

KEEPING THE LIGHTS ON: EXAMINING AND RE- IMAGINING NLRA PREEMPTION IN A TIME OF ELECTRIC NECESSITY

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Synopsis: Strikes or lockouts at an electric utility can lead to delayed maintenance in the best case or blackouts in the worst. In a society dependent on electricity for everything from health care to safe drinking water, a disruption in utility service could cause untold damage. Yet, thanks to the expansive doctrine of preemption under the National Labor Relations Act (NLRA), many public utility commissions (PUCs)—the state entities that regulate electric utilities—have concluded they are prohibited from intervening in labor disputes, even when public safety is threatened. Given the magnitude of harm that could be caused by electric service disruptions, clarification of PUCs’ authority is necessary. This article analyzes the extent to which state agencies retain the power to regulate utilities and protect their citizens, even when their actions may, either directly or indirectly, impact collective bargaining or alter the balance of power between labor and management. The article illustrates the authority of state utility regulators to set service and safety standards, oversee utility staffing, and intervene in labor disputes. In addition, the article proposes a re-thinking of the NLRA preemption doctrine as applied to electric utilities and suggests possible reforms to accommodate the role electricity plays in today’s society.

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I. INTRODUCTION

In today's highly electrified society, a disruption in electric service has the potential to cause untold damage. We are increasingly reliant on the utility grid for everything from national security to the treatment of drinking water to the safe operation of hospitals.¹ The electric grid has been called the "glass jaw" of American industry because a blow to the grid could cause long-term blackouts that would "create disruptions of a scale that was only hinted at by Hurricane Sandy and the attacks of [September 11, 2001]."² In short, electricity is no longer a luxury—it is a basic necessity.³

Yet even as our dependence grows, so does our vulnerability. The interconnected nature of the grid makes it difficult to keep failures at one utility from affecting others, and mistakes made by a single individual within the system can affect millions.⁴ Most notably, in 2003, failure by utility workers at a small utility in Ohio resulted in a massive blackout up and down the East Coast that affected over fifty million people.⁵ Damages from the 2003 blackout have been estimated at somewhere between \$4 and \$10 billion.⁶

1. The myriad ways in which we are dependent on the electrical grid have been recognized in a number of contexts. Presidential Directive 63, signed by President Clinton in 1998, identified electric power as critical infrastructure necessary for the nation's security and economy. See generally KARL A. SEGER, UTILITY SECURITY: THE NEW PARADIGM 4 (2003). The United States military is reliant on commercial power for continued operations at 99% of its facilities. Matthew L. Wald, *As Worries Over the Power Grid Rise, a Drill Will Simulate a Knockout Blow*, N.Y. TIMES, Aug. 17, 2013, at A11. Studies quantifying outage costs to private households must consider harm to all aspects of society: "economy, quality of life, institutions, environment and health and life." Aaron J. Praktiknjo, Alexander Hähnel & Georg Erdmann, *Assessing Energy Supply Security: Outage Costs in Private Households*, 39 ENERGY POL'Y 7825, 7826 (2011); see also Simon Bennett, *Insecurity in the Supply of Electric Energy: An Emerging Threat?*, 24 ELEC. J. 51 (2011) (discussing the impact of power failures and ways societies can improve resilience); Nicholas C. Abi-Samra, *One Year Later: Superstorm Sandy Underscores Need for a Resilient Grid*, IEEE SPECTRUM (Nov. 4, 2013), <http://spectrum.ieee.org/energy/the-smarter-grid/one-year-later-superstorm-sandy-underscores-need-for-a-resilient-grid> (noting various impacts from Super Storm Sandy, including disruption of drinking water supplies).

2. Wald, *supra* note 1, at A11.

3. See generally Tom Tiernan, *Outage Frustrations Rise Faster, Utilities Learn Anew after Storms Slash Midwest, MidAtlantic*, PLATTS (July 9, 2012) (describing the increasing dependence of customers on electric service and pressure on utilities to recover more quickly after outages); Ashley Halsey, III, *Decrepit U.S. Power Grid Starts to Sputter*, WASH. POST, Aug. 2, 2012, at A1 (citing damages in recent years resulting from a variety of generator outages, and black- and brownouts, from New York to California).

4. See generally David Cay Johnson, *Danger! Exploding Pipelines. Bursting Dams. Massive Blackouts.*, NEWSWEEK, Sept. 10, 2012, at 40 (detailing vulnerability of aging U.S. infrastructure and potential disaster of future outages). In 2012, a technician testing a transmission line in southern California made some simple errors that ultimately resulted in a blackout affecting about nine million people in the region. Matthew L. Wald, *Combination of Errors Led to Power Loss in San Diego*, N.Y. TIMES, May 2, 2012, at B4.

5. The blackout of 2003 is widely attributed to cascading failures that began with an outage in northern Ohio caused by tree limbs coming into contact with transmission wires. See generally JR Minkel, *The 2003 Northeast Blackout--Five Years Later*, SCI. AM. (Aug. 13, 2008), <http://www.scientificamerican.com/article/2003-blackout-five-years-later/>; see also U.S.-CANADA POWER SYSTEM OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS 1, 45-46 (April 2004) [hereinafter 2003 Blackout Final Report], available at <http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/BlackoutFinal-Web.pdf>.

6. Bobby McMahon, *Even with Lessons from Blackout, US Grid Still Faces Looming Challenges*, PLATTS (Aug. 16, 2013).

A mix of state and federal regulators oversee the safety and security of the electric grid. The high voltage transmission system, which takes electricity across state lines, is governed by the Federal Energy Regulatory Commission (FERC), while responsibility for the local distribution system and the utilities that operate it lie with state entities generally known as public utility commissions (PUCs).⁷ These state agencies have broad regulatory responsibility for ensuring utility customers have access to safe, reliable, and reasonably priced utility services.⁸ With a largely unionized workforce, utilities are no strangers to significant labor controversies, including the ultimate remedies of strikes and lockouts.⁹ High profile labor disputes have taken place with regularity in recent years, including in Hawaii,¹⁰ New Jersey,¹¹ Massachusetts,¹² Maryland,¹³ and Nevada,¹⁴ with management lockouts taking place in New York¹⁵ and Pennsylvania.¹⁶ In any strike, one must consider the possible interruption of production or downgrade of service at the affected business, but such a prospect is undeniably more serious at an electric utility. During a strike or lockout situation, utilities must replace hundreds—even thousands—of unionized line workers and service technicians with management or contract employees, often forcing the utility to operate with less than a full complement of employees. Such circumstances can lead to delayed maintenance in the best case, or black- or brownouts in the worst.¹⁷

The National Labor Relations Act (NLRA or the Act)¹⁸ governs and protects collective actions, such as strikes and lockouts, with the goal of “remedying

7. Generally, state public utility commissions regulate *retail* sales and distribution of electricity, while the FERC regulates *wholesale* transactions and transmission. *See generally* *New York v. FERC*, 535 U.S. 1, 5-7 (2002) (describing history of state and federal regulation of public utilities); *see also* Jonathan Armiger, *Judicial Review of Public Utility Commissions*, 86 IND. L.J. 1163, 1165-67 (2011) (providing brief history of public utility commissions). The FERC also oversees the North American Electric Reliability Corporation (NERC), which is a non-profit entity that sets reliability standards for the North American wholesale power system. *See generally* *About NERC*, N. AM. ELEC. RELIABILITY CORP., <http://www.nerc.com/AboutNERC/Pages/default.aspx> (last visited Sept. 9, 2014).

8. *See generally* EDWARD EYRE HUNT, ED., *THE POWER INDUSTRY AND THE PUBLIC INTEREST: A SUMMARY OF THE RESULTS OF A SURVEY OF THE RELATIONS BETWEEN THE GOVERNMENT AND THE ELECTRIC POWER INDUSTRY* 35 (1944) (describing the tri-fold purpose of public utility commissions); *see also* CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 110 (2d ed. 1988); Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVTL. L. & POL'Y REV. 209, 212-216 (2011) (describing the establishment and purpose of state public utility commissions).

9. The U.S. Bureau of Labor Statistics (BLS) reports work stoppages involving 1,000 or more workers in its Work Stoppages Database. *See also* *Work Stoppages*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/wsp/> (last visited Sept. 4, 2014). The BLS recorded utility work stoppages in 2012. Chart, U.S. Bureau of Labor Statistics, *Work Stoppages Detailed Monthly Data 2012*, <http://www.bls.gov/wsp/ws072012.htm> (last visited Sept. 4, 2014) (Consolidated Edison July 1-July 26, 2012); Chart, U.S. Bureau of Labor Statistics, *Work Stoppages Detailed Monthly Data 2011*, <http://www.bls.gov/wsp/ws032011.htm> (last visited Sept. 5, 2014) (Hawaii Electric, March 4-7, 2011); Chart, U.S. Bureau of Labor Statistics, *Work Stoppages Detailed Monthly Data 2005*, <http://www.bls.gov/wsp/ws062005.htm> (last visited September 5, 2014) (NStar; May 15-June 1, 2005); Chart, U.S. Bureau of Labor Statistics, *Work Stoppages Detailed Monthly Data 2004-2005*, <http://www.bls.gov/wsp/ws032005.htm> (last visited Sept. 5, 2014) (Jersey Central Power & Light, Dec. 8, 2005-Mar. 15, 2005).

