Spells to Ward Off *Lochner*'s Ghost:

the Defense of Pro-Worker Legislation against NLRA Preemption Attacks

Louis Brandeis

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This paper outlines tactics for defending progressive state and local legislation against NLRA preemption attacks.

I argue that these attacks resurrect the *Lochner* doctrine. To defeat them, we should study the tactics of the early progressives like Brandeis who dismantled *Lochner* between 1905 and 1937.

State and local law can create a minimum wage or overtime rights above the federal level, rights to specified benefits, a right to breaks and meal periods, rights to workplace privacy, a right against discharge without just cause, or a right to keep a job if a business changes hands. The legislation is sometimes applied across the board; sometimes, to specific industries or sub-zones within the local jurisdiction.

Management continues to attack these laws as contrary to the NLRA. In management's view, the NLRA is a charter of employer rights giving them immunity in the name of the "freedom to bargain," "the right to use economic weapons," *Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132 (1976) or "the NLRB's primary jurisdiction," *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

This argument is a disguised revival of pre-New Deal doctrines associated with *Lochner v. New York*, 198 U.S. 45 (1905). Management's version of the NLRA rehashes the Nineteenth Century attacks on

progressive legislation based on "freedom of contract." In both the old and new versions, this argument is essentially saying that workers must be stripped of any substantive rights before they bargain. This is a one-sided "freedom of contract" – it allows the employer all the economic privileges it lobbies for under local law, without workers being allowed any opposite leverage.

I outline ways to deal with management's revival of *Lochner*. This paper is based on my litigation of *Rhode Island Hospitality Ass'n v. City of Providence*, 667 F.3d 17 (1st Cir. 2011), in tandem with Henry Willis, Margo Fineberg, Rich McCracken, Andy Kahn and Michael Rubin, who successfully litigated *California Grocers Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 127 Cal.Rptr.3d 726 (2011) cert. denied, 132 S.Ct. 1144 (2012).

1. This paper should not be necessary.

We have already won this issue several times over.

It is a sad comment on management's persuasive power in the lower courts that NLRA preemption of individual employment rights is still treated as an open question.

The Supreme Court rejected NLRA preemption of minimum labor standards in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22 (1987), and *Livadas v. Bradshaw*, 512 U.S. 107, 131-132 & n.26 (1994).

In arguing from these cases, it is crucial not merely to cite them, nor to give block quotes, but to explain their context and rationale at length. Many judges are predisposed to the arguments rejected in these cases, so they must be painstakingly educated about who won, who lost, and why.

- ***Metropolitan Life:*** **NLRA does not prohibit state and local minimum standards**

In *Metropolitan Life*, the Court rejected the argument that a state law requiring coverage for mental health benefits could not apply to

organized workers. To introduce *Metropolitan Life* to a court, it's useful to start by setting out the management argument rejected there:

> [A]ppellants argue that, not only did Congress establish a balance of bargaining power between labor and management in the Act, but it also intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law. Appellants assert that such state regulation is permissible only when Congress has authorized its enactment. Because welfare benefits are a mandatory subject of bargaining under the labor law, *see Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, and n. 1 (1971), and because Congress has never given States the authority to enact health regulations that affect the terms of bargaining agreements, appellants urge that the NLRA pre-empts any state attempt to impose minimum-benefit terms on the parties.

471 U.S. at 751-752. This sounds persuasive, and even the *Metropolitan Life* Court recognized it had "a surface plausibility to appellants' argument, which finds support in dicta in some prior Court decisions. *See Teamsters v. Oliver*, 358 U.S. 283, 295-296 (1959); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S., at 525-526." *Id.*

Management will fill its brief with pre-*Metropolitan Life* preemption cases broadly declaring that labor-management issues are off-limits, like *Machinists* and *Teamsters v. Oliver*. A lower court judge unfamiliar with the law will assume that management is right - which makes it all the

more essential to identify its argument as the same argument rejected made in *Metropolitan Life*.

The Court cited earlier rhetoric that scolded unions for trying to avoid state laws they found inconvenient: "It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. 'Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.' citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 212." 471 U.S. at 755-756. It recognized the post-*Lochner* consensus that state law has "broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety ... are only a few examples." 471 U.S. at 756. "Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Id.*

The best sentence in the opinion is the one where Justice Blackmun stopped parsing the language of prior opinions, and stopped

sifting the legislative history, and instead spoke bluntly about the original purpose of the NLRA: "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." 471 U.S. at 756.

- ***Fort Halifax Packing*:**
  management's rights come from state law too.

The Court reaffirmed this rule in *Fort Halifax Packing*, 482 U.S. at 20-22.

Fort Halifax Packing is useful because it gives, for the benefit of a generalist judge, a plain statement that there is a presumption against NLRA preemption of minimum labor standards: "The evil Congress was addressing [with the NLRA] thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Such regulation provides protections to individual union and nonunion workers alike, and thus neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA. Furthermore, pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." 482 U.S. at 20-21 (emphasis added.)

Even more important, *Fort Halifax Packing* is your clearest authority explaining why the "freedom of contract" argument revived from *Lochner* is wrong. Employers also draw their economic bargaining strength from state and local law. The *Lochner* theory assumes that worker rights are flimsy and prescriptive- created only by the legislature in derogation of the common law. By contrast, the *Lochner* theory assumes that management rights (e.g., the common law right to hire and fire at will, to dictate any terms that the labor market will bear, the economic strength from limited liability, the corporate form, state and local support of business through tax subsidies, business development grants, infrastructure support, and legal protections like workers comp exclusivity) are all natural and inherent rights of business.

This theory demands "freedom of contract" from state and local regulation, by assuming that any law that infringes management's common-law rights to hire and fire at will, or to impose any terms it pleases on impasse, is therefore an offense against the federal NLRA.

Fort Halifax Packing echoes the refutation of *Lochner* by progressives like Brandeis, by pointing out that both employers and workers come to the bargaining table with rights created by state and local law:

> Both employers and employees come to the bargaining table with rights under state law that form a " 'backdrop' " for their negotiations. [cit.om.] Absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run the work-place as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, pre-existing state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it. Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for "there is nothing in the NLRA ... which expressly forecloses all state regulatory power with respect to those issues ... that may be the subject of collective bargaining." *Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978).

