is most clear: increased Medicaid reimbursement rates — and particularly a cost-based system that explicitly accounts for higher labor costs — can enable employers to, inter alia, pay higher wages and offer improved staffing ratios. *See* HARRINGTON ET AL., *supra* note 142, at ii–v.

278 Fisk & Oswalt, *supra* note 10, at 1510–11.

279 *See id.* at 1521–23. As noted above, Fisk and Oswalt contend that "labor preemption makes it impossible for workers to enact state laws that make it feasible to organize themselves collectively and demand better wages." *Id.* at 1511. The claim in this Article is to the contrary.

280 *Id.* at 1523.

281 *Id.* at 1528.

in the long term for both civic participation and social movement dynamism.[282]

To be sure, unions quite often engage in advocacy on a range of issues far broader than the rules of organizing and collective bargaining.[283] In recent years, for example, unions and their members have pressed for reform of the health care system,[284] fought for changes to immigration policy,[285] advocated for stronger environmental laws,[286] and opposed the war in Iraq.[287] These types of engagements reflect the basic fact that union members' concerns and interests extend beyond the workplace.[288] But the political redirection entailed by tripartite lawmaking is different because the targets of political activism in tripartism are selected according to the political goals of *employers*. As such, workers need have no direct interest in — and may well have an aversion to — the policies they are engaged in supporting.[289] As Fisk and Oswalt argue, moreover, it is the detaching of political aims from "on-the-ground" concerns that puts the prospects for civic participation and social movement viability at risk.[290]

4. Collateral Effects. — Finally, tripartism's requirement that local governments rely on other areas of law to effect private reorderings of organizing rules has repercussions for those other areas of law. What these repercussions are depends, however, on the political balance of

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[282] *Id.* at 1530 ("[T]he site fight serves as a one-size-fits-all funneling mechanism that . . . leav[es] the foundation for democratic action less sturdy and less likely to spark sustained activist responses.").

[283] For a general account, see Lowell Turner & Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, *in* REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 9 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

[284] *See, e.g.*, Ricardo Alonso-Zaldivar, *Late-Innings Hardball in Health Care Push*, ASSOCIATED PRESS, Mar. 17, 2010, *available at* http://www.timesrepublican.com/page/content.detail/id/523905.html.

[285] *See, e.g.*, Laura Litvan, *Focus Is on Legal Foreign Workers; Senate Democrats' New Approach Would Give Power to Commission*, WASH. POST, May 24, 2010, at A17.

[286] *See e.g.*, *About the BlueGreen Alliance*, BLUEGREEN ALLIANCE, http://www.bluegreenalliance.org/about_us?id=0001 (last visited Jan. 30, 2011).

[287] *See, e.g.*, Mark Naymik, *Hundreds Rally Against the Iraq War; Demonstrators Lend Support to Labor Push*, PLAIN DEALER (Cleveland), Dec. 3, 2006, at B5.

[288] It is also true that unions have enjoyed some of their greatest periods of growth and vibrancy when they have advocated for the interests of working people in general, and not only for union members. *See* Turner & Hurd, *supra* note 283, at 12–15 (noting that labor enjoyed great success in the 1930s as a "transforming social movement," *id.* at 12, but encountered problems in the 1970s with labor leaders presiding over "increasingly narrow member-oriented organizations," *id.* at 14–15).

[289] As illustrated by the Medicaid rate campaigns, there are instances in which the employers' political demands are more directly relevant to, and beneficial for, the workers involved in the tripartite exchange. *See supra* note 277; *see also* HARRINGTON ET AL., *supra* note 142, at v (reviewing the wage effects of California's Long-Term Care Reimbursement Act). In such cases, the concern about political indirection will be less acute.

[290] *See* Fisk & Oswalt, *supra* note 10, at 1531.

power in each jurisdiction. The clearest effect occurs in contexts where, absent the preemption regime, labor could secure the enactment of its desired labor law reforms without support from employers or other interest groups. To take one example, in a world without federal preemption, a state might respond to union demands by enacting a law requiring card check recognition. With preemption, however, the jurisdiction cannot pass this legislation directly. The union movement may therefore demand action on another piece of legislation in order to secure employers' private agreement on card check. Thus, instead of passing the card check law, the state might change its Medicaid reimbursement rules.[291] Under these political assumptions, then, labor preemption not only prevents the passage of local labor legislation, but also results in the reshaping of another area of law. In other words, by redirecting labor's political power, preemption impacts areas of law with which it should have no concern.[292]

It is quite possible, however, that even absent preemption, labor could enact its desired reforms only with the cooperation of employers or other interest groups. To continue with the same example, in order to secure a state card check law, the union movement might need to offer its support for an employer-sponsored bill, say, Medicaid reform. In this setting, then, labor and nonlabor issues become part of a single legislative package — forming the two parts of a legislative logroll — even absent preemption.[293] Nonetheless, the manner in which nonlabor areas of law are impacted differs in a significant way as a result of the preemption rules. In a traditional legislative logroll, constituents may not know of the trade that underlies their representatives' votes on two pieces of legislation,[294] but the constituents can know how their

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[291] *See* section III.A.2, pp. 1180–87.