10. *See generally* Alan Yonan Jr. & Rob Shikina, *HECO Strike: 1,300 Workers Walk off the Job Amid Outages*, STAR ADVERTISER (Mar. 5, 2011),

industrial strife” by protecting negotiations between labor and management from interference and the development of collective bargaining arrangements.¹⁹ The question of when state actions are preempted by the Act has been the subject of a multitude of court decisions and Supreme Court opinions, leaving a broad, convoluted trail of precedent that has been called “one of the most expansive preemption regimes in American law.”²⁰

http://www.staradvertiser.com/news/20110305_heco_strike_1300_workers_walk_off_the_job_amid_outages.html.

11. In 1980, 4,600 electrical workers from the Public Service Electric and Gas Company went on strike for fourteen hours. *See generally* *Strike Disrupts Utility in Jersey*, N.Y. TIMES, July 26, 1980, at Sec. 2 p. 20.

12. Utility workers from Boston combined gas and electric utility NStar went on strike in 2005 over a number of issues, including mandatory overtime and staffing levels. *See generally* Greg Sukiennik, *Union Representing Linemen, Engineers at Boston Utility Goes on Strike*, THE ASSOCIATED PRESS, May 16, 2005.

13. Pepco union employees have repeatedly threatened to strike in recent years. *See generally* Victor Zapana, *Pepco Union Approves Contract, Averting Strike*, WASH. POST (Oct. 19, 2012), http://www.washingtonpost.com/local/md-politics/pepco-union-approves-contract-averting-strike/2012/10/19/4e8fe6fe-1a02-11e2-bd10-5ff056538b7c_story.html; Jeffrey Goldberg, *Union Workers Call for Strike Against Pepco; Employees Stay on Job as Negotiations Continue*, WASH. POST, July 15, 1988, Financial Section at D1. Pepco workers also went on strike in August of 1985. *Id.*

14. In 2008, workers are Nevada Power threatened to strike over changes in pension benefits. *See generally* John G. Edwards, *Utility, Labor Union Clash*, LAS VEGAS REV., July 17, 2008, at 1D. The Nevada Power union also went on strike in 1990. *Id.*

15. *See infra* notes 22-29 and accompanying text.

16. Workers from the Penelec division of the FirstEnergy utility have been locked out since November 25, 2013. *See generally* Lauren Schmoll, *FirstEnergy Lockout Begins This Morning in Pa.*, WKSU NEWS (Nov. 25, 2013), <http://www.wksu.org/news/story/37503>; *FirstEnergy Ends Penelec Lockout but Continues Unfair Concession Demands*, UTIL. WORKERS UNION OF AM., AFL-CIO, <http://uwua.net/firstenergy-penelec-lockout> (last visited Feb. 4, 2014).

17. *See infra* note 137 (describing delayed maintenance and repairs resulting from lockout at Con Edison). In 1983, a strike at Con Ed delayed repairs to an electric substation and caused a three-day blackout. *See also* Kate Swearingen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 COLUM. J.L. & SOC. PROBS. 513, 535 (2011) (citing Matthew Sweeney, *Macy's, Gimbel's Went Dark During '83 Con Ed Strike*, A.M. NEW YORK, July 29, 2008). *See also* Edwards, *supra* note 14, at 1D (“For the first time in 18 years, a union strike could threaten the reliability of power as air conditioners are roaring around the valley.”).

18. In this article, “the Act” refers collectively to the National Labor Relations Act (the Wagner Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2012))), the Labor-Management Relations Act (the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in 29 U.S.C. §§ 401-531) (2012))), and the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519-46 (codified as amended at 29 U.S.C. §§ 401-531) (2012))). For a brief history of the passage of these statutes, *see generally* Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 311-13 (2010).

19. 29 U.S.C. § 151 (2012). Though it may sound counter-intuitive, the text of the Act and subsequent analyses suggest that Congress believed the preservation of the right to strike and bargain collectively would ultimately improve relationships between the parties by putting labor and management on more of an even footing. *See also* Michael C. Duff, *Symposium: Employment and Labor Law in the 21st Century: Changes in the Arenas of Conflict: Article & Essay: What Brady v. N.F.L. Teaches about the Devolution of Labor Law*, 52 WASHBURN L.J. 429, 445-46 (2013). The intent to diminish industrial strife, which could have an effect on interstate commerce, was the constitutional basis for the passage of the Act. *See also* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 28 (5th ed. 2004).

20. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154-55 (2011) (describing the manner in which the NLRA preemption regime has virtually eliminated the possibility for state and local innovation in labor law).

The breadth of the preemption doctrine has led to the conclusion that states and state agencies, such as PUCs, are prevented from intervening in labor issues, even when those issues touch areas of traditional state regulation.²¹ Consider the 2012 management lockout at Consolidated Edison of New York (Con Edison), the large, investor-owned utility providing service to New York City and most of Westchester County.²² In July 2012, labor negotiations between the union and management broke down, and there were concerns that union employees might vote to strike. To forestall such an action, management locked out over 8,000 union employees and replaced them with a much smaller workforce of non-union management and contract laborers.²³ This action was to the consternation of the union, which warned of inadequate safety monitoring, deferred maintenance, and threats of unsafe conditions.²⁴ However, thanks to the tangled legacy of NLRA preemption decisions, the New York Public Service Commission (NYPSC)—the only regulatory agency with direct authority over the safe and reliable operation of Con Edison’s system—publicly announced it lacked jurisdiction to end the lockout or even to be involved in any way in the negotiations between the parties.²⁵

More than three weeks into the lockout, severe thunderstorms and excessive heat threatened Con Edison’s service territory.²⁶ Union employees predicted dire consequences if Con Edison failed to have adequate personnel prepared to work in the event of a storm.²⁷ Concerned about the reliability of the grid and safety of New Yorkers, New York Governor Andrew Cuomo urged the NYPSC to intervene in the dispute.²⁸ Even then, the regulators’ only action was to grudgingly invite

21. A number of scholars have written about the manner in which the extensive preemption regime has restricted innovation and cut states out of the process of reforming labor law, while the NLRA itself has failed to protect employee rights or foster collective bargaining. See, e.g., 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, 103 (2009) (“federal labor relations law not only creates a legal environmental inhospitable to collective bargaining, but also simultaneously prevents reform and experimentation at the state level”); see also Sachs, *supra* note 20, at 1154-55.

22. See generally *About Con Edison*, CON EDISON, <http://www.coned.com/aboutus/> (last visited Feb. 6, 2014).

23. James Barron & Eric P. Newcomer, *Tentative Deal in Con Ed Labor Dispute*, N.Y. TIMES, July 27, 2012, at A19; see also Response of Consolidated Edison Company of New York, Inc. to Motion for Initiation of Expedited Investigation and Interim Relief, Request for Investigation of Utility Workers Union of America, No. 12-M-0306 at 1, 5-6 (N.Y. Pub. Serv. Comm’n July 17, 2012), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={165D35D2-3A80-4115-BB1D-13A1E1538360}>.

24. See generally Motion for Initiation of Expedited Investigation and Interim Relief, Request for Investigation of Utility Workers Union of America at 8-12 (N.Y. Pub. Serv. Comm’n July 10, 2012), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B7CBE64DA-C560-4D6A-9575-ED9E125FF245%7D>.

25. Memorandum from Garry Brown, Chairman of the N.Y. State Pub. Serv. Comm’n (July 25, 2012), available at <http://www.governor.ny.gov/assets/documents/MemofromPSC.pdf> (“The Commission therefore does not have legal authority to directly intervene to order an end to a work stoppage, and the attempt to exercise such authority would not withstand legal challenge.”).

26. See generally Barron & Newcomer, *supra* note 23, at A19.

27. *Id.* In recognition of the danger, Con Edison management allowed 3,000 union workers back on the job until the storm had passed and necessary repairs were made. *Id.*

28. Letter from Governor Andrew M. Cuomo to N.Y. Pub. Serv. Comm’n (July 25, 2012), available at <http://www.governor.ny.gov/press/07252012Lock-Out> (“This lockout has gone on long enough. Elected state

both sides to the bargaining table. In the end, it is more likely the two sides were able to reach compromise and agree to a new contract due to the storm, not the NYPSC's leadership.²⁹

With the passage of the NLRA, did Congress really intend to entirely remove state authority to intervene in a labor dispute that threatened the security and reliability of a large utility system, had the potential to disrupt service to thousands of customers, and could have resulted in billions of dollars of damage and the loss of lives? It seems difficult to believe it did. After all, the National Labor Relations Board (NLRB) has no jurisdiction or authority to oversee the state utility system, lacks the expertise necessary to determine when a labor lockout (or strike) threatens reliability or creates a strain on the electric grid, and has no authority to enjoin collective activity in the event of a local emergency.³⁰ If we assume Congress intended for states to have no authority to remedy such dangerous conditions, we must also assume they intended *no one else* should have such authority either.