482 U.S. at 21-22 (emphasis added).

This long quote from *Fort Halifax Packing* will be powerful if the judge is willing to read it without glossing over it. But it will help in dealing with the obtuse or ideologically hostile judge to argue this point at length, because it strikes at the heart of the *Lochner* myth.

Management's legal rights to do business come from the common law, which is a creature of state and local law, not from the Constitution or the NLRA. In the words of Justice Holmes' *Lochner* dissent, 198 U.S. at 75, neither the Constitution nor the NLRA enacts Mr. Herbert Spencer's

Social Statics (the 1896 Social Darwinist manifesto that Justice Holmes singled out for derision).

- ***Livadas*: minimum standards allowing for opt-out only in unionized workplaces are OK.**

The Court took a further step in *Livadas v. Bradshaw*, 512 U.S. 107, 131-132 & n.26 (1994). There, the Court explained that a local law may permit unions and employers to opt out of the statutory right in collective bargaining, even though non-union employees and employers do not have the same option.

This is a crucial step for designing local laws to ensure that minimum standards are fully applicable to non-union workplaces, while allowing unions the freedom (if they choose, through a clear and unmistakable waiver) to do so.

Management will likely attack such a local law as a device to pressure non-union employers, since it imposes greater burdens on them that may only be escaped if the workplace is organized and the workers choose to bargain it away. This attack is futile after *Livadas*.

The *Livadas* Court took pains to approve state laws that allow unionized employees to choose to opt out of minimum labor standards through collective bargaining, provided their negotiated waiver is express and unmistakable. 512 U.S. at 132. The Court held that such "opt out"

provisions are not preempted by the NLRA. *Livadas*, 512 U.S. at 132 (Court's holding "should cast no shadow on the validity of the familiar and narrowly drawn opt-out provisions.")

The *Livadas* Court also rejected the related argument that unionized workers' power to opt out of state standards through collective bargaining "unfairly" disadvantages non-union employers: "Nor does it seem plausible to suggest that Congress meant to pre-empt such opt-out laws, as 'burdening' the statutory right of employees not to join unions by denying non-represented employees the 'benefit' of being able to 'contract out' of such standards." *Id.*, 512 U.S. at 132 n.26. *See also St. Thomas-St. John Hotel & Tourism Assn. v. Virgin Islands*, 218 F.3d 232, 244-245 (3d Cir. 2000).

2. Why Management Is Scared

To understand why the management bar is deeply anxious about union-supported local legislation, read Seyfarth Shaw's blog post after *California Grocers* and *Rhode Island Hospitality,* http://www.seyfarth.com/publications/LE-hospitality-newsletter:

> **Recent Cases May Lead to More Hospitality Union "Negotiation" Through Local Legislation**
>
> By: Ron Kramer
> In the past few months two decisions have issued that could incentivize unions that cannot achieve their demands at the bargaining table to get them

> through local, industry-specific legislation instead. This is not a new phenomena [sic], but every court decision that supports such an action only will encourage it.

Right off the bat, Seyfarth apologizes to its clients. It reminds them that the management bar has been very successful at frustrating union attempts to win worker rights in collective bargaining. However, these new union-backed state and local employment laws are changing the game, because Seyfarth's usual tactics do not work against them - no filibusters in R cases, no protracted ULP litigation, no regressive bargaining, no implementation of final offers, no permanent replacement of strikers.

Seyfarth then outlines the worker-retention ordinances that the courts left intact:

> On December 2, 2011, in *Rhode Island Hospitality Association v. City of Providence*, 2011 U.S. App. LEXIS 23915 [667 F.3d 17] (1st Cir. 2011), the First Circuit Court of Appeals upheld a Providence ordinance that requires companies that acquire, lease, or take over the management of hotels to employ the predecessor's employees for the first three months of operations. The new company need not hire everyone if it does not need the assistance, can still fire employees for just cause, and also is entitled to set initial terms and conditions of employment. Nevertheless, the ordinance basically insures that, for the first three months, the successor employer's workforce will consist of the predecessor employer's employees.

Seyfarth begins the first incantation of *Lochner*:

> The City adopted this ordinance on the theory that transfers of hotel operations in New England had caused "immeasurable damage to the reputation of the tourist industry," and that the law was needed "to promote

> the stability of Providence's hospitality and tourism business." One can only assume a driving force behind the legislation was organized labor's goal of protecting the jobs of existing employees and forcing successor employers into a position of having to recognize any existing unions.

In any other area of Seyfarth's practice, it would futile to disparage the political motives of unwanted legislation. In a democratic legal system, courts are not allowed to judge the legislature's motive for passing laws. Nor does a court have any authority to investigate the identity of a law's supporters, in order to decide whether the law is constitutionally legitimate. A modern court could not strike down environmental deregulation because it was backed by the oil industry. Imagine what Seyfarth would say about a federal court that enjoined an employer's tax subsidy because the court felt it was wrong for employers to lobby for their interests, and because the subsidy might strengthen the employer's bargaining strength with its workers.

Nevertheless, the *Lochner* revival begins when courts and management lawyers believe themselves free to condemn progressive laws because they are advanced by unions.