[292] A second way of understanding this dynamic is that labor preemption results in a transfer of political power from unions to employers. Absent preemption, that is, unions could deploy their political resources directly and on behalf of their own members — for example, they could press the state legislature for a card check law. Preemption, however, means that unions cannot use their local political resources in this way: it would be fruitless to ask the state legislature to enact card check legislation because such legislation would be quickly invalidated. Instead, with preemption, in order to secure card check, labor must deploy its political resources toward a goal chosen by employers — such as securing Medicaid reform, tort reform, or development permits.

[293] For general discussions of logrolling, along with assessments of its normative implications, see, for example, Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1338–48 (2000); and Stratmann, *supra* note 271. The prevailing view is that logrolling will benefit the parties to the logroll, but may be socially harmful if the costs imposed on nonparties exceed the benefits to the parties. *See, e.g.*, Gilbert, *supra* note 271, at 836.

[294] *See* Gilbert, *supra* note 271, at 846 ("[R]educing the number of provisions in a bill . . . clouds the tradeoffs [citizens'] representatives are required to make . . . ."). Traditional logrolling also may raise transparency concerns if it is difficult for legislators to perceive the political deals that undergird legislation. As Professor Michael Gilbert explains, when a logroll involves separate bills, "legislators who are not privy to the logroll" may fail to "understand[] what political deals are unfolding around [them]." *Id.* Thus, a legislator who supports Medicaid rate reform, but

representatives voted on each individual piece of legislation. In the labor context, for example, if Medicaid reform and card check are logrolled, constituents may not know that the bills form a single legislative deal, but they will know that their representatives supported both pieces of legislation. With labor lawmaking under preemption, however, only one part of the legislative deal takes place inside the legislature, and thus only one piece of the deal is transparent to constituents: legislators vote on Medicaid reform, but there is no public vote on the private card check agreement. For constituents who support Medicaid reform, but would not support a Medicaid–card check trade, this may be a significant concern.[295]

V. POSSIBILITIES FOR REFORM

As the last Part revealed, the form of tripartite lawmaking that continues under preemption allows for variation from the federal regime, but it achieves that variation in a manner that raises a set of concerns. For some, including the parties to these arrangements, considerations of this sort may be less relevant than the substantive policy outcomes that tripartism allows. From this perspective, the local reordering of organizing rules and the securing of local government action — like the enactment of Medicaid rate reform — will figure more prominently than the debate between variation and uniformity, and will have greater relevance than accountability, indirection, and opacity.

From a broader perspective, however, the implications of tripartism are different. Namely, the possibility for tripartite lawmaking suggests that the current preemption regime is ideal for neither proponents nor opponents of preemption. For preemption's proponents — for those who believe national uniformity remains the right approach for labor law — the variation that tripartite lawmaking allows will be a cause for concern. For preemption's opponents — for those who believe that some form of decentralization is now the appropriate course for labor law — the variation that tripartite lawmaking allows will appear a step in the right direction. But both the scope and form of variation that is possible under preemption will concern those who favor a decentralized and experimentalist system of labor law. Irrespective of one's position on preemption, moreover, the accountability problems tripartism presents, its law-eluding qualities, the politics of indirection

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would not support a joint Medicaid–card check bill, may nonetheless, and contrary to her actual preferences, vote for the Medicaid bill.

[295] This type of transparency problem is not unique, and may be no more significant than that which inheres in several common legislative practices that may be as difficult for constituents to observe (for example, the practice of killing bills in committee).

it requires, and its collateral effects on other areas of law provide significant reasons to consider reform.

As such, the existence of tripartite lawmaking gives cause for both labor law nationalists and those who favor decentralization to seek amendment of the existing preemption regime. But the desired type of reform will be starkly different for those who favor national uniformity and for those who support local variation. Preemption's proponents will desire reforms that prohibit tripartism in a manner that enhances uniformity, while preemption's opponents will want legal reforms that preclude tripartism in a manner that increases variation in labor law.

Determining which type of reform is optimal thus requires a prior resolution of whether labor law should, in fact, be centralized or decentralized. Rather than attempting to resolve that question, this Part instead offers a set of potential approaches, two of which will appeal to preemption's proponents and another that will appeal to those who favor decentralization. Accordingly, this Part begins by suggesting two ways in which tripartite lawmaking might be prevented in order to increase uniformity. First, the scope of NLRA preemption doctrine could be expanded even further — or existing doctrine could be enforced more expansively — in order to capture and invalidate the form of local labor lawmaking described here. Second, the type of private organizing agreements that are a central element of this form of labor lawmaking could be banned. This Part then notes how tripartite lawmaking might be prevented in order to increase variation and allow for more genuine experimentation: by relaxing, or potentially eliminating, NLRA preemption rules, we could enable direct local interventions into labor law, thereby removing the conditions that call for tripartism.

With regard to the first approach, this Part will argue that while expanding the reach of preemption doctrine enjoys some conceptual support, this approach faces significant practical impediments. Prohibiting private ordering of organizing rules, moreover, constitutes an overbroad and ultimately unjustifiable response to the costs of tripartite lawmaking. In contrast, relaxing the preemption regime seems more likely to succeed, and would allow for the benefits of variation without the costs associated with tripartism.