Despite the admittedly wide sweep of NLRA preemption, the existence of an exception to preemption based on the historic police power of the states and case law applying this exception argue against this conclusion. On the other hand, NLRA preemption cases *have* required proof of actual or imminent harm to citizens before allowing state agencies to directly intervene in protected activities, even to protect public safety.³¹ In fact, the bar for the showing of actual or imminent harm has been set so high many believe the NLRA forces states to dangle their citizens on the edge of disaster before they can intervene.³² Complicating matters further, the majority of key preemption decisions are many decades old, harkening back to a time when utilities were not the absolute necessities they are today, leaving it difficult to draw relevant parallels to current circumstances.

Given the high stakes of labor disputes at electric utilities and the danger of a lack of action by state regulators in situations involving public safety, clarification of the authority of state PUCs is necessary. This article analyzes the extent to which state agencies maintain the power to regulate utilities and protect their citizens, even when their actions may, either directly or indirectly, impact

and city officials are rightfully concerned. I urge you to bring both parties together to strongly encourage an expeditious resolution.”). See also Eric P. Newcomer, *Cuomo's Push Leads Agency to Set up Con Ed Labor Talks*, N.Y. TIMES, July 26, 2012, at A21.

29. As Governor Cuomo stated, “Sometimes a storm has a silver lining.” Barron & Newcomer, *supra* note 23, at A19.

30. The role of the NLRB in administering the Act is outside the scope of this article. For a history of the NLRB and overview of its role in developing U.S. labor policy, see generally FRANK W. MCCULLOCH, *THE NATIONAL LABOR RELATIONS BOARD* (1974); JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974). In cases in which the President determines “a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof . . . will, if permitted to occur or to continue, imperil the national health or safety,” the NLRA provides procedures for a court to order the injunction of the activity and encourages both sides to continue negotiations with an eye toward settling the dispute. See also 29 U.S.C. § 176 (2012). No similar procedures exist for the settlement of local or regional disputes.

31. See *infra* notes 71, 123-32 and accompanying text.

32. See *infra* Part III.C.

collective bargaining or the balance of power between labor and management. The article will elucidate the authority of state utility regulators to set service and safety standards, oversee utility staffing, and intervene in labor disputes. In doing so, the article should provide a roadmap for other state agencies, and even legislatures, who may develop regulations or policies related to labor issues. In addition, this article will suggest a re-thinking of NLRA preemption as applied to electric utilities, and possible reforms to the law to accommodate the role electricity plays in today's society.³³

Part II provides a brief overview of the historic role of PUCs, and the development of the cannon of NLRA preemption. Using this background, Part III argues PUCs have the authority to: (1) set minimum safety and service standards, even if those standards have the result of increasing or decreasing the unionized workforce, or impact the ability of the utility to hire replacement workers; (2) oversee utility workforces through rate case or show cause proceedings to ensure that minimum standards of safety and reliability are maintained; and (3) intervene in labor disputes—even those involving protected activity, such as strikes or lockouts—threatening imminent harm to public safety. Of course, the nature of an “imminent threat” is highly debatable. Given the potentially disastrous consequences of getting it wrong, this article will argue courts should provide PUCs with greater authority to make this determination, consider the magnitude of the potential harm rather than simply the imminence of the harm, and provide greater authority in the area of oversight of electric utility labor disputes than has previously been afforded. Part IV suggests a fresh analysis of existing precedent to make clear PUCs have authority to intervene in labor disputes that create a threat of imminent harm to public safety, and also argues for a change to the existing statute to recognize the importance of electric utilities in modern life and provide state agencies with additional authority to intervene in labor disputes with regard to public utilities.

33. While some aspects of this article are applicable to natural gas utilities, the focus here is on electric utilities, as significant differences between the two make direct application problematic. First, the inability to store electricity makes constant monitoring and adequate staffing at an electric utility essential. Natural gas can be stored and pressure imbalances rectified over a longer period of time, which significantly alters any analysis of the imminence of a threat to the public welfare caused by a labor dispute. Second, failure in a gas pipeline can be catastrophic, but such occurrences are typically caused by construction defects and corrosion, rather than short-term labor conflicts or inadequate staffing. *See generally* Richard M. Peekema, *Causes of Natural Gas Pipeline Explosive Ruptures*, 4 J. PIPELINE SYST. ENG. PRAC. 74, 74 (Feb. 2013) (citing NTSB reports concluding significant explosions in gas pipelines over the past twenty-five years have all resulted from mechanical failures). Finally, the regulatory oversight of natural gas pipeline safety is dictated, in part, by the Natural Gas Pipeline Safety Act (NGPSA) and related federal statutes that are distinct from the statutory scheme applied to electric utilities. *See generally* Jim Behnke, *Safety Jurisdiction over Natural Gas Pipelines*, 19 ENERGY L.J. 71, 84 (1998). These differences may not be relevant to an NLRA preemption analysis (*see, e.g.*, *Southern Union Gas Co. v. R.I. Div. of Pub. Util. Carriers*, 306 F. Supp. 2d 129, 129 (2004) (analyzing NLRA preemption of statute involving replacement workers at a gas utility)), or could require an analysis of the preemptive effect of competing federal regulatory schemes (i.e., the NGPSA and NLRA).

II. NLRA PREEMPTION AND THE HISTORIC ROLE OF PUBLIC UTILITY COMMISSIONS

The application of the NLRA preemption doctrine to the regulation of electric utilities is particularly troublesome because it requires a court to interpret the Act, which contains no express preemption clause, to preempt the historic police power of the state, which, absent clear and manifest intention from Congress, should not be subject to preemption. This Part provides a brief foundation for the analysis of these two competing principles.

A. *State Police Power*

The concept of federal preemption derives from the Supremacy Clause of the United States Constitution, and there can be no doubt the federal government retains the right to overrule or prohibit state action when it deems it appropriate.³⁴ The essential question in determining whether state laws or actions should be preempted is whether Congress intended such a result.³⁵ When a federal law includes an express preemption clause, congressional intent is easy to determine. Congressional intent can also be implied, however, as when the federal government occupies an entire field or area of law, or in a case in which allowing a state law or action to proceed would conflict with or obstruct the purpose of the federal law.³⁶

Well before the passage of the NLRA, however, courts recognized and protected the authority of the state to exercise its police power. Beginning in the early twentieth century, the Supreme Court repeatedly found that where the state is acting to protect the health and welfare of its citizens, it should be provided broad protection from federal preemption, even in areas such as interstate commerce where the federal government has presumptive regulatory authority.³⁷ As the Court stated in *Sterling v. Constantin*, “[i]n the performance of its essential function, in promoting the security and well-being of its people, the [s]tate must of necessity enjoy a broad discretion.”³⁸ This “presumption against preemption”³⁹

34. U.S. CONST. art. IV, § 3, cl. 2; *see also* *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012) (reviewing doctrines of federal preemption).

35. *See, e.g.,* *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (“The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law.”).

36. *See generally* Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17, 22 (2011) (describing different types of federal preemption); *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

37. *See, e.g.,* *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915) (finding state regulation of shipment of citrus fruits in interstate commerce not preempted); *Hall v. Geiger Jones Co.*, 242 U.S. 539, 552, 559 (1917) (upholding state ‘Blue Sky’ laws regulating the sale of securities as a proper exercise of the state police power, despite burden on interstate commerce).

38. *Sterling v. Constantin*, 287 U.S. 378, 398 (1932).

39. Dustin M. Dow, *The Unambiguous Supremacy Clause*, 53 B.C. L. REV. 1009, 1016 (2012); *see also supra* note 35, at 21 (“The Court sometimes invokes a presumption against preemption, especially where the federal statute regulates in fields of traditional state regulation such as health and safety, and even more especially when the federal law offers no remedies to replace the state remedies that would be preempted.”).

requires that in cases of implied preemption—including cases decided under the NLRA—congressional intent must be “clear and manifest” before a state’s exercise of its police power will be overruled or invalidated.⁴⁰

B. Regulation of Public Utilities

The legal authority for the regulation of public utilities can be traced to the seminal case of *Munn v. Illinois*,⁴¹ in which the Court determined that, because grain storage elevators were a necessity and were operated as a monopoly, the public interest required their regulation.⁴² Today, PUCs approve rates and service standards, monitor reliability, and enforce compliance with safety regulations at the utilities they oversee.⁴³ The Court has affirmed that, at a fundamental level, the regulation of public utilities is “one of the most important of the functions traditionally associated with the police power of the States.”⁴⁴

As part of their rate-setting process, PUCs review utility staffing to ensure minimum service and safety standards are not compromised, while at the same time prevent utilities from driving up rates with unnecessary or overpaid employees.⁴⁵

The oversight of complex utility codes and safety standards requires a significant amount of agency expertise. Rate case opinions, in which utility commissions review everything from employee retirement plans to the purchase of new emergency monitoring systems, regularly run into the hundreds of pages. Utility commission staff must become conversant in the rules of tree trimming, load management systems, and complex utility financing.⁴⁶ Even labor

40. As recently reiterated by the Court in *Arizona v. United States*, “In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.” 132 S. Ct. 2492, 2501 (2012) (citations omitted).

41. *Munn v. Illinois*, 94 U.S. 113 (1876).

42. *Id.* at 151-52.

43. See generally PHILLIPS, *supra* note 8, at 164-165. “While rate regulation has been the major concern of the commissions and the courts, attention has also been paid to the problems of quality and quantity of service, safety of operations, and efficiency of management.” *Id.* at 164.

44. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983) (reviewing state jurisdiction over wholesale rates charged by rural power cooperative).

45. “In the typical rate case, the utility offers evidence that its employee compensation costs are reasonable. If the evidence proves insufficient, regulators may choose to disallow certain requested costs. The regulator must review the evidence and consider how a cost allowance will affect rates.” David W. Sosa, Ph.D., & Virginia Perry-Failor, *Labor Costs and the Rate Case*, PUB. UTIL. FORTNIGHTLY MAGAZINE (Mar. 2012), <http://www.fortnightly.com/fortnightly/2012/03/labor-costs-and-rate-case>. While each PUC approaches its review of utility staffing differently, the position of the Oregon PUC is fairly standard: it reviews the utility’s total number of full time employees using an average historic growth rate, and then allows the utility to determine how to fill those positions within the utility’s total workforce. See also *In re Portland General Electric Co.*, UE 197, Order No. 09-020 at 7 (Or. Pub. Util. Comm’n Jan. 22, 2009) available at <http://apps.puc.state.or.us/orders/2009ords/09%2D020.pdf> (“the Commission’s role should not be to micromanage PGE’s operations, but to instead set an appropriate workforce level and allow the Company to establish priorities”).

46. A popular training program for PUC staffers is “Camp NARUC,” a one- or two-week course endorsed by the National Association of Regulatory Utility Commissioners (NARUC), offering sessions on a variety of topics, including utility accounting, forecasting supply and demand, transmission economics and grid reliability. See generally *57th Annual Regulatory Studies Program: “Camp NARUC”*, MICH. STATE UNIV. INST. OF PUB.

controversies, which of course are not unique to utilities, have an overlay that is highly complex. What level of training should utility linemen have? How many are necessary to maintain the system in working order? How much redundancy should a utility have in its workforce? These complex questions require knowledge of industry standards and norms, as well as on-the-ground experience with the particular system. In leafy Virginia, for example, tree trimming crews likely need to work on different schedules than crews in Nevada or Arizona.⁴⁷ This specialized, technical knowledge is one of the underpinnings of the traditional deference courts apply in their review of agency decisions.⁴⁸

With regard to safety, the enabling legislation for PUCs generally provides a broad grant of authority.⁴⁹ For example, in Delaware, the Public Service Commission has the authority to “[r]equire every public utility to furnish safe and adequate and proper service and keep and maintain its property and equipment in such condition as to enable it to do so.”⁵⁰ State agency procedures also generally

UTIL., available at <http://ipu.msu.edu/camp/index.php> (click on 2013 Program Agenda under “Program Information”). For an example of a tree-trimming regulation adopted by the Oregon Public Utility Commission, see, e.g., *In re Proceeding to Adopt Oregon Administrative Rule 860-024-0017*, AR 431, Order No. 02-368 (Or. Pub. Util. Comm’n June 4, 2002) (adopting Administrative Rule 860-024-0017), available at <http://apps.puc.state.or.us/orders/2002ords/02%2D368.pdf>.

47. “The actual spread for utility [tree-trimming] cycles industry-wide is anywhere from 1 to 10+ years.” Utility Vegetation Management Final Report (commissioned by FERC to support the federal investigation of the August 14, 2003 Northeast blackout) at 12 (Mar. 2004), available at <http://www.ferc.gov/industries/electric/indus-act/reliability/blackout/uvm-final-report.pdf>.

48. See generally *United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001) (noting both the deference afforded to reasoned agency decision-making, and the wide variety of standards that have been applied). Determining what standards of review a court will apply to an agency’s decision is notoriously difficult. See, e.g., *Jud Mathews, Deference Lotteries*, 91 TEX. L. REV. 1349, 1350-1352 (2013) (arguing that standards of review are applied in what amounts to a “lottery” fashion). Things are no clearer when it comes to public utility commissions. See, e.g., *Jonathan Armiger, Judicial Review of Public Utility Commissions*, 63 IND. L. REV. 1163, 1174-1176 (finding at least thirty different standards of review that have been applied to state courts’ review of PUC decisions, affording a higher level of deference for decisions within the expertise of the agency).

49. It is important to note the safety and reliability standards overseen by state authorities are distinct from the reliability standards for the bulk power system, which are set by NERC, and the complex web of state and regional grid operators coordinating to ensure reliability at the local level. See generally *supra* note 7; see also THE REGULATORY ASSISTANCE PROJECT, ELECTRIC REGULATION IN THE U.S.: A GUIDE 16-18 (Mar. 2011), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.raponline.org%2Fdocs%2FRAP_Lazar_ElectricityRegulationInTheUS_Guide_2011_03.pdf&ei=-MFnU-HULdKHogSK8YLYBQ&usg=AFQjCNGQmJpx6o94LjxdGMzSmrsBiezsFQ&sig2=_C4eLiXogXdKdynZ5Ct91g&bv=bv.65788261,d.cGU (providing overview of electric reliability regulation and oversight). The FERC oversees the standards set by NERC, though the extent to which the FERC owes deference to NERC is subject to debate. See also John S. Moot, *When Should the FERC defer to the NERC?*, 31 ENERGY L.J. 317, 318-321 (2010) (describing the split authority provided to the FERC and delegated to NERC under the Energy Policy Act of 2005). This article focuses on the authority of state agencies to respond to labor disputes at jurisdictional utilities. A labor dispute involving employees working in the bulk power industry would not come under state public utility commission jurisdiction. The authority of any federal agency to intervene in such a dispute would require an analysis similar to the one undertaken here. However, because the intervention would not originate from a state agency, the police power exemption would presumably be unavailable, making it more difficult to craft a cognizable argument against NLRA preemption.

50. DEL. CODE ANN. tit. 26, § 209 (2014); see also CAL. PUB. UTIL. CODE § 701 (2014) (“The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and

provide the PUC with authority to institute a “show cause” proceeding to investigate utility practices if they believe regulations are being violated,⁵¹ and to fine utilities for violations.⁵²

While the PUC has investigatory and fining authority, the primary means available to the PUC for carrying out its duty is the oversight of utility rates. In a general rate case, the utility calculates rates based on operating expenses, depreciation, capital expenditures, and a desired rate of return.⁵³ PUC staff review the rate schedule and support documents to determine whether it believes the rates requested by the utility are “just and reasonable.”⁵⁴ PUCs do not direct the management of the utility or order utilities to hire or fire particular employees.⁵⁵ However, through the rate-setting process, the PUC has enormous authority over a utility’s staffing plan. For example, if a PUC believes the utility has overstaffed a department, it can reduce the utility’s overall revenue requirement accordingly.⁵⁶

jurisdiction.”); OR. REV. STAT. § 757.035(1) (2014) (giving PUC authority to “require the performance of any . . . act which seems to the commission necessary or proper for the protection of the health or safety of all employees, customers or the public.”).

51. *See, e.g.*, N.H. REV. STAT. ANN. § 365:5 (2014) (“The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility.”); 1 PA. CODE. § 35.14 (2014) (“Whenever an agency desires to institute a proceeding against a person under statutory or other authority, the agency may commence the action by an order to show cause setting forth the grounds for the action.”).

52. The extent of the PUC’s fining authority varies by state. *See, e.g.*, ARIZ. REV. STAT. ANN. § 40-425 (2014) (giving PUC authority to levy fines from \$100 to \$5,000 a day) and CAL. PUB. UTIL. CODE § 2107 (2014) (giving PUC authority to levy fines from \$500 to \$50,000 for each offense). In New York, Governor Andrew Cuomo initiated statutory reforms after Superstorm Sandy to provide the NYPSC with greater fining authority. *See also* Press Release, Governor Cuomo Outlines Public Service Commission Reforms to Dramatically Improve Accountability and Oversight of State Utilities (Mar. 25, 2013), *available at* <https://www.governor.ny.gov/press/03252013Public-Service-Commission-Reforms>.

53. *See, e.g.*, MICHAEL A. CREW & PAUL R. KLEINDORFER, *THE ECONOMICS OF PUBLIC UTILITY REGULATION* 98 (1986). Utility ratemaking is a complex process that cannot be fully addressed within the scope of this article. For a thorough discussion of general cost of service ratemaking and the controversial process of setting the utility’s rate of return, *see generally* PHILLIPS, *supra* note 8, at 168-72, 243-443; *see also* LEONARD S. HYMAN, *AMERICA’S ELECTRIC UTILITIES: PAST, PRESENT, AND FUTURE* 128-85 (1988).

54. The requirement that utility rates be “just and reasonable” is ubiquitous at both the state and federal level. *See, e.g.*, FLA. STAT. ANN. § 366.06 (2013) (“the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service”); N.H. REV. STAT. ANN. § 374:2 (2014) (“All charges made or demanded by any public utility for any service rendered by it . . . shall be just and reasonable.”); 16 U.S.C. § 824d (2012) (“All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable.”).