Seyfarth continues:

> The local hotel association and two local hotels sued, claiming that this ordinance was unlawful for a variety of reasons, including in particular that it was preempted by the National Labor Relations Act on *Machinists* preemption grounds. Under *Machinists* preemption, courts will exclude state regulation of conduct neither arguably protected nor arguably

> prohibited under the National Labor Relations Act (NLRA), but nevertheless intended by Congress to be left unregulated so that it may be controlled by the free play of economic forces. Plaintiffs argued the ordinance was preempted for three reasons, each of which the court rejected.
>
> First, plaintiffs argued that the ordinance creates the risk that a new employer taking over the operation of a hotel will be considered to be a legal successor under the NLRA, such that it would have to recognize and bargain with the union representing the predecessor's employees. By forcing new employers to hire most, if not all, of their staff from the predecessor's operations, a key factor in the successorship test, the ordinance had an impermissible impact on the successorship doctrine. The court disagreed, primarily because it understood the successorship doctrine to be based upon a conscious, voluntary decision of the new employer to maintain the same business and to hire a majority of its employees from the predecessor. As such, the court did not believe that a ordinance mandating employment could trigger the successorship doctrine. The court also cited to an administrative law judge's decision, *M&M Parkside Towers LLC*, 2007 WL 313429 (NLRB ALJ 1/30/2007), finding, in the case of a similar ninety-day hire ordinance, that the appropriate time to make the successorship determination was at the time employment decisions are made sometime after the expiration of the ninety-day period. The court acknowledged that, were the National Labor Relations Board (NLRB) to apply the successorship doctrine in a way that the ordinance would impact the decision, preemption could be a defense -- and the concurring judge declared that such a claim would prevail.

This was a tactical choice I had made - turning management's arguments against it. A terrible ALJ decision held that workers hired under a New York ordinance were "contingent" until the statutory 90-day period was over, thereby postponing the moment of *Burns* successorship until they were not fired on the 91st day. I pointed to this to deter the courts (who were eager to find preemption from "mandatory" Burns successorship), to show that the local ordinance did not force the NLRB's hand.

> Second, plaintiffs argued that, by providing employees with benefits for which they would otherwise have to bargain, the ordinance impermissibly, enhanced employee and union bargaining power. The court rejected that argument, as the Supreme Court has recognized that states and local governments can adopt minimum labor standards that are not inconsistent with the general legislative goals of the NLRA. Although this ordinance applied only to one industry, the court did not see that as sufficient to raise preemption concerns. The court distinguished this ordinance, which covered all employees in a particular industry, from *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1130 (7th Cir. 2008). In *Shannon*, the Seventh Circuit found an Illinois state mandatory break statute preempted where it only applied to housekeepers in Cook County (Chicago). The First Circuit distinguished *Shannon* as a situation where the law was to apply only to one occupation, in one industry, in one county.

Seyfarth here laments that the First Circuit did not follow the terrible Seventh Circuit decision in *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1130 (7th Cir. 2008). Seyfarth's point- that there is no coherent distinction between the two cases - has merit. It is arbitrary to say that the City of Providence may enact a jurisdiction-wide ordinance for hotels, while Illinois may not enact a law for Cook County. Would the result in *520 S. Mich. Ave.* have been different if the same ordinance had been enacted by the Cook County Board of Commissioners, to cover the entire jurisdiction of Cook County?

> Third, plaintiffs argued that the *Machinists* doctrine protects a new employer's "right" to make hiring and firing decisions free of state interference. The court found nothing in the *Machinists* preemption doctrine or federal labor law to indicate such a right existed. Indeed, the NLRA limits employer rights to refuse to hire or to fire for discriminatory purposes, and courts have upheld ordinances and laws placing restrictions on an employer's ability to fire employees. After rejecting the Plaintiffs'

> other arguments as well, the court upheld the ordinance.

Here the federal courts' normal inclination to avoid inventing new federal rights, or to open the doors of the federal courthouse to state-law disputes, pushes things in the right direction. But courts will only fall back into their normal pattern of refusing to federalize state law if management's *Lochner* revival has been discredited.

> While this was only an appellate court decision, the U.S. Supreme Court on January 23, 2012, declined to take up a similar challenge to a Los Angeles ordinance that required the purchaser of grocery stores to employ the predecessor's workers for ninety-days. In so doing, the Court let stand a California Supreme Court decision upholding the ordinance and rejecting plaintiffs' preemption claims. *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177, 127 Cal. Rptr. 3d 726, 254 P.3d 1019 (July 18, 2011), cert. denied, January 23, 2012. As did the First Circuit, the California Supreme Court: (1) did not believe successorship could be based upon the involuntary retention of employees pursuant to an ordinance; (2) rejected the theory that the ordinance impermissibly interfered with an employer's right under the NLRA to, in a nondiscriminatory fashion, refuse to hire a predecessor employer's employees (a theory accepted by the state appellate court); and (3) believed that single industry legislation could qualify as a generally applicable employment standard, for there was nothing that would indicate Congress intended to prevent states and localities from attacking employment problems industry by industry.
>
> While Providence and Los Angeles were not the first cities to impose such "successor hire" ordinances, *Rhode Island Hospitality* and *California Grocers* give unions and local governments significant legal precedent to support the adoption of these ordinances across the country.

Of course, the catastrophe Seyfarth warns its clients of will only occur if unions do, in fact, pursue such legislation vigorously.

Seyfarth next gives an interesting piece of advice, which reveals that

its clients who want to avoid successorship can do so more easily by refusing to hire rather than firing workers after the 90-day retention period required by the ordinance:

> Hospitality employers must be cognizant of the possibility of such ordinances when acquiring, leasing or taking over the management of properties. From a practical standpoint, the impact of these ordinances, depending upon how written, may be minimal. Most employers taking over an existing operation hire a majority of the predecessor's employees and become a successor under the NLRA anyway. For those employers wishing to come in and start anew, however, that will be difficult. While, in theory, compliance with such ordinances will not make an employer a successor under the NLRA, it will be difficult for an employer at the end of the ninety-day time period to justify firing most if not all of its staff, many of whom no doubt have performed well, simply because it never wanted to hire any of the old employees anyway.

Reading this Seyfarth report vindicates the tactical decision to argue that the NLRB is not necessarily bound to find a successorship. Seyfarth is admitting that union-busting successors who want to "start fresh" (i.e., purge the workforce of union members) will have a much harder time if they have to employ the predecessor employees for 90 days. Seyfarth admits that the predecessor employees "no doubt perform[] well", meaning that the only reason they would not have been hired absent the ordinance is anti-union discrimination. When workers are given more autonomy and more rights, even when that does not directly translate to an immediate NLRB victory for the union, it means that management loses control over the workplace, and it becomes harder for management

to orchestrate appearances against us.