Of course, depending on how significant the costs of tripartism are perceived to be, proponents and opponents of preemption might prefer the status quo to reforms designed by the other side. For example, labor law nationalists might rather live with the costs of tripartite lawmaking — and the scope of variation it allows — than see a regime defined by relaxed preemption rules. Some localists, by the same token, might prefer the scope and form of variation possible under tri-

partism — even with its costs — to a more robust preemption doctrine.[296] In this respect, the status quo constitutes a second-best regime that members of both sides might accept if their own preferred reforms are not attainable. What this Part offers, then, is a discussion of possibilities for moving from a second-best status quo to a regime closer to the ideal — first as defined by those who support labor law preemption and then by those who oppose it.

Before turning to this discussion, a word is in order about the political prospects for amending the NLRA's preemption rules. Given the repeated failure of substantive labor law reform efforts over the past several decades,[297] skepticism about the practical likelihood of changing the NLRA's preemption regime is warranted. There may be reasons, however, why preemption reform stands a better chance of enactment than does substantive labor law reform. First, preemption reform offers something to both sides of the political debate: loosening the NLRA's preemption standards would enable states and localities where business interests predominate to move the law in business-friendly directions, while states and localities where labor interests have sufficient sway could move the law in union-friendly directions.[298] This dynamic distinguishes preemption reform from previous attempts at substantive NLRA reforms, which have all been understood as favoring either labor or management, and which have all foundered as a result.[299] Second, the costs of tripartite lawmaking extend beyond labor and management, impacting wide cross-sections of society. Indeed, the political accountability concerns that come with tripartism impact all constituents, and when tripartite arrangements have collateral effects on other areas of law, the individuals and interest groups concerned with these nonlabor areas will have pointed reasons to care about tripartism. Although the outcome is impossible to predict, with a wider array of interests invested in preemption reform

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[296] Of course, it is also possible that some nationalists would rather live with variation than with the costs that tripartite lawmaking imposes, just as some localists might prefer stricter uniformity to the costs of tripartism.

[297] *See* Part II, pp. 1162–72.

[298] For a discussion of how states might vary labor policy absent a preemptive NLRA, see Richard B. Freeman & Joel Rogers, *The Promise of Progressive Federalism*, *in* REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 205, 211–19 (Joe Soss, Jacob S. Hacker & Suzanne Mettler eds., 2007).

[299] The extent of this political dynamic would depend on the manner in which Congress amended the preemption regime. As discussed below, *see* section V.B, pp. 1217–20, Congress could simply eliminate or loosen the preemptive effect of the NLRA's organizing and bargaining provisions. But Congress might also amend the statute in a manner that establishes the federal rules as a "floor" below which states and cities could not go. *See, e.g.*, Estlund, *supra* note 3, at 1578–79. This type of preemption reform would more clearly favor unions and therefore would be less likely to garner political support among employers.

than in substantive labor law reform, the prospects for enactment may be different.

Irrespective of the political prospects for reform, however, the discussion in this Part illuminates some important aspects of the interaction between tripartism and preemption law. In particular, as this Part argues, it is difficult to conceive of any set of preemption rules that could effectively capture and invalidate the tripartite arrangements described above. On the other hand, a relaxation of the NLRA's preemption rules seems more likely to reduce the prevalence of tripartite lawmaking.

A. Preventing Tripartism and Bolstering Uniformity

1. An (Even) Broader Preemption Regime. — One approach to prohibiting tripartite lawmaking in order to enhance uniformity would involve courts' identifying and holding preempted the state and local government actions involved in these arrangements. In certain instances, a robust application of existing doctrine might suffice. In *Golden State*, for example, the Court held preempted Los Angeles's decision to condition the award of a taxi franchise on the taxi company's agreement to settle a strike.[300] Similarly, in *Brown*, the Court held that California could not "predicat[e] benefits on [employers'] refraining from conduct protected by federal labor law," and thus the state's statute prohibiting the use of public funds for union-related activity was preempted.[301] A broad reading of *Golden State* and *Brown* might therefore reach an instance like New Haven's decision to tie a development permit to the hospital's agreement on organizing rights.[302]

Even this broad reading of existing doctrine, however, would not capture other iterations of tripartite lawmaking, and reaching all forms of tripartism would require a significant expansion of the existing la-

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[300] *See supra* pp. 1166–67.

[301] Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2416–17 (2008) (quoting Livadas v. Bradshaw, 512 U.S. 107, 116 (1994)) (internal quotation marks omitted). This rule applies where the state is not acting within its proprietary capacity. *See id.* at 2415.

[302] The reading would have to be broad because in both *Golden State* and *Brown* it was clear that the employers *would have* received the public benefit in question had the government not interposed the labor-related conditions. For example, in *Golden State*, the taxi company had been found "in compliance with all terms and conditions of their franchise[]" and was nonetheless denied the franchise because of its refusal to settle the Teamsters strike. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 610 (1986) (citation omitted) (internal quotation marks omitted); *see also Brown*, 128 S. Ct. at 2416. In the New Haven context, and others like it, it is far less clear that the employer would have received the public benefit in the absence of labor-related issues, particularly given the "ad hoc" nature of local land use and development processes and the range of factors that municipalities consider in making decisions in this setting. *See, e.g.*, Schragger, *supra* note 105, at 511 (citing ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 304, 308–09 (3d ed. 2005)).