55. *See, e.g.*, *W. Ohio Gas Co. v. Pub. Util. Comm’n of Ohio*, 294 U.S. 63, 72 (1935) (“Good faith is to be presumed on the part of the managers of a business . . . [and] in the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.”); *Pa. Pub. Util. Comm’n v. Phila. Elec. Co.*, 501 Pa. 153, 159 (1983) (absent express legislative authority, Public Utility Commission is powerless to interfere with the general management decisions of public utility companies); *Ala. Power Co. v. Ala. Pub. Serv. Comm’n*, 359 So. 2d 776, 780 (Ala. 1978) (Public Service Commission should not be allowed to interfere with proper operation of utility as a business concern by usurping managerial prerogatives).

56. *See infra* notes 106-111 and accompanying text.

The PUC may also create generic regulations related to the wages or oversight of utility employees.⁵⁷

This article considers the application of NLRA preemption in cases involving the legitimate exercise of PUC authority. Whether or not the PUC's engagement was within the agency's jurisdiction—absent NLRA preemption concerns—would have to be considered in each individual case. A case in which a PUC determined the safety and reliability of the utility system was threatened by a strike or other labor activity would likely fall under the traditional authority of the PUC.⁵⁸ The PUC would also be on solid jurisdictional ground if setting or applying generic safety and reliability standards, or if reviewing a utility staffing plan in the context of a rate case.⁵⁹ On the other hand, if a PUC attempted to interfere directly in a collective bargaining negotiation it would more likely run afoul of traditional prohibitions against PUC involvement in utility management.⁶⁰ Of course, the PUC could not interfere in non-jurisdictional matters involving the bulk power or wholesale power system.

C. NLRA Preemption

The NLRA was passed in 1935 “to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”⁶¹ By protecting collective bargaining activities and strengthening the bargaining power of employees, Congress hoped to ultimately improve working conditions.⁶² Section 7 of the Act protects employees' rights to form labor organizations, bargain collectively, and engage in other “concerted activities.”⁶³ Section 8 prohibits certain unfair labor practices, including employer interference with concerted activities protected in section 7.⁶⁴

Because the NLRA does not have an express preemption clause and the federal government has not occupied the entire field of labor regulation, preemption can only be found where a state law or action conflicts with or obstructs the purposes of the NLRA, thus satisfying the test for implied

57. For an example of a regulation setting employment standards and giving the public utility commission oversight of utility employees, *see, e.g.*, WASH. ADMIN. CODE § 480-93-080 (2014) (covering welder and plastic joiner identification and qualification). *See also infra* Part III.A.

58. *See supra* notes 42, 44, 48-51 and accompanying text, and discussion at Part III.C.

59. *See supra* note 55 and accompanying text, and discussion at Part III.A and Part III.B.

60. *See supra* note 54 and accompanying text.

61. *National Labor Relations Act*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/resources/national-labor-relations-act> (last visited Sept. 4, 2014).

62. *See generally* *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 190 (1978) (“Congress expressly recognized that collective organization of segments of the labor force . . . may produce benefits for the entire economy. . .”). As Professor Archibald Cox describes, “Two fundamental ideas lie at the core of the national labor policy: (1) freedom of employee self-organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours, and other conditions of employment through the negotiation and administration of collective bargaining agreements.” Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972).

63. 29 U.S.C. § 157 (2012).

64. 29 U.S.C. § 158 (2012).

preemption.⁶⁵ The Supreme Court has created two distinct lines of NLRA preemption cases under this implied preemption umbrella, named after their seminal cases: *Garmon*⁶⁶ and *Machinists*.⁶⁷ Under the *Garmon* doctrine, states are preempted from regulating conduct protected or prohibited under the NLRA, or conduct *arguably* protected or prohibited.⁶⁸ Under the *Machinists* line of analysis, states are preempted from regulating conduct Congress did *not* regulate, but intended to be left unregulated.⁶⁹ In their totality, these lines of preemption are “unquestionably and remarkably broad.”⁷⁰ Scholars have described the purpose of NLRA preemption as a congressional attempt “to vest exclusive regulatory authority in the federal government and to preclude state and local governments from varying the rules of organizing and bargaining.”⁷¹

Importantly, however, even this broad NLRA preemption doctrine recognizes the traditional reluctance of courts to imply congressional intent to preempt when dealing with state laws or actions deemed necessary to protect state citizens from harm. In 1942, the police power exception to NLRA preemption was recognized in *Allen-Bradley v. Wisconsin Employment Relations Board*,⁷² where the Court considered whether an unfair labor practices finding under state law should be preempted when union members and officers had threatened and coerced non-striking employees.⁷³

At the outset of the case, the Court expressed it would not “lightly infer” an intention to preempt state action directed at public safety, which it considered part of the “traditional sovereignty” of the state.⁷⁴ While recognizing that the state’s exercise of jurisdiction might overlap with the Act, the Court did not agree that the NLRA represented an intention by Congress to occupy the entire field of labor relations.⁷⁵ Rather, the Court found that the regulation of threatening and coercive conduct by striking employees was not governed by the Act.⁷⁶ The state could exercise jurisdiction over such conduct because the state’s regulation would not conflict with the Act. “[W]e fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies, or in any respect subtracts from any of the rights guaranteed and protected by the federal Act.”⁷⁷ Importantly, the Court noted if the state could not

65. See generally Drummonds, *supra* note 21, at 163-164 n.295 (explaining forms of implied preemption and offering critique of the application of implied preemption doctrine to the NLRA); see also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 240-241 (1959) (noting, “the Labor Management Relations Act leaves much to the states, though Congress has refrained from telling us how much.”) (citations omitted).

66. *Garmon*, 359 U.S. at 236.

67. *Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976).

68. *Garmon*, 359 U.S. at 244-45.

69. *Machinists*, 427 U.S. at 140-41, 149.

70. Sachs, *supra* note 20, at 1164.

71. *Id.* at 1165.

72. *Allen-Bradley v. Wis. Emp’t Relations Bd.*, 315 U.S. 740 (1942).

73. *Id.* at 742-43.

74. *Id.* at 749.

75. *Id.* at 750.

76. *Id.* at 751.

77. *Id.* at 750.

intervene in this instance, “it is difficult to see how any State could under any circumstances regulate picketing or disorder growing out of labor disputes”⁷⁸ This, the Court implied, would be an absurd result.

The *Garmon* doctrine also specifically recognizes an exception to the preemption rule:

[W]here the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.⁷⁹

The state’s exercise of authority to remedy conduct “marked by violence and imminent threats to the public order” has repeatedly been recognized under this latter *Garmon* exception.⁸⁰ While *Garmon* made clear the state must establish a “compelling state interest” to escape federal preemption, where the compelling interest is in “the maintenance of domestic peace” the Court suggested the scales should be tipped in favor of the state.⁸¹

III. DETERMINING THE SCOPE OF PUC AUTHORITY

Because of the broad role of the PUC in the oversight of utilities and the protection of public safety, conflict with the NLRA has the potential to occur in a number of ways. First, the PUC has the responsibility to promulgate and enforce a variety of regulations that can directly affect labor practices and could conflict with NLRB jurisdiction. Second, as noted above, the PUC’s general ratemaking authority can impact staffing levels and compensation at utilities, including those for union positions. Finally, concerted union activity, such as a strike or a lockout, can directly affect the utility’s ability to maintain the safety and reliability of its system, which is a key component of the PUC’s jurisdiction. Each of these scenarios raises questions as to when and whether the PUC should intervene in an active labor dispute.

A. *Generic Regulations Impacting Labor Issues*

Given the wide breadth of subjects over which a PUC has authority—from safety to compensation of utility employees—it is not surprising that PUC

78. *Id.* at 751.

79. *Garmon*, 359 U.S. at 243-44.

80. *Id.* at 247; *see, e.g.*, *Farmer v. United Bhd. of Carpenters & Joiners of Am. Local 25*, 430 U.S. 290, 304 (1977) (intentional infliction of emotional distress claim allowed to proceed where potential for interference with federal labor scheme outweighed by legitimate and substantial interest of state in protecting its citizens); *Linn v. United Plant Guard Workers of Am. Local 114*, 383 U.S. 53, 63 (1966) (finding “overriding state interest” in protecting citizens from libel outweighed federal interest in uniform regulation of labor disputes); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 196 (1978) (allowing state action in trespass based on *Garmon* “local interest” exception).

81. *Garmon*, 359 U.S. at 247-48. Ironically, the Court did not find such a compelling interest in *Garmon* itself. There, the petitioners sought damages from union picketing of their business. The NLRB declined to exercise jurisdiction over the matter, so petitioners sought recourse in state court. On review, the Supreme Court found the state’s interest—in providing a remedy to petitioners where the NLRB refused to act—was not grounded in violence or threats of intimidation, and therefore was not compelling. *Id.* at 248.

regulations can impact labor issues. In some cases, a state may pass specific legislation delegating authority to the PUC to oversee utility employees. In others, the PUC may promulgate a regulation related to safety or compensation pursuant to its general authority which in turn has an impact on staffing or collective bargaining arrangements. Two cases illustrate a framework that should be applied when considering such regulations. In *Southern California Edison Co. v. Public Utilities Commission (SoCal Edison)*, the court considered a PUC regulation requiring utilities to pay prevailing wages.⁸² In *Southern Union Gas Co. v. Rhode Island Division of Public Utilities & Carriers (Southern Union)*,⁸³ a state law requiring PUC oversight of natural gas technicians was challenged for its potential impact on an ongoing labor dispute.