> Perhaps a greater concern with these decisions is the apparent willingness of the courts to accept with little debate the idea that single industry legislation is not preempted. No doubt certain industries have particular employment issues (e.g., mining) for which industry-specific legislation is completely appropriate. But were these two ordinances really designed to address an industry-specific issue, or were they designed to "fix" in one industry for bargaining leverage purposes a common issue general to all industries? If so, how is this any different from the mandatory Cook County-only housekeeper-only break law held preempted by the Seventh Circuit? The courts may not have heard the end of this issue.
>
> In the meantime, hospitality employers should expect and be prepared to fight more attempts at industry specific legislation at the state and local level to basically set a new floor for collective bargaining on various terms and conditions of employment.

http://www.seyfarth.com/publications/LE-hospitality-newsletter.

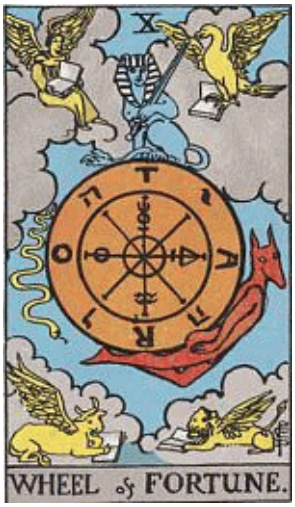
Note that although Seyfarth sets forth the First Circuit's and the California Supreme Court's opinion as straightforward applications of existing law, it nevertheless concludes with a battle cry that Seyfarth clients "should expect and be prepared to fight more attempts at industry specific legislation at the state and local level to basically set a new floor for collective bargaining on various terms and conditions of employment." What do *Metropolitan Life*, *Fort Halifax Packing*, and *Livadas* mean, if not that it is legitimate for unions to seek legislation to raise the floor from which bargaining starts?

I argue that the reason for this management intransigence is that it is channeling deep-seated judicial prejudices, as old as *Lochner*, that

capitalism is more powerful than democracy - that, no matter what the Supreme Court said in the 1980s, there is something illegitimate about laws that give workers more rights than management wants to give up on the free market.

3. The five tell-tale incantations of *Lochner*

Management does not have to win a majority of cases to keep its fight alive. Even if only a few courts decide the issue in favor of management, the decisions will be held up in all future courts as authority that *Metropolitan Life*, *Fort Halifax Packing*, and *Livadas* do not mean what they say. The two poster children for management's continuing resistance are *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 499 (9th Cir. 1995) and *520 South Michigan Avenue Associates v. Shannon*, 549 F.3d 1119 (7th Cir. 2008). These cases show an astonishing degree of persistence in the lower courts in ignoring *Metropolitan Life*, *Fort Halifax Packing*, and *Livadas*.



Bragdon struck down a county prevailing wage ordinance, that required employers on private construction projects to pay a prevailing wage similar to Davis-Bacon prevailing-wages on public works contracts.

That is, a local bureaucrat would survey prevailing wages; in a heavily unionized county, this wage would reflect the governing rates set by CBAs of the main employers. *Bragdon*'s first rationale for preemption was that this required non-union employers to subscribe to wage rates negotiated by other employers, thereby infringing on their NLRA right to bargain. 64 F.3d at 501-502.

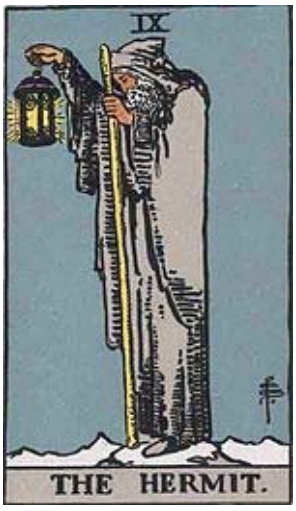
So far as this goes, this first rationale was bad, but not catastrophic. As a general rule, it is a bad idea for minimum labor standards to incorporate "prevailing wage" structures, in turn based on area collective bargaining. It would have been safer for the Contra Costa County Board of Commissioners to legislate the minimum wages directly into the ordinance, rather than leave the minimum to be fixed by a bureaucrat in reference to private agreements.

Unfortunately, *Bragdon* went much further, by declaring that the wage and benefit packages were preempted because they were too detailed, "far more invasive" than the "simple" standards in *Metropolitan Life* and *Fort Halifax Packing*. 64 F.3d at 503. It held that the law was preempted because it only affected one industry, and so was not a law of "general application," *id.* *Bragdon* denounced the law as "an interest group deal in public-interest clothing," and announced that the law was

not, in the Court's view, necessary to promote the Ordinance's stated purposes of safety and raising the standard of living. *Id.* Without mentioning *Livadas*, the *Bragdon* Court held that the provision for an opt-out further undermined the Ordinance's validity. *Id.* Worst of all, the Court declared the importance of preventing this strategy from spreading, lest workers get the idea they could win their objectives through democratic legislation:

> A precedent allowing this interference with the free-play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies.

64 F.3d at 504.



Bragdon became something of an embarrassment to the Ninth Circuit. When confronted with the clear conflict between *Bragdon* and settled law, the Ninth Circuit repudiated *Bragdon* in *Associated Builders & Contractors v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004) ("the NLRA does not authorize us to pre-empt minimum labor standards simply because they are applicable only to particular workers in a particular industry. [citing cases] It is now

clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.")

In *520 South Michigan Ave.*, 549 F.3d at 1130-33, however, the Seventh Circuit (Manion, J.) rejected the Ninth Circuit's current reading in *Nunn*, and embraced its former decision in *Bragdon*. Judge Manion held for the Seventh Circuit that an Illinois break-time law focusing on hotel housekeepers in Cook County was preempted by the NLRA, because it was enacted in the context of a labor dispute and did not apply state-wide. The Seventh Circuit's decision conflicts with the Illinois courts' rejection of the same arguments against the same law. *See Illinois Hotel and Lodging Ass'n v. Ludwig*, 374 Ill.App.3d 193, 869 N.E.2d 846 (Ill.App.) *appeal denied*, 225 Ill.2d 633, 875 N.E.2d 1111 (Ill.2007). It also conflicts with the majority of appellate courts to have addressed the issue since *Bragdon*. *See California Grocers*, 52 Cal.4th at 200 n.8 (noting that *Nunn* repudiated *Bragdon*, and citing cases rejecting *Bragdon* with the exception of *520 South Michigan Ave*).