bor preemption regime.[303] Such an expansion might be possible, and could perhaps be achieved by incorporating a robust motive analysis into preemption review. Following Kagan's suggestion, for example, courts could invalidate the nonlabor enactments that are part of tripartite lawmaking if they found that the government would not have acted in the way it did but for the concomitant private design of organizing rules. A motive analysis of this type could be justified on consequentialist grounds: by identifying, for example, legislation passed with improper motives (that is, passed because of the legislation's effect of reordering organizing rules), it might be possible to smoke out legislation that has impermissible effects.[304] Similarly, this kind of motive inquiry could also be justified on the ground that it would likely impose "enactment costs" on state and local governments, costs that would decrease the prevalence of tripartite lawmaking.[305] Indeed, a judicial inquiry into legislative motive would make it more costly for legislators to publicize the reasons they supported a given measure — doing so would increase the likelihood that the relevant decision would

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[303] Under existing law, for example, it is clear that California could not have amended its Medi-Cal reimbursement regime such that employers who agreed to card check and neutrality would receive higher reimbursement rates than employers who did not adopt such labor-related policies. *See supra* pp. 1181–82. Similarly, the state could not have amended the elder abuse law to provide more favorable rules of evidence for nursing homes that agreed to arbitrate first contract disputes. *See supra* note 147. Laws of this type clearly would "predicat[e] benefits on [employers] refraining from conduct protected by federal labor law." *Brown*, 128 S. Ct. at 2416–17 (quoting *Livadas*, 512 U.S. at 116) (internal quotation marks omitted). But this is not what the California Alliance Agreement did, or contemplated. Instead, under that agreement, California enacted Medicaid rate reforms that applied to all nursing homes in the state irrespective of the nursing homes' labor-related policies. Under current law, such actions are not preempted by the NLRA. *See, e.g.*, N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 531–33 (1979) (holding that laws of general applicability are not preempted even when they "alter[] the economic balance between labor and management," *id.* at 532).

[304] *See, e.g.*, Kagan, *supra* note 213, at 507–08. Accordingly, even if preemption analysis is concerned solely with a state action's "*effect* on federal rights," motive analysis might be an approach to determine these effects. *Livadas*, 512 U.S. at 119 (emphasis added). There is an active debate in the circuit courts regarding whether a motive inquiry is appropriate in labor preemption cases. Thus, in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, the Third Circuit held that "a factual investigation into the particular subjective motives of the relevant government agency" was inappropriate in preemption analysis and stated that "[w]e see the test as objective, based on the language and probable effect of the state ordinance or specification." 390 F.3d 206, 216 n.7 (3d Cir. 2004). In contrast, in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, the Seventh Circuit endorsed a pretext inquiry, holding that the "spending power may not be used as a pretext for regulating labor relations." 431 F.3d 277, 279 (7th Cir. 2005). Of course, the approach to motive analysis outlined here may suggest that this judicial debate has missed the way in which motive analysis can assist in determining legislative effects. *See* Kagan, *supra* note 213, at 506–08.

[305] *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 50 (2008).

be invalidated on preemption grounds — and thereby reduce the political benefits of engaging in this form of tripartism.[306]

Although enforcing existing rules — like those in *Golden State* and *Brown* — with more rigor and expanding the preemption regime to include a motive analysis make conceptual sense as means to prohibit tripartite lawmaking, both approaches suffer from the same pragmatic limitations. A threshold issue concerns detection. The problem is that there often will be no one with the right information and incentives to bring preemption challenges in this context. In many cases, the organizing agreements, and the connection between those agreements and the relevant state action, will be known only to the three parties. But neither the government decisionmakers who enact the relevant laws nor the unions who seek the organizing agreements will have an incentive to mount preemption challenges. In many cases, the employer will lack that incentive as well.[307]

Exacerbating these detection problems is a second and more fundamental issue, one identified above.[308] Again, should tripartite lawmaking be subjected to enhanced preemption scrutiny, the parties likely would take measures to drive their arrangements even farther underground. And, unlike straightforward state and local labor enactments — which are impossible to hide — keeping private the components (and the relevant connections between the various components) of tripartite labor lawmaking is not difficult to do.

Thus, parties to New Haven–type arrangements could easily adjust to a more aggressive application of *Golden State* and *Brown*: government officials could avoid publicizing the deal beyond the parties — communicating with the relevant unions and employers, but not with the general public — while unions and employers could structure their agreements to mask the connection between organizing rules and gov-

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[306] *See id.* at 52. The point should not be overstated. As Professor Matthew Stephenson notes, politicians may have ways to convey their actual motives to interested parties without announcing these motives to the general public. *Id.* at 54. Thus, in our context, decisionmakers often will not need to make any public statements in order to ensure that the relevant unions and employers are aware of how and why the decisionmakers are acting.

[307] Such incentive will not always be lacking. Where the employer views the agreement on organizing rules as the means to gain the union's affirmative assistance in securing some desired government action, the employer will have no motive to claim that the state action, which it desires, is preempted. Where, however, the employer views the organizing agreement as necessary to prevent the union from blocking delivery of a desired government benefit that the employer believes it would otherwise receive, the employer might have both the necessary information and the right incentives to mount a preemption challenge. Even here, however, it is far from certain that the employer would proceed with a preemption challenge. Given significant difficulties related to proof and remedies, employers might well decide that they can better advance their interests by accepting an organizing agreement and obtaining the relevant municipal action than by bringing a preemption claim under the NLRA.