In *SoCal Edison*, the California Public Utilities Commission (Cal. PUC) decided, after a rulemaking proceeding, that utilities in the state were required to pay prevailing wages to workers employed on utility construction projects.⁸⁴ The electric utility challenged the decision, claiming, *inter alia*, the Cal. PUC's action was preempted by the NLRA.⁸⁵

The court started its analysis with the presumption that the court should not lightly infer preemption of state action "in fields of traditional state regulations," which the court found to include "the establishment of labor standards."⁸⁶ In these areas, the court held, the intent to preempt state standards must be "clear and manifest."⁸⁷ Having grounded the decision in the foundational presumption against preemption, the court analyzed the claim of preemption using the *Machinists* framework.⁸⁸ The court construed *Machinists* and its progeny to require an analysis of whether the state regulation at issue was compatible with the "general goals of the NLRA to restore the equality of bargaining power and resolve the problem of depressed wages."⁸⁹ Presuming so, the state regulation could affect the substantive terms of employment without conflicting with the NLRA.⁹⁰ Under this framework, the *SoCal Edison* court found the prevailing

82. *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 1085, 1091 (Cal. Ct. App. 2006).

83. *S. Union Gas Co. v. R.I. Div. of Pub. Utils. & Carriers*, 306 F. Supp. 2d 129, 131-32 (D.R.I. 2004).

84. *SoCal Edison*, 140 Cal. App. at 1094.

85. *Id.* Edison also challenged the Cal. PUC's ruling on procedural grounds, arguing the Cal. PUC had violated its own rules, committed an abuse of discretion, and denied the utilities due process and a meaningful opportunity to challenge the decision. *Id.* at 1091.

86. *Id.* at 1097 (citing *Fort Halifax Packing Co. v. Coyne*, 482 US 1, 21 (1987) (holding Maine statute requiring employers to provide severance pay to certain employees was not preempted by the NLRA)).

87. *Id.* at 1097 (citation omitted).

88. *Id.* at 1103-04. The *SoCal Edison* court considered, but quickly dismissed, a claim of preemption under *Garmon*. The court held the regulation in question did not regulate conduct protected or prohibited under the NLRA, or arguably protected or prohibited, and therefore a *Garmon* analysis was inapposite. *Id.* at 1104.

89. *Id.* at 1100. The court took specific guidance from *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985), which upheld over a preemption challenge a Massachusetts statute requiring mental health care benefits in employer health care plans, even those plan negotiated as part of a collective bargaining agreement. *Id.* at 1099.

90. *Id.* at 1103-04. Reaching this analysis required the *SoCal Edison* court to consider some significant precedent in the Ninth Circuit regarding NLRA preemption of state labor standards. In *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), the Ninth Circuit had held a Contra Costa County prevailing wage ordinance was preempted under the *Machinists* doctrine. However, relying on the cases of *Associated Builders & Contractors of So. Cal. v. Nunn*, 356 F.3d 979 (9th Cir. 2004) and *Dillingham Const. N.A. Inc. v.*

wage requirement was not inconsistent with the goals of the NLRA, and therefore not subject to preemption.⁹¹

Interestingly, the court all but ignored the fact that the prevailing wage requirement had been set by a public utility commission and was being applied to an electric utility. The court also applied the traditional deference to states to set minimum labor standards without questioning whether the regulation at issue was passed as a pretext to achieving some other purpose. In *Southern Union*, on the other hand, the court directly considered the origin and purpose of the regulation.⁹²

In *Southern Union*, collective bargaining negotiations between the gas utility (Southern Union) and union employees broke down, and the utility locked out service technicians and employed replacement workers.⁹³ Around the same time, however, R.I. Gen. Law section 39-2-23 was passed, prohibiting any individual from starting or stopping gas service who had not worked for two years for a gas company and who was not certified by the Rhode Island PUC.⁹⁴ Southern Union argued this law interfered with its ability to find and employ replacement workers, and was therefore preempted by the NLRA.⁹⁵ The State countered that the regulation was primarily directed at health and safety, and while it might make it more difficult to hire replacement workers, it was still possible for the utility to operate its system using outside contractors, management personnel, and if necessary, technicians from other locations within the Southern Union system.⁹⁶

The *Southern Union* court began its analysis on the premise that hiring replacement workers was not directly protected or prohibited by the NLRA, but was a self-help tool intended by Congress to be left unregulated.⁹⁷ Ordinarily, this would point toward a *Machinists'* analysis, but in this case, the court borrowed language from both *Garmon* and *Machinists*, creating a balancing test in which the state's interest in passing the regulation was weighed against the burden the regulation placed on the hiring of replacement workers.⁹⁸ In determining the state's interest, the court considered the purpose of the regulation, the extent to which the regulation served its purpose, and whether the purpose could have been achieved by some alternative means.⁹⁹ As part of the analysis, the court noted the

Cnty. of Sonoma, 190 F.3d 1034 (9th Cir. 1999), the *SoCal Edison* court held that more recent precedent had distinguished or ignored *Bragdon*, and it accordingly did the same. *SoCal Edison*, 140 Cal. App. at 1103-1104.

91. *SoCal Edison*, 140 Cal. App. at 1100-01. The weight of authority generally holds that minimum labor standards set by states do not conflict with the NLRA and are not preempted. *See also Metro. Life*, 471 U.S. at 755 (law requiring employers to offer certain employees health benefits not preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (requirement that employers pay one-time severance payment not preempted); *Kapiolani Med. Ctr. for Women & Children v. Haw.*, 82 F. Supp. 2d 1151 (D. Haw. 2000) (statute requiring use of agent in hiring replacement workers preempted, while statute requiring advertisements for replacement workers disclose the existence of a labor dispute was not).

92. *Southern Union*, 306 F. Supp. 2d at 129.

93. *Id.* at 132.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 134.

98. *Southern Union*, 306 F. Supp. 2d at 135-36.

99. *Id.* at 136.

deference traditionally afforded to states when dealing with public safety, but reserved the possibility the legislation at issue was actually aimed at interfering with the collective bargaining process.¹⁰⁰ Ultimately, the court was unable to resolve the case on summary judgment; on remand, the statute was held preempted by the Natural Gas Pipeline Safety Act, rather than the NLRA.¹⁰¹

From these and similar cases a general framework of analysis can be developed. At the highest level, the goal of the analysis must be to determine if Congress intended to preempt the state action at issue. Where the state action does not frustrate the intent of the NLRA by altering the balance of bargaining authority between management and labor, no conflict can be said to exist, and the regulation should not be preempted. Where the state action *does* impact the relationship between management and labor, the regulation should be assessed to determine if it is a legitimate exercise of the PUC's jurisdictional authority, and represents an exercise of the state's police power. If this is the case, the interest of the state in making the regulation should be balanced against the extent to which it conflicts with the goals or purpose of the NLRA. Preemption should only be found where the conflict is strong enough to clearly outweigh the state's interest in protecting its citizens, making plain the "manifest intent" of Congress to preempt the regulation.

More specifically, existing precedent leads to the conclusion that PUCs and state legislatures can promulgate regulations that are protective of workers or set minimum safety, reliability, or labor standards.¹⁰² As noted earlier, regulation of utilities has been held to be a field of traditional state regulation and should receive a strong presumption against preemption, particularly when the regulation has to do with the safe operation of the utility system.¹⁰³ However, this deference does not require a court to ignore the circumstances surrounding the passage of the regulation. Where circumstances require, the motive, purpose, and effectiveness of the legislation may need to be examined to assess its legitimacy and to determine the strength of the state's interest. If the regulation is a pretext for involvement in a labor dispute, or does not directly address the health and welfare of the state's citizens, the scales should appropriately tip in favor of preemption.

B. *Review of Individual Utility Staffing Plans*

One of the primary means for a PUC to ensure the provision of safe and reliable utility service is the oversight of utility staffing plans.¹⁰⁴ To illustrate how this might work, consider the 2010 case of the Connecticut Department of Public

100. *Id.*

101. *See generally* S. Union Co. v. R.I. Pub. Util. Comm'n, 2006 U.S. Dist. LEXIS 7726 (D.R.I. Feb. 10, 2006).

102. State OSHA requirements are generally not preempted because they are held not to conflict with the purpose of the NLRA or interfere with the goal of establishing a fair bargaining process. *See, e.g.,* Paige v. Henry J. Kaiser Co., 826 F.2d 857, 864-65 (9th Cir. 1987) (finding wrongful discharge claim based on state health and safety law not preempted). "[W]hile safety standards may be a subject of bargaining between the parties . . . minimum safety standards [do] not undercut the collective bargaining process." *Id.* at 864.

103. *See supra* notes 39, 43 and accompanying text.

104. *See supra* note 44.