Bragdon and *520 South Michigan Ave.* should be studied closely, because they preach the core tenents of *Lochner*.

- **Only "minimal" standards allowed**

Bragdon and *520 South Michigan Ave.*, like *Lochner* itself, had to deal with a legal background in which some legislation on employment terms had already been held valid. Just as *Bragdon* and *520 South Michigan Ave.* had to distinguish *Metropolitan Life* and *Fort Halifax Packing*, the *Lochner* Court a century earlier had to distinguish a host of precedents upholding Sunday laws, mining regulations, and other employment laws. *See* 198 U.S. at 56.

Because a blanket condemnation of employment standards was not possible, the *Lochner* strategy is to condemn any legislation that imposes more than a minor nuisance on employers. For example, *520 South Michigan Ave.* seized on *Metropolitan Life*'s use of the word "minimal," which Justice Blackmun used interchangeably with "minimum," to denote a floor from which the parties might bargain, *see* 471 U.S. at 755. Yet the Seventh Circuit declared that by using the word "minimal," *Metropolitan Life* actually authorized courts to legislate extremely low thresholds of tolerance, which pro-worker laws may not exceed.

This is vintage *Lochner*. *Compare Lochner*, 198 U.S. at 62 ("Adding to all these requirements [regulating bakery work] a prohibition to enter

into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.") *with Bragdon*, 64 F.3d at 502 ("It is clear that this Ordinance affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*.") and *520 South Michigan Ave.,* 549 F.3d at 1132 ("'Minimum' as used by the Supreme Court, implies a low threshold. . . These statutory provisions can in no sense be considered 'minimal.'")

- **Prohibit selective legislation: laws are invalid if "narrow, not generally applicable"**

The second incantation of *Lochner* is that legislation is doomed if it is in any way focused or selective. This hamstrings the legislature, by denying it the power to choose and address each industry and class of work separately. (Ironically, across-the-board state and local legislation that treated truck drivers, merchant seamen and hotel housekeepers identically might be attacked from the opposite direction as an interference with interstate commerce.)

Both *Bragdon* and *520 South Michigan Ave.* sound this theme:

Bragdon, 64 F.3d at 504 ("this type of minimum labor standard enactment, which is not of general application, but targets particular workers in a particular industry and is developed and revised from the bargaining of others, affects the bargaining process in a way that is incompatible with the general goals of the NLRA.") and *520 S. Michigan Ave.*, 549 F.3d at 1132 ("The Attendant Amendment's narrow scope distinguishes it from minimum labor standards which are not subject to preemption, and places the Attendant Amendment in the zone protected and reserved for market freedom.")

Again, this is vintage *Lochner*. *Lochner* made much of the fact that the New York statute was only aimed at bakers, with no explanation as to why it should not apply to other trades. The *Lochner* Court decided that the specific focus on bakers was illegitimate, because the Court did not think it was good policy: "In our judgment, it is not possible, in fact, to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten

hours a day, it is all right, but if ten and a half or eleven, his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable, and entirely arbitrary." 198 U.S. at 62.

- **Attack the local law's motive and supporters: "interest group deal in public-interest clothing"**

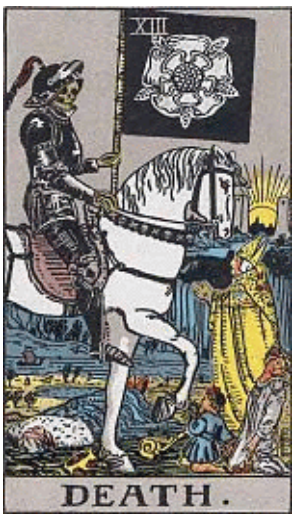
- **Protect employers' economic leverage by denying workers political power: local laws are invalid if they "encourage lobbying instead of negotiating"**

The next overtone in *Lochner*-mancy is contempt for workers as political actors. These opinions are remarkable for their candor in declaring that workers and their organizations should not be allowed to use the political process at all.

"This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies." -said the *Bragdon* Court, 64 F.3d at 504, as if that were a threat that courts could legitimately counteract. Judge Manion implied that unions have no business talking to elected representatives about their members' interests: "[T]here seems to be a disincentive to collective bargaining and instead encouragement for employers or unions [footnote] to focus on lobbying at the state capital instead of negotiating at the bargaining table." *520 South Michigan Ave.*,

549 F.3d at 1132-33. In the footnote, the Seventh Circuit noted that UNITE HERE lobbied for the Act, then conceded that this is legally irrelevant. 549 F.3d at 1133 n.10. This raises the question of why the footnote was included in the first place. While the Seventh Circuit claimed not to care whether UNITE HERE had lobbied for the law, it identified as one of the main reasons for enjoining it that the law's success might motivate unions like UNITE HERE to lobby for other laws when they should be bargaining without rights, and without seeking any legislative help. *Id.*

The Seventh Circuit apparently holds that unions are not allowed to seek general laws, either, because that would constitute "bargaining" for non-members: "Illinois' approach further allows non-union employees to benefit from the bargaining of the union which took place, not at the bargaining table, but at the legislature." 549 F.3d at 1133. This last sentence is truly astonishing- having condemned union lobbying for their members' interests as "not general enough," the Seventh Circuit then springs the Catch-22 that general labor standards equally benefiting non-union workers are even worse, because unions are



thereby imposing employment terms on non-union businesses they do not even bargain with.

Again, this is the resurrected voice of *Lochner*. The *Lochner* majority was equally contemptuous of the progressives who passed the 60-hour week: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when . . . the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men *sui juris*) in a private business. . ." *Lochner*, 198 U.S. at 64.

- **Federal law makes Nineteenth Century common law the permanent law of the land**

The core tenent of the *Lochner* regime is that the common law of the Nineteenth Century, inherited from medieval England, is the inherent and permanent law of the federal Constitution. "[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution." 198 U.S. at 64.