[308] *See supra* pp. 1198–99.

ernment enactment.[309] With respect to incorporating a motive analysis into preemption doctrine, the literature on legislative motive recognizes that judicial inquiry into motive might well be futile because of legislators' ability to "hide bad legislative intent"[310]: if courts invalidate statutes based on illegitimate motive, legislators will respond by not revealing their motives or by offering alternative motives for the same pieces of legislation.[311] More to the point, as Professor Matthew Stephenson argues, the judicial inquiry into legislative motive can encourage politicians to "make sure their true motives and interests are communicated to relevant constituency groups" but not to the public at large.[312] In our context, motive analysis could be subverted if the relevant connections between public acts and private ordering are made known to the unions and employers involved but not otherwise disclosed.[313]

2. Prohibiting Private Ordering. — Because tripartite lawmaking depends on the ability of unions and employers to redesign privately the rules of organizing and bargaining, prohibiting this form of private ordering would also prevent tripartite lawmaking and enhance uniformity. Such a prohibition could be accomplished in any of several ways. For example, Congress could prohibit private reordering directly, or by rewriting section 301 so as to deny courts jurisdiction to enforce these agreements. The courts could invalidate such agreements by reading section 301 more narrowly than they have to date,[314] and

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[309] *See supra* p. 1204.

[310] Hasen, *supra* note 212, at 861; *see* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214–15 (1970); Kagan, *supra* note 213, at 438 n.77.

[311] *See, e.g.*, Kagan, *supra* note 213, at 438–39 (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[312] Stephenson, *supra* note 305, at 54. This is not to say that an attempt to invalidate these forms of tripartite labor lawmaking would be entirely futile. Requiring the parties to mask their arrangements even further than they do now would impose added costs and make the agreements more difficult to achieve. If, for example, employers could not commit in writing to exchange expanded organizing rights for union political support, the incidence of such agreements might decline. And, per Stephenson's argument on enactment costs, the increased need for secrecy might lessen the incentives that state and local politicians have to enter into these bargains. *See id.* at 53–54.

[313] Aside from the significant practical problems with attempting to enforce preemption rules against tripartite lawmaking, doing so would also present a remedial issue. If a court, in hearing a preemption challenge to a tripartite arrangement, invalidated the government enactment, the union would have the benefit of the private organizing agreement, while the employer would lose the benefit of the government action for which it bargained. One possible response is for a court to hold an organizing agreement unenforceable, under section 301, if the agreement is secured through a tripartite deal that results in preempted governmental action. *See supra* p. 1170 (discussing section 301). Another possibility is that parties would adjust to this potential outcome by refining their organizing agreements ex ante, writing them so as to remain in effect only so long as the predicate government action remains in effect.

[314] *See, e.g.*, Serv. Emps. Int'l Union v. St. Vincent Med. Ctr., 344 F.3d 977 (9th Cir. 2003).

the NLRB could preclude such agreements by refusing to recognize unions organized pursuant to private rules.[315]

Although any of these approaches undoubtedly would be effective, precluding unions and employers from designing alternatives to the NLRA rules is not justified by the costs inherent in tripartite lawmaking. While some union-employer agreements on organizing and bargaining rules are achieved in the manner described here, many — presumably the great majority — are not.[316] As noted above, many such agreements are secured through the traditional collective bargaining process.[317] In other instances, employers agree to private organizing agreements in order to avoid costs that unions could otherwise impose — costs ranging from strikes and picketing, to boycotts, to pressure from union-controlled pension funds.[318] Some employers report that they accepted the terms of private organizing agreements because unionization was useful in securing business.[319] Other employers report that the organizing agreements, and the unionization they facilitated, allowed them to attract more qualified workers.[320] Whatever the costs of tripartite lawmaking, then, they cannot justify the preclusion of union-employer agreements made in contexts that have nothing to do with tripartism.

B. Preventing Tripartism and Enhancing Local Variation

Instead of prohibiting tripartite lawmaking in an attempt at bolstering uniformity, we might also attempt to eliminate tripartism in a manner that increases variation in labor law. We could do so by relaxing the NLRA's preemption regime and enabling state and local governments to enact alternative rules of union organizing and bargaining.[321] To this end, Congress could simply eliminate the preemptive

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[315] *See* Dana Corp., 351 N.L.R.B. 434, 441–43 (2007) (establishing limitations on the binding effect of voluntary recognition).

[316] Because we do not have anything approaching a full account either of the total number of these agreements or of how many are achieved through each of the various processes described immediately below, we cannot know for sure. Based on the evidence we do have, it appears that tripartite lawmaking accounts for a significant proportion of these agreements, but is only one of several approaches through which the agreements are reached. *See, e.g.*, Brudney, *supra* note 7, at 835–40.

[317] *See supra* note 89.

[318] *See* Eaton & Kriesky, *supra* note 90, at 144, 147.

[319] *See* Brudney, *supra* note 7, at 837; Eaton & Kriesky, *supra* note 90, at 146.