Utility Control's (DPUC) investigation of the Connecticut Natural Gas Corporation's planned workforce reduction.¹⁰⁵ The DPUC opened the docket on its own motion to investigate the impact of layoffs at the gas company on "the safety of the public and employees,"¹⁰⁶ and carried out the investigation pursuant to state law providing the DPUC with authority to monitor utilities to ensure the safety of the public, and to order changes in the manner of operation of a utility as necessary to ensure the public welfare.¹⁰⁷

As part of the investigation, the department obtained and reviewed information about the utility's operation and maintenance record, including gas odor complaint response time, leak repair scheduling and management, and annual goals including reliability of service, service quality, and employee safety.¹⁰⁸ The department sought to determine if the proposed staffing reductions would negatively impact any of these metrics, and concluded in its final report that it could not draw such a conclusion from the evidence presented.¹⁰⁹ Nonetheless, the DPUC made it clear it intended to continue to monitor the situation, and believed it had the authority to remedy any negative impact on these areas in the future:

If the Department finds . . . that the safety of the public and the employees . . . is being jeopardized or that the [] level of service is reduced below what customers reasonably expect . . . it is empowered to rescind the instant layoffs and if necessary, rescind any workforce reductions made.¹¹⁰

Did the DPUC in fact have this authority, or would it have been preempted by the NLRA had it intervened in the gas utility's staffing levels of unionized workers? Based on existing precedent, the answer appears mixed. To the extent the DPUC sought to enforce minimum safety standards set for the protection of employees or the public—for example, had the DPUC fined the utility for failing to respond in a timely way to gas odor complaints, or required the utility to demonstrate its ability to meet gas leak requirements—its actions should not have been preempted. Intervention to protect the safety of the public and employees of the utility falls squarely within the police power exception, there is no sign the DPUC's actions were in any way a pretext to intervene in an active labor dispute,

105. DPUC Investigation into the Contemplated Workforce Reductions by Connecticut Natural Gas Corporation and the Southern Connecticut Gas Company, Docket No. 09-09-08 (Del. Pub. Util. Comm'n Sept. 10, 2009). For documents filed in this docket, *see generally* [http://www.dpuc.state.ct.us/dockhist.nsf/\(Web+Main+View/All+Dockets\)?OpenView&StartKey=09-09-08](http://www.dpuc.state.ct.us/dockhist.nsf/(Web+Main+View/All+Dockets)?OpenView&StartKey=09-09-08) (last visited Sept. 4, 2014). The case involved both the Connecticut Natural Gas Corporation (CNG) and the Southern Connecticut Gas Company (Southern), but the DPUC treated them collectively.

106. DPUC Investigation into the Contemplated Workforce Reductions, Final Decision, Docket No. 09-09-08 (Del. Pub. Util. Comm'n Feb. 11, 2010) [hereinafter DPUC Final Decision] at 1, <http://www.dpuc.state.ct.us/dockhist.nsf/8e6fc37a54110e3e852576190052b64d/ab0842cbde16a29a85257727004ecc33?OpenDocument> (last visited Sept. 4, 2014).

107. *See generally* CONN. GEN. STAT. § 16-11 (2011) ("The authority may order such reasonable improvements, repairs or alterations in such plant or equipment, or such changes in the manner of operation, as may be reasonably necessary in the public interest.")

108. DPUC Final Decision, *supra* note 106, at 9-13, 18-19.

109. *Id.* at 22.

110. *Id.* at 23.

and setting and enforcing minimum safety standards does not conflict with the goals of the NLRA.¹¹¹

In a similar vein, if the DPUC had used its general ratemaking authority to enforce existing safety and reliability standards—for example, by conditioning rate levels based on achievement of certain service or safety metrics—it would likely have been well within its authority. The case of *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission (Southwestern Bell)*¹¹² is instructive in this regard. In this case, Southwestern Bell sought approval from the public service commission (PSC) to raise rates to cover increased labor costs arising out of a new contract with its unionized employees.¹¹³ After reviewing the wages agreed upon by the utility, the PSC found they were unreasonable compared to similarly situated companies, and adjusted downward the requested rate increase by approximately \$5 million.¹¹⁴

On review in the Eighth Circuit Court of Appeals, the court found the PSC's downward adjustment to the requested rate was not preempted by the NLRA, and did not interfere with the exercise of collective bargaining rights.¹¹⁵ While the downward adjustment obviously would indirectly impact future collective bargaining, in that the utility would be reluctant to agree to any contract for which it felt that the PSC would not let it recover, it did not directly affect the substance of any particular agreement and did not restrict *Southwestern Bell* from meeting its contractual obligations.¹¹⁶ Moreover, the court noted the PSC's order did not intrude in any area of economic self-help Congress intended to leave unregulated.¹¹⁷

Other regulatory adjustments, in the area of productivity measures,¹¹⁸ or hospital cost reimbursement formulas,¹¹⁹ have similarly been upheld. This is consistent with the presumption against preemption, and the requirement that implied preemption arises out of clear and manifest congressional intent. If a state agency could not use its authority in such circumstances, the NLRA would undermine the very nature of state regulation, which surely lies contrary to the intent of Congress.

[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 Clean air and water laws, selective cutting requirements in forest operations,

111. See *supra* Part II.A.

112. *Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 824 F.2d 672 (8th Cir. 1987).

113. *Id.* at 673.

114. *Id.*

115. *Id.*

116. *Id.* at 674.

117. *Id.*

118. See generally *Flaherty v. Pub. Serv. Comm'n of N.Y.*, 93 Civ. 6385 (JSM), 1994 U.S. Dist. Lexis 11783 (S.D.N.Y. Aug. 23, 1994) (PSC's settlement with utility, including 1% productivity adjustment, not preempted by NLRA).

119. See generally *Mass. Nurses Ass'n v. Dukakis*, 726 F.2d 41 (1st Cir. 1984) (finding state system for reimbursing hospital costs not preempted).

industrial safety standards, tax increases—all pro tanto hobble collective bargaining . . . [b]ut they do not add to or detract from the rights, practices, and procedures that together constitute our collective bargaining system.¹²⁰

As long as these types of state regulation do not directly conflict with the goals of the NLRA, preemption should not be found. However, these holdings depend on the regulatory agency acting in a manner that only indirectly affects collective bargaining relationships. If, instead of using regulatory tools with an incidental effect on labor relations (i.e., rate regulation or fining authority for violation of safety standards), the DPUC directly ordered the utility to reinstate a contract with members of a unionized workforce, the question of NLRA preemption would have to be reconsidered. In such a case, the DPUC would have been directly inserting itself into the substance of a labor agreement and disrupting the bargaining process between parties. This, of course, is precisely what the Act was intended to prevent.¹²¹

When it comes to oversight of the utility workforce, there should be no doubt a PUC maintains the authority to pass and enforce general regulations that protect the health and safety of the citizens of a state. Where the PUC acts to enforce such rules, its actions should not be preempted, though there may be incidental impact on a labor arrangement. However, the NLRA will likely prevent the PUC from *directly* interfering with contractual relations, either through general regulations used as a pretext to disrupt labor activities (as in *Southern Union*), or through direct oversight of a utility's staffing plans.¹²² While the PUC maintains significant authority in this arena, it is not limitless.

C. Collective Activity

The area of state action most susceptible to NLRA preemption is interference with protected or prohibited labor activity including strikes, collective bargaining processes, and concerted activities like picketing. After reviewing precedent in this area, it is easy to see why an entity like the NYPSC believed it had no role in the labor dispute at Con Edison, even when public safety may have been threatened as a result. But a closer read of the existing case law suggests that, given current circumstances and the necessity of electric utilities for public safety, situations can be found in which states can act in utility labor disputes without being preempted.

The origin of the belief that a PUC would be barred from intervening in collective action at utilities is not difficult to trace. Beginning in 1951, the Supreme Court repeatedly overturned state efforts to prevent strikes at public utilities. In *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board (Motor Coach)*,¹²³ the Wisconsin Employment Relations Board sought and received a

120. *Id.* at 45.

121. *See supra* note 61 and accompanying text.

122. 306 F. Supp. 2d at 133.

123. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Wis. Emp't Relations Bd.*, 340 U.S. 383 (1951).

state court injunction to stop a proposed strike by state transit and natural gas utility workers.¹²⁴ The injunctions were issued pursuant to the Wisconsin Public Utility Anti-Strike Law, which outlawed strikes, slowdowns or work stoppages by public utility employees that would have the effect of causing an interruption in service.¹²⁵

The Court found that the Public Utility Anti-Strike Law squarely conflicted with the NLRA and as a result “must yield as conflicting with the exercise of federally protected labor rights.”¹²⁶ The *Motor Coach* decision rejected the argument that Congress had intended to make state regulation of “local emergencies” a blanket exception to the NLRA,¹²⁷ while at the same time clarifying that this case did not, in fact, deal with an emergency situation.¹²⁸ “[T]he Wisconsin Act before us is not ‘emergency’ legislation but a comprehensive code for the settlement of labor disputes . . . application of the act does not require the existence of an ‘emergency.’”¹²⁹

A similar position was reiterated in *Division 1287 of the Amalgamated Ass’n of Street, Electric Railway & Motor Coach Employees of America v. Missouri (Missouri)*,¹³⁰ in which the Court rejected a state’s attempt to prohibit a strike at a public transit utility.¹³¹ Though the Governor of Missouri generally asserted the strike would jeopardize the public welfare, the State could point to no specific action that could lead to violence or danger; rather, it argued *any* strike would jeopardize the health and safety of the public.¹³² As it had in *Motor Coach*, the Court dismissed this blanket claim and found the law preempted.¹³³ In this case, however, the Court also pointed out that it was not invalidating the state’s police power: “It is hardly necessary to add that nothing we have said even remotely affects the right of a State . . . to deal with emergency conditions of public danger, violence, or disaster”¹³⁴

124. *Id.* at 385-86.