Cases like *Bragdon* and *520 South Michigan Ave.* continue this, by cloaking the same "freedom of contract" doctrine in the NLRA system of

collective bargaining. “The more stringent a state labor substantive standard, the more likely it is that the state law interferes with the bargaining process.” 549 F.3d at 1136. This is another way of saying that workers must be stripped of any substantive employment rights before they come to the bargaining table, because any “non-minimal” worker rights might get in the way of the employer’s bargaining.

4. Conjuring Brandeis

Remember that *Lochner* has been defeated before.

To be sure, we ought to have judges who follow *Metropolitan Life*, *Fort Halifax Packing*, and *Livadas* fairly. But their reading will be influenced by management’s citation of *Bragdon* and *520 South Michigan Ave.*, which cast a pall over what the precedents really mean.

So to marginalize *Bragdon* and *520 South Michigan Ave.,* and to keep the court from doing more damage to the law, we should look at what progressives like Brandeis did in response to *Lochner*.

- **Name the thousand ways that employers' bargaining power depends on local legislation**

The progressives' first job after *Lochner* was to dissolve the idea businesses have immutable, Constitutionally enshrined common-law rights of contract and property. Those rights come from state law, the source of the common law. That common law is not, as Justice Holmes reminded the Court, "a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). While states used to give businesses the rights of ancient English common law, nothing prevents states from changing those rights. The excellent passage in *Fort Halifax Packing* about the state-law backdrop of the employer's bargaining power, 482 U.S. at 20-22, repeats what Brandeis and others argued eighty years before.

The corollary is that employers already depend on state law for their power. Employers' bargaining strength, which courts like *Bragdon* and *520 S. Michigan* are so concerned to protect, is itself a creature of a legion of laws, benefits, privileges and subsidies that state and local governments confer and which employers vigorously lobby for.

In my Rhode Island case, I began even before *Metropolitan Life* with *Massachusetts Nursing Ass'n v. Dukakis*, 726 F.2d 41, 45 (1st Cir.1984). This is a useful case, because it ruled against a union who argued that state laws affecting the employer's bargaining position were preempted. Massachusetts imposed a cap on the cost for which hospitals could claim reimbursement under Medicaid and private insurance. A nurses' union sued, arguing the law impaired its ability to bargain, by imposing a ceiling on the hospital's labor costs. The union claimed that the Massachusetts law imposed external constraints on the union's "freedom to bargain," and was therefore preempted by the NLRA. The First Circuit rejected this argument, pointing out that it would require preemption of any state or local regulation that affected matters subject to bargaining:

> [I]n any industry the price of whose product or service-such as electric power, telephone, natural gas, or even rent controlled real estate-is regulated, a state would find its regulatory system vulnerable to preemptive attack on the ground that the overall control of price was too inhibiting an influence on collective bargaining. Logic, however, would carry beyond simple price control. Any state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to the preemption argument.

726 F.2d at 45.

I argued from *Massachusetts Nursing Ass'n* that, while the Providence worker-retention ordinance may strengthen workers'

bargaining position, this cannot trigger preemption of the individual employment right. If it did, the NLRA would also preempt any of the innumerable local and state decisions affecting the Providence hotel industry, which might increase or decrease a hotel's economic strength and therefore its ability to withstand union pressure. For example, during a pending labor dispute, the City may grant a hotel a zoning variance, a liquor license renewal, a tax subsidy or access to City-backed financing. Each of these "targeted" measures would enhance the hotel's economic power, and therefore its ability to withstand a strike. But the exercise of the City's police power is not preempted just because it affects the backdrop of collective bargaining.

The Seventh Circuit's reasoning in *520 S. Michigan* is extremely vulnerable to this insight. If pro-employee legislation is preempted because it singles out hotels in Chicago, then so is pro-hotel legislation in the same sector. Under the Seventh Circuit's logic, any zoning variances or tax concessions given to Chicago hotels would "distort bargaining" in this heavily unionized sector, by strengthening the hotels' economic position. The First Circuit does not follow such a preemption rule. The

hospital industry in Massachusetts and the paper industry in Maine are as heavily unionized as the hotel industry in Chicago, but this did not persuade the First Circuit to strike down "targeted" legislation affecting those industries. *Cf. Massachusetts Nursing Ass'n*, 726 F.2d at 45; *International Paper Co. v. Town of Jay*, 928 F.2d 480, 483-484 (1st Cir.1991).

- **Raise the specter of judicial policy-making**

Progressives' next strategy was to put so much stress on *Lochner*'s legislative line-drawing that the doctrine would ultimately collapse. The "Brandeis" brief- an amicus brief devoted entirely to legislative policy arguments about the need for regulation in the instant case - was simply a way of calling *Lochner*'s bluff. If the courts were to grant themselves the power to decide what economic laws were and were not justified, and to decide what is and is not acceptably "minimal," they would have to deal with a avalanche of policy arguments in successive cases. The long-term strategy of the Brandeis brief was not simply to make a case in the particular lawsuit, but to drive the courts out of the business of substantive policy review altogether.

A healthy dose of realism never hurts. In the Rhode Island case, I put in an extensive record that the worker retention ordinance was motivated by the 2009 firings of 100 non-union Hyatt housekeepers in Boston. I put in *Harvard Business Review* articles about how badly the resulting uproar had hurt the regional hotel industry. The Court did not discuss this submission, but it helped to discredit management's oratory that this was solely a union issue. It also confirmed that Providence's rationale for protecting the area hotel industry was not fanciful.

So when management tempts the court with *Bragdon / 520 S. Michigan* arguments, dare the Court to draw a clear definition of where to draw the line, with the help of empirical Brandeis-brief submissions. For example, in *520 S. Michigan*, the Seventh Circuit did not give lower courts a way to decide how minimal, or how general, a regulation would have to be to survive preemption. The Court pointed to the relative union density of Cook County: so how heavily unionized does an industry have to be before a law would be preempted? Do the non-union housekeepers at the Boston Hyatt and the Hilton Providence lose their right to petition lawmakers for protection, just because there are a few union hotels in the area who might find such protections inconvenient? Since when do non-union workers get disqualified from political rights just because other

workers at other competing hotels have organized? How onerous would a local law have to be before it is preempted?