[320] *See* Eaton & Kriesky, *supra* note 90, at 146.

[321] This Article does not attempt to develop a proposal for a relaxed preemption regime. Although such a project is beyond the scope here, other scholars have given this question some consideration. *See, e.g.*, Estlund, *supra* note 3, at 1578–79 (suggesting a possible structure in which federal law acts as a "floor" below which states and localities may not go); Gottesman, *supra* note 3, at 411–25.

effect of certain provisions of the NLRA,[322] or, borrowing from federal employment laws like the Fair Labor Standards Act,[323] refashion the federal organizing and bargaining provisions as "floors" below which states and cities cannot go but above which they may climb.[324] Because a relaxed preemption regime, of whatever type, would enable state and local governments to intervene directly in the law of union organizing and bargaining, such a regime would make tripartite lawmaking less necessary and likely less prevalent.

To be sure, a relaxed preemption regime might not eliminate all instances of tripartite labor lawmaking. Given the right balance of political power in a local jurisdiction, unions might be able to achieve desired departures from the NLRA rules only through tripartite arrangements even absent a rule of federal preemption. For example, a union might lack the political power necessary to convince a city council to enact a citywide card check ordinance, but the union might have political power sufficient to convince the city council to tie approval of an employer's development plans to a private agreement on card check. Given this particular balance of political power, certain instances of tripartite lawmaking might continue even absent federal labor preemption. Nonetheless, tripartite lawmaking would likely survive only in jurisdictions where this particular balance of power obtains, and would not continue in jurisdictions where labor has sufficient power to seek labor law reform directly. Accordingly, while no approach promises to eliminate tripartite lawmaking entirely, relaxing the preemption regime would reduce the prevalence of tripartism.

This conclusion does not necessarily imply that relaxing the NLRA's preemption doctrine is the right course for labor law. Indeed, preemption reform of this kind would implicate all the costs and benefits traditionally associated with federal preemption. Among the bene-

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[322] There would be precedent for such a move. In 1947, Congress amended the Act to allow states to pass so-called right-to-work laws, which make union-shop agreements — permissible under section 8(a)(3) of the federal law — illegal. *See* 29 U.S.C. §§ 158(a)(3), 164(b) (2006).

[323] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006 & Supp. III 2009). The Fair Labor Standards Act, for example, establishes a federal minimum wage. *Id.* § 206. Under the statute, states and cities may enact minimum wages that exceed the one set by federal law, but they may not enact a minimum wage lower than the federal standard. *Id.* § 218(a).

[324] *See* Estlund, *supra* note 3, at 1578–79. There is a difficulty inherent in construing the NLRA's organizing and bargaining provisions as a floor. Unlike the Fair Labor Standards Act's minimum wage, for example, the NLRA's organizing and bargaining rules assign rights to both labor and management, and they provide employees with both the right to engage in certain activities (for example, union organizing activity) and the right to refrain from such activity. *See, e.g.*, 29 U.S.C. § 157 (granting employees the right both to join labor organizations and to refrain from joining labor organizations); *id.* § 158 (detailing unfair labor practices for both unions and employers and establishing bargaining obligations for both unions and employers). With statutory rights in tension in this manner, Congress would have to be relatively specific about which rights constitute the floor and which do not.

fits of relaxing or eliminating the NLRA's preemption regime would be the potential for more genuine and productive experimental learning than is possible under the current rules.[325] And given the multiple pathologies of the current federal regime, the potential benefits of this type of reform are apparent.[326] With less preemption, we might also expect greater and more direct political participation in local politics, along with the ability to satisfy a greater diversity of preferences — here, preferences of employees, employers, and unions — for various labor law rules.[327] On the other hand, with a less robust preemption regime and wide variation in the rules of union organizing and bargaining, it might be more costly for corporations to operate in multiple jurisdictions.[328] Moreover, with a less robust preemption regime, some

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[325] *See, e.g.*, Dorf & Sabel, *supra* note 252, at 287–88; Listokin, *supra* note 252, at 551–52.

[326] In addition to enabling direct experimentation with the types of reform tripartism currently allows, *see* section IV.B, pp. 1199–1202, a less restrictive preemption regime would allow states and cities to experiment with the forms of labor-management cooperation and nonunion workplace committees that the federal Act prohibits, and would thereby permit firms to adopt the types of flexible work organization that the NLRA is rightly condemned for impeding. *See* Barenberg, *supra* note 12, at 879–93 (discussing flexible work organizations). Localities might also help mitigate the vitriol that attends many NLRB organizing campaigns by abandoning the NLRA rule that precludes unions and management from discussing the terms of a collective bargaining agreement prior to the completion of an organizing drive. *See* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834–36 (1996); Sachs, *supra* note 23, at 2694 n.28. As Drummonds points out, local variation could facilitate productive experiments in the area of "minority" or "nonexclusive" unionization. *See* Drummonds, *supra* note 3, at 189–91. *See generally* Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008) (discussing the need for state-based legislation to ban captive audience meetings).

[327] *See, e.g.*, Young, *supra* note 252, at 53–58. Professor Roderick Hills suggests a salutary local-federal feedback effect that a relaxed preemption regime might generate and that would hold promise in the labor context. Hills notes that the federal government, because of the size and heterogeneity of the population it encompasses, can suffer political gridlock. Hills, *supra* note 251, at 12. Hills argues that a presumption against federal preemption can serve as a partial antidote to gridlock: if states and cities are free to regulate business interests, those interests will have both the incentive and the institutional resources to demand congressional response. *See id.* at 17. If Hills is correct, relaxing the labor preemption regime might be a partial antidote for the gridlock that has stymied federal labor law reform. If states were to, for example, mandate card check recognition or — on the other hand — erect higher barriers to unionization, Congress might finally be jarred to amend the federal law.

It is worth noting that Hills's argument may extend descriptively, but not normatively, to our context. He argues that gridlock is not always a problem, and that we should be concerned about gridlock only when "Congress maintains the status quo despite the existence of latent interest groups that would, if mobilized, induce Congress to change the status quo for an outcome closer to that preferred by the public." *Id.* at 18. It would be difficult to describe either labor or business as a "latent interest group[]," *id.*; indeed, both are already quite clearly mobilized around labor law reform. *See, e.g.*, Sachs, *supra* note 12, at 670 n.48. Thus, although state and local innovation in labor law might prompt a congressional response, it is not clear that Hills would view the status quo as problematic.

[328] *But see* Silverstein, *supra* note 251, at 33–43.

state and local jurisdictions would likely use labor law as a mechanism to attract business, potentially initiating the kind of race to the bottom in labor-protective legislation that Cox himself feared.[329]

In sum, relaxing the preemption rules appears more likely to reduce the prevalence of tripartism than does a more robust preemption regime. Whether this conclusion implies that a relaxation of the rules of preemption is the appropriate course for labor reform, however, depends on independent judgments about the relative benefits of uniformity and variation themselves — judgments that are beyond the scope of this Article — and a subsequent assessment of how those benefits should be balanced against the costs of tripartism that this Article has described.

VI. TRIPARTISM IN OTHER AREAS OF LAW

Although this Article has focused on labor preemption and labor lawmaking, the analysis here suggests that the potential for tripartism extends beyond labor and across multiple areas of law. In fact, the dynamics necessary for tripartite lawmaking are common. In jurisdictions where local governments have regulatory leverage over firms, and where interest groups — of whatever variety — have local political power, the government's regulatory leverage can be exchanged for firms' compliance with the private demands of the interest groups. Although a full empirical investigation into these other contexts is beyond the scope of this Article, the literature already suggests several nonlabor iterations of tripartite lawmaking.

In the environmental context, for example, firms have begun to enter into "Good Neighbor Agreements" with community groups.[330] These agreements are private contracts through which firms agree to actions like reducing their emissions below federally mandated levels,

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[329] Cox wrote that a national labor policy, to be achieved through federal preemption doctrine, was necessary to avoid "interstate competition in enacting statutes attractive to industry." Cox, *Federalism in the Law of Labor Relations*, *supra* note 39, at 1317. A different possibility is that states and cities would use an expansive labor law to attract certain types of workers, thus creating a type of race to the top. *See* Freeman & Rogers, *supra* note 298, at 219. Economists Richard Freeman and Joel Rogers predict neither type of race, instead projecting that states would vary their laws on private sector unionization in approximate accordance with their public sector bargaining laws. *See id.* at 215, 219. Freeman and Rogers estimate that states hostile to labor would enact laws that would reduce union membership by approximately half a million members, while states friendly to labor would enact laws that would grow union ranks by approximately four million members — leading to a net addition of 3.5 million union members. *Id.*

[330] *See, e.g.*, Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, SOC. JUST., Winter 1996, at 134; Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147, 171–72 (2002); Vandenbergh, *supra* note 237, at 2064–66.

subsidizing local health facilities, providing information to the community, and allowing community monitoring of environmental compliance.[331] As environmental scholars have noted, moreover, community groups can secure such agreements by intervening in local political processes.[332]

Of course, federal environmental law also preempts certain forms of state and local environmental legislation. Federal statutes, for example, set standards for pesticide presence in foods, and states are precluded from imposing more stringent requirements than those set out in the federal law.[333] So, should a state or city wish to set more exacting standards for pesticide content in foods, it would be prohibited from doing so directly. Assume, though, that an agricultural firm doing business in a given state and county wants a certain area rezoned for agricultural purposes, or needs a permit to expand operations, or wants the state tax code amended in some way, or has any number of other interests that are impacted by state and local government action. Now assume that there is an environmental organization that wants to increase the stringency of pesticide standards for foods. The organization lacks the ability to convince the agricultural firm to agree to heightened standards on its own, but the organization has significant political sway in the county council or state legislature. Good Neighbor Agreements — like private organizing agreements — present the possibility for a tripartite political exchange: the state or county could act in the nonenvironmental area of law in exchange for the agricultural firm's private agreement to abide by more stringent pesticide standards. As in the labor context then, tripartite lawmaking would enable a local departure from the formally preemptive federal environmental regime.

Community Benefits Agreements, or CBAs, provide another example. CBAs are instruments through which community groups secure commitments from developers to provide a range of public goods.[334] Like Good Neighbor Agreements, many CBAs take the form of a private contract between the community group and a developer, spelling

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331 *See* Vandenbergh, *supra* note 237, at 2064.