Courts will not want to make judgments like this. The sheer repetition of the exercise in line-drawing erodes the power of *Lochner*. For example, in overruling *Lochner*, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) capped off decades of steady Brandeis-inspired erosion to uphold state and local employment laws limited to particular industries, including to miners, seamen, and women, notwithstanding the *Lochner* doctrine that the limited focus distorted the freedom of contract. *West Coast Hotel* cited earlier successes by progressive lawyers, like *Spokane Hotels v. Younger*, 113 Wash. 359, 360-361, 194 P. 595, 596 (1920) which defined a special minimum wage for hotel housekeepers but no other job classifications, and *Miller v. Wilson*, 236 U.S. 373, 382-384 (1915), which rejected the argument that a maximum-hours law was unconstitutional because it only applied to hotels, and not to boarding houses or domestic servants. 300 U.S. at 390, 395.

Bragdon and *520 S. Michigan* condemn in the name of the NLRA "freedom of contract" the same classifications and selective laws upheld in *West Coast Hotel* against the same theory.

- **Summon democratic outrage**

West Coast Hotel was a reaction to the courts' nullification of virtually any legislation sought by labor, for the very reason that labor sought it.

We need to be absolutely militant against the disenfranchisement of workers that the *Lochner* revival preaches. Cases like *Bragdon* and *520 S. Michigan* say outright that unions and workers have no right to seek employment legislation that might strengthen their hand in bargaining – a worker's place is to beg at the bargaining table, with no external rights, to an employer whose undiminished privileges under state and local law give it an dominant bargaining position. There is a universal constitutional rule that a court may not inquire into the support or motivation of a law, but that rule goes by the wayside in too many labor cases. Management too often gets away with re-casting the NLRA as a feudal obligation that bars servants from appealing to the sovereign.

Again, I had the benefit of good circuit law. In *International Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir.1991), the First Circuit held that local exercise of the police power is just as safe from NLRA

preemption when it "targets" a particular industry or even a particular employer in the locality. In *Town of Jay*, International Paper Co. was embroiled in a protracted labor dispute in Jay, Maine. The Town of Jay passed a local ordinance placing onerous restrictions on paper mills operating in the Town– effectively applying only to International Paper. International Paper claimed the ordinance was preempted by the NLRA because it was passed by striking union workers (who formed a large part of the town) to impede its operations during the strike.

The First Circuit affirmed a Rule 12(b)(6) dismissal of this NLRA preemption challenge. It held that the motives of the town ordinance were irrelevant to the Court's inquiry. 928 F.2d at 483-484. "[International Paper's] is the extreme contention contemplated and expressly rebuffed in *Massachusetts Nursing Ass'n.*" 928 F.2d at 484. So long as the Ordinance was an otherwise valid exercise of the Town's police power, the fact that it focused on a single employer in a single industry made no difference to its validity.

On this point, it will also help to remind the Court that the NLRA does <u>not</u> disenfranchise workers. "The 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial

forums.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 & n.15 (1978). Yet in response to *Eastex*, *Bragdon* and *520 S. Michigan* hold that the resort to the legislative process is nevertheless preempted, because such appeals might disrupt "free collective bargaining." This, you can tell the Court, is why *Bragdon* and *520 S. Michigan* are distinguished and rejected in the majority of courts. *See California Grocers*, 52 Cal.4th at 200 n.8 and cases cited therein.

- **Expose management's contract and property rights as smoke and mirrors**

Brandeis and the progressives exposed the mysteries of employer common-law rights, in ways we can copy now.

A central text was Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1919), a brilliant treatise used to oppose labor injunctions. The essential insight is that an employer common-law "right" is often confused with what should be more precisely called a "privilege" - something that makes the employer's conduct lawful, but which does not give the employer the right to enjoin an adversary whose conduct is equally lawful. It is telling that the *California Grocers*

court invoked Hohfeld in its worker-retention case. 52 Cal.4th at 202, 127 Cal.Rptr.3d at 743.

The problem there came in construing *NLRB v. Burns International Security Services* 406 U.S. 272, 280 (1972) and *Howard Johnson Co. v. Hotel Employees* 417 U.S. 249, 262-264 (1974). Each case described how the NLRA does not abridge the employer's "right" to hire a new workforce. Management persuaded the lower courts in *California Grocers,* 176 Cal.App.4th 51, 98 Cal.Rptr.3d 34 (2009) that this created a federal NLRA right for successor employers to fire the prior workforce, so that local worker-retention laws abridged the federal right.

In response, we had to channel Brandeis and Hohfeld. An employer's right to hire and fire at will comes from the common law, a creature of state law. State and local legislatures may change the common law of at-will employment to give individual workers a right to keep their jobs, without offending the NLRA. *See St. Thomas-St. John Hotel & Tourism Assn. v. Virgin Islands*, 218 F.3d 232, 244-245 (3d Cir. 2000) (rejecting NLRA preemption attack on local law giving employees the right not to be discharged except for just cause); *see also Belknap v. Hale*, 463 U.S. 491, 500 (1983) (federal law permits, but does not require, the employer to hire replacements during a strike; but state law may give

the replacement a right to sue for breach of contract if the employer breaks a promise to them, notwithstanding federal law.)

We argued that *Burns* and *Howard Johnson* demonstrate this. These decisions distinguished a prior successorship case, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964), because in *John Wiley*, state law imposed such obligations on the successor. "[T]he merger in Wiley was conducted 'against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation,' *Burns*, 406 U.S. at 286, which suggests that holding Wiley bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties." *Howard Johnson*, 417 U.S. at 257. *See also Burns*, 406 U.S. at 286 ("[Wiley's] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation . . .") *Burns* and *Howard Johnson* held that there was no affirmative NLRA duty compelling employers to retain the prior workforce, but they presumed that this duty could be imposed by the background of state law, as in *Wiley*.