332 Janet Siegel writes that one means through which a community organization can secure a Good Neighbor Agreement is "to intervene in a permitting process or permit renewal process." Siegel, *supra* note 330, at 174; *see also* Vandenbergh, *supra* note 237, at 2066 ("The agreements enable firms to head off community opposition to facility operations or pressure for government regulatory measures by agreeing to private standards and oversight.").

333 *See, e.g.*, Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 632–33 (2001).

334 *See, e.g.*, Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 46–47 (2008); Schragger, *supra* note 105, at 509–12.

out the types of community benefits the developer has committed to provide — ranging from low-income housing, to jobs programs, to resettlement assistance — as a component of its overall development project.[335] And, again, developers often commit to provide these benefits because doing so secures the community group's political support and, in turn, the requisite zoning and permitting approvals from the local government.[336] Accordingly, CBAs present another context in which tripartite political exchanges can be used to avert the formally preemptive effect of a broad range of federal laws. Practitioners in the CBA field recognize this fact. As one leading CBA attorney writes: "Although the public approval process provides the backdrop for negotiation of a private CBA, these purely private agreements are not subject to the wide range of legal strictures on governmental action. Thus the substance of a private CBA is not restricted by . . . statutory preemption concerns . . . ."[337]

Indeed, CBAs can impose a host of standards on developers that federal preemption law would prohibit states and cities from imposing directly. In addition to setting labor and environmental standards,[338] CBAs also might be used, for example, to impose health care requirements the direct imposition of which would be preempted by ERISA,[339] or immigration standards which, if imposed through direct local legislation, would be preempted by federal immigration law.[340]

In short, where federal preemption coexists with the possibility for private ordering, the potential for tripartite lawmaking will exist as well. And, as this Article has shown, the possibility for tripartite lawmaking presents a significant challenge to preemption law: whatever the specific federal regime, courts will struggle to find state and local government action preempted when that government action takes place in an area of law removed from the one governed by the federal statute.

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335 *See* Gross, *supra* note 334, at 46.

336 *See* Schragger, *supra* note 105, at 509 (observing that CBAs can be secured "[i]n exchange for community political support"); *see also* Gross, *supra* note 334, at 46 (noting that, in exchange for the developer's commitment to provide community benefits, "the community groups agree to support the project through the approval process, to refrain from lobbying against it, and/or to release legal claims regarding the project").

337 Gross, *supra* note 334, at 46.

338 For a list of examples of Community Benefits Agreements and the conditions they require, see *Community Benefits Agreements (CBAs)*, THE P'SHIP FOR WORKING FAMILIES, http://communitybenefits.org/section.php?id=155 (last visited Jan. 30, 2011).

339 *See* Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 190 (4th Cir. 2007) (noting the broad reach of ERISA preemption).

340 *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518–20 (M.D. Pa. 2007), *aff'd in relevant part*, 620 F.3d 170, 202 (3d Cir. 2010).

The normative implications described in Part IV will also follow tripartite lawmaking into these other legal contexts. Thus, the variation that tripartite lawmaking permits will present opportunities for experimentalism, even in areas of law where the federal regime intends to foreclose state and local variation. But the form of experimentalism will be limited, both by the private nature of the tripartite agreements and by the asymmetric political valence that tripartism will exhibit.[341] Moreover, the problems with opacity, elusion of legal review, political indirection, and collateral effects on other areas of law follow from the structure of tripartite lawmaking, and they will be attendant on tripartism irrespective of the specific subject matter of the tripartite agreement. Accordingly, the normative assessment of tripartism in these other contexts, and thus the appropriate response to it, will depend — as it does in the labor context — on an overall assessment of the relative desirability of variation and uniformity, along with an evaluation of the costs that come with this form of lawmaking.

VII. CONCLUSION

This Article has described the ways in which the rules of union organizing and bargaining can be reshaped in states and cities despite the exceptional breadth of the federal labor preemption regime. Through a tripartite political process, the public acts of local governments are exchanged, in one manner or another, for private union-employer agreements on a redesigned set of organizing and bargaining rules. Identifying and describing this form of labor lawmaking provides a more accurate and a more complete picture of the role of the local in U.S. labor law.

The form of tripartite lawmaking identified here also allows for a new, and fuller, assessment of the preemption regime itself. That is, although the NLRA's preemption doctrine is among the broadest and most robust in federal law, political exchanges and private ordering allow for circumventions of that doctrine. By operating under the radar of preemption analysis, tripartism allows for forms of local variation that preemption doctrine intends to, and is understood to, foreclose. This variation, in itself, is significant. But so too are the legal and political processes through which such variation is achieved and, here, this Article has detailed the concerns raised by this form of lawmaking.

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[341] These dynamics will not be precisely the same across contexts. For example, if there are community or advocacy groups over which local jurisdictions have significant regulatory leverage, the asymmetry in political valence might be less severe than in the labor context.

Finally, because the political conditions that facilitate tripartism are fairly common, the dynamics identified here have significance across multiple areas of law. Where state and local governments possess regulatory authority over firms, and organized interest groups enjoy political power in those state and local jurisdictions, the kind of tripartite exchanges described in this Article are possible. As this Article has shown, the possibility for this kind of political exchange raises important questions about, and poses challenges for, preemption law — both within the labor context and beyond.