This was Hohfeld in action. It paid off in the California Supreme Court's opinion:

> That the United States Supreme Court was using "right" in this instance in the sense of a Hohfeldian privilege against any asserted duty arising from federal common law or an existing collective bargaining agreement to hire particular workers, and not to describe an immunity from state or local regulation of such hiring, is clear from context. This was what *Burns* had said, 406 U.S. at p. 280, fn. 5, . . . and what *Howard Johnson* itself said when it explained that "nothing in the federal labor laws 'requires' " a business purchaser to hire predecessor employees. 417 U.S. at 261. *Howard Johnson* was not a preemption case and did not at any point contemplate whether a successor's hiring choices might be regulated or restricted by sources other than an existing collective bargaining agreement or federal common law.

52 Cal.4th at 202, 127 Cal.Rptr.3d at 743.

- **Reanimate the Wagner Act**

Cases like *Bragdon* and *520 S. Michigan* reflect a jaded view of the NLRA. They defend the *status quo* where bargaining is a code word for management domination, oblivious to the original purpose of the Act.

There is no reason for our side to run away from the NLRA, or pretend to the Court that we are not intimately involved with that Act. To the contrary, we can destroy management's attempt to use it by teaching the court what the Act means.

NLRA preemption condemns disqualification of union workers.

We are not arguing that the NLRA should be ignored. To the

contrary, we should tell the court point-blank that the NLRA preempts in the opposite direction- that it condemns any effort to disqualify union workers from state and local employment rights. This is the holding of *Livadas*, 512 U.S. at 126-129. *Livadas* held that a California state wage-penalty statute was not preempted, but more powerfully that the California Labor Commissioner's refusal to enforce it for a union member because she had a union contract was itself preempted in the opposite direction as anti-union discrimination. It burdens the NLRA right to organize and support unions to disqualify workers from state employment rights because of their union support. When courts are asked to enjoin enforcement of state employment law for union members, there is a conflict with NLRA rights - not the rights of employers to bargain freely, but the rights of workers to support unions without having judges disqualify them from the protections of state law.

Unions fight for all workers. The approving phrase in *Metropolitan Life* "applies to union and non-union alike" is not just a statement that the state law is unconcerned with NLRA-regulated conflict. It can be used to show that the law is not a special union dispensation. In the Rhode Island case, I

argued that the Ordinance protects non-union workers from replacement by union members, as much as in the opposite scenario. If the non-union Hilton Providence sold its hotel to a unionized corporation like Starwood, the Ordinance would protect the existing non-union workers from being replaced by union members for 90 days. Starwood could not lawfully recognize a union absent the retained employees' choice. Yet this would not give Starwood or its contracting union any claim to enjoin the Ordinance as a "preempted" obstacle to unionization. *See Mass. Nursing Ass'n*, 726 F.2d at 45.

No bearing on choice of representative

Judges will often be fuzzy on exactly how the NLRA works. They may assume that the world is divided into "union" and "non-union" employers, and any local law that affects labor relations may interfere with the "employer's choice" in the matter.

This surfaced in the worker retention cases. The Hotels argued that the NLRA gives successor employers a property right to have a non-union workforce. I had to explain, with some vigor, that union organization is the prerogative of employees, not their employers. The Ordinance does not affect that choice. Whether a successor retains its predecessor's employees or hires a new complement, its employees always have the

right to decide whether they will join a union, irrespective of their employer's wishes. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 50 n.16 (1987). Nothing prevents the employees of a successor (whether retained or newly hired) from voting a union in or out. *See Williams Energy Services*, 340 NLRB 764, 765 (2003). Successor employers are also free to withdraw recognition from the predecessor union, if a majority of its retained employees no longer support it. *Id.* Nothing in the Ordinance changes this.

Turn anti-union NLRB decisions against them.

The worker-retention cases were probably won because of an obscure, unreviewed ALJ case.

In *M&M Parkside Towers*, a new employer claimed that it was not a *Burns* successor because it had been compelled to retain the predecessor employer's workforce pursuant to New York City's Displaced Building Service Workers Protection Act. The ALJ agreed with the General Counsel that (1) the predecessor employees were only "contingent" until the new employer chose to offer them employment beyond the 90 days required by New York City law, and (2) the new employer had no duty to bargain with the union that had represented these employees as long as they remained merely contingent employees. 2007 WL 313429 at text

surrounding fns. 5 and 6. The ALJ did not impose a bargaining duty until the successor voluntarily chose to retain them after the 90-day period required by the law. *See id.*

We turned this decision around to show that retention did not automatically force the NLRB's hand on successorship- the Board remains free to do what it deems appropriate in such a case

Employers must take their NLRA complaints to the Board.

You can appeal to federal courts' impatience with litigants who do not exhaust their remedies. In a case like worker retention, the employer's ostensible complaint is not that retention of predecessor employees is itself a violation of the Act, except insofar as it forces the Board to order successorship.

We turned this around to argue that the remedy is with the Board, not in the civil courts to enjoin the ordinance wholesale. If the NLRB reaches the wrong conclusion, the aggrieved employer is free to seek review in the Circuit. NLRB orders are not self-enforcing. *See* 29 U.S.C. §160(e). An employer who believes an NLRB bargaining order is contrary to law must take its case to the reviewing Circuit- not sue for an injunction against a state law just because the Board might interpret one of its consequences incorrectly.

Employers are confused about the strike/lockout right. The Hotels argued that the Ordinance interfered with their right to lock employees out during the first 90 days. I had to educate the judge that ta lockout is not the same as a termination of the locked-out employees' employment, just as a strike is not the same as a voluntary quit. *See Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989).

The Hotels also proposed a perverse Catch-22: they argued that by exempting lockouts, the Ordinance is preempted by the NLRA because a local court might have to decide whether a given job action was a lockout. This has no merit. Local and state laws are not preempted just because they contain exemptions for NLRA-regulated activities like strikes and lockouts. *See Baker v. General Motors Corp.*, 478 U.S. 621, 633 (1986).

Conclusion

No one tactical move will win on its own. But we cannot always rely on the intellectual honesty of judges to apply *Metropolitan Life* and its progeny correctly. To defeat the revival of *Lochner*, we have to re-fight the battles won by the progressives between *Lochner* and *West Coast Hotel*.