125. *Id.* at 386-87 (citing WIS. STAT. § 111.63 (1949)).

126. *Id.* at 395. Notably, this case based its preemption analysis on the conclusion that Congress had intended to occupy the entire field of labor relations. *Id.* at 390 (citing *Int’l Union of United Auto. Workers v. O’Brien*, 339 U.S. 454, 457 (1950) (“Congress occupied this field and closed it to state regulation.”)). Subsequent cases have interpreted the NLRA to allow room for state action in the field of labor and employment relations, though it has been difficult to determine precisely where that room exists.

127. 340 U.S. at 393. This case was decided on the heels of *Int’l Union of United Auto. Workers v. O’Brien*, which also found a Michigan law restricting strikes unless certain provisions were adhered to, including mandatory mediation was also preempted. 339 U.S. at 455-59.

128. *Motor Coach*, 340 U.S. at 393-94.

129. *Id.*

130. *Div. 1287 of the Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Mo.*, 374 U.S. 74 (1963).

131. *Id.* at 75. Though this case addressed Missouri’s attempt to intervene in a particular labor dispute, the state’s authority arose from the King-Thompson Act, which gave the state the authority to take possession of utility property and thereafter prohibit strikes or concerted actions against the utility when necessary to protect public safety. *Id.*

132. *Id.*

133. *Id.* at 82.

134. *Id.* at 83.

The Court's defense of the state's police power, even in the face of protected conduct, was also upheld in *Youngdahl v. Rainfair, Inc.*,¹³⁵ where picketers in a labor dispute began to engage in verbal harassment and threatening conduct against replacement workers, and were enjoined from continuing such conduct on the basis that it was likely to lead to violence and a breach of public safety.¹³⁶ Noting the state was "in a better position than we can be to assess the local situation," the Court upheld the injunction as it pertained to the restriction of the harassing behavior, while rejecting a blanket injunction of picketing and patrolling the employer's premises.¹³⁷ "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing."¹³⁸ Subsequent cases have upheld the authority of the state to intervene in cases of concerted activity where necessary to protect public health and safety, though not in the context of a utility labor dispute.¹³⁹

The position thus far established rejects blanket rules prohibiting collective or concerted action, yet still upholds the right of the state to intervene where specific facts show public health and safety is actually threatened. The NLRB recognized this rule in *National Labor Relations Board v. State of Florida*, in which the NLRB challenged a state law requiring the jai-alai players' unions to give fifteen days' notice before striking: "The NLRB concedes that Florida's police powers allow it to enjoin strike conduct under exigent circumstances. The NLRB contends, however, that the [State has] not established the requisite actual or imminent public danger to justify such state action."¹⁴⁰

Unfortunately, case law provides few examples of the types of circumstances that might qualify as an "actual or imminent" threat other than the threat of physical violence from aggressive or intimidating picketers. Perhaps as a result, courts appear insistent on seeing evidence of this type of conduct before they will permit states to act. In California, for example, the court of appeals rejected an argument by electric utility Southern California Edison that picketing outside one of its generating stations threatened the reliability of that plant, and as a

135. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

136. *Id.* at 136.

137. *Id.* at 139-40.

138. *Id.* at 139.

139. See, e.g., *Int'l Union v. Russell*, 356 U.S. 634 (1958) (allowing recovery under state tort claim for damages associated with aggressive and intimidating picketing that kept employee from getting to his job); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (claim for damages for lost construction projects due to union intimidation and violence upheld); *New England Health Care v. Rowland*, 221 F. Supp. 2d 297, 339-44 (D. Conn. 2002) (finding potential harm to nursing home residents sufficient state interest to avoid preemption); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124, 1127-28 (Colo. App. 1999) (trial court could enjoin picketing in the interest of public safety); *K-T Marine, Inc. v. Dockbuilders Local Union 1456 of N.Y. & N.J.*, 251 N.J. Super. 107 (N.J. Super. Ct. App. Div. 1991) (allowing injunction of picketing in residential area far removed from job site). See also *infra* notes 143, 160 and accompanying text.

140. *Nat'l Labor Relations Bd. v. Fla.*, 868 F.2d 391, 392, 396 (11th Cir. 1989).

consequence, the reliability of service to the southern California area.¹⁴¹ In the face of uncontested affidavits and declarations that utility employees were refusing to go to work, or were scared to go to work, the court nonetheless found that the utility had provided insufficient evidence of actual violence or intimidating behavior by picketers.¹⁴² Noting “the mere *possibility* that Edison’s ability to deliver power *may* be impaired is not sufficient” to establish the police power exception under *Garmon*, the court held that the NLRB held sole jurisdiction over the matter, and action by a state court to enjoin the conduct was preempted.¹⁴³

Based on this precedent, it is difficult to fault the NYPSC for refusing to take action in the midst of the Con Edison lockout. Although in that case the union produced evidence that certain inspection, maintenance, and repair procedures were not being completed during the lockout, with potentially fatal consequences,¹⁴⁴ the union could not produce a smoking gun, a timeline for the impending disaster, or evidence of actual harm that had already occurred. As previous blackouts have demonstrated, small mistakes can lead to enormous disasters, but this potential does not fit neatly into an “actual or imminent threat” standard. It seems likely that, if given these facts, a court would find the imminence of the harm had not been sufficiently demonstrated to warrant state intervention.

Considering the potential economic and physical damage that can be caused by a blackout, however, one can readily understand why New York Governor Andrew Cuomo sent a strongly worded letter to the NYPSC, demanding the agency intervene in the Con Edison labor dispute and help negotiate an end to the lockout *before* a dangerous event occurred:

[I]t would be a failure to serve the public to respond only after a blackout or serious safety incident that occurs due to the labor dispute. I believe there is a real possibility of a safety or reliability issue if this situation continues. This is especially true as our region faces an ongoing heat wave which places significant stress on the power grid and requires all parties to devote the highest level of attention to the energy system.¹⁴⁵

Part of the difficulty in applying previous NLRA preemption cases to a labor dispute at a utility is the nature of the harm that is threatened. When the threat to public safety originates in violence by picketers or strikers, one can demonstrate

141. Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers v. Super. Ct. of L.A. Cnty., 132 Cal. App. 3d 1, 2 (Cal. Ct. App. 1982).

142. *Id.* at 7.

143. *Id.* (emphasis in original).

144. See generally Motion for Initiation of Expedited Investigation, *supra* note 24. For example, the union pointed to transformer inspections which were not being completed as a result of the lockout, and noted that shortly after the lockout began, a transformer exploded in Midtown Manhattan, “igniting a minivan and spreading flames to a 16-story building.” *Id.* at 8. The union speculated the explosion could have been avoided if an inspection had been carried out. *Id.* at 8-9. The union also pointed out that the utility lacked sufficient personnel to carry out contingency plans established in case of a “heat event” that could seriously affect customers. *Id.* at 10-11. For its part, management argued it was operating the system safely, and added that union protesters were creating potential safety hazards by blocking the delivery of equipment and fuel to certain generating stations. Patrick McGeehan, *At Con Ed, the Managers Are Tasked with Repairs*, N.Y. TIMES, July 18, 2012, at A23. As one manager noted, “[a]s long as nothing major happens, we can maintain the system . . .” *Id.*

145. David Freedlander, *Cuomo Urges Con Ed, Union To Come To Terms*, POLITIKER (July 25, 2012, 2:34 PM), <http://observer.com/2012/07/cuomo-urges-con-ed-union-to-come-to-terms/>.

the imminence of the harm by pointing to escalating verbal threats, physical intimidation, property damage, or physical assault. This type of concrete and direct evidence is easy to judge, and requires little specialization of skills. If people are getting hurt, or strikers are threatening to hurt people, the court can readily say imminent harm exists and allow states to act as the Court did in *Youngdahl*.¹⁴⁶ But when it comes to the threat to public safety that would be caused by an interruption of electric service, the evidence is not so clear or easy to read. When employees at a single generating station are intimidated by picketers and threaten not to attend work, how can a judge, with no experience or knowledge of utility systems, determine the potential threat to the reliability of an entire, multi-state system? What standard should be used, and how can the problem of cascading failures within interconnected utility grids be assessed?

One way of addressing this problem would be for the court to assess both the *likelihood* of an event occurring and the *magnitude* of the potential harm. While there may be a lower likelihood of harm in a utility case, the enormity of the potential impact far exceeds what one might expect in other types of cases. Analysis of both likelihood and magnitude is not unknown in the law, though it is not typically applied in NLRA preemption analyses.¹⁴⁷ Yet, it surely can and should be applied in this context. Simply considering one metric in an analysis—the probability of an event occurring—appears shortsighted, and has no grounding in congressional intent.

Precedent does not require a narrow consideration of the potential for harm in a preemption case. Courts already engage in a balancing test in NLRA preemption cases which broadly consider the nature of the state's interest, not simply the likelihood of an event occurring.¹⁴⁸ In *Southern Union*, for example, the court considered the purpose of the state regulation of gas technicians and the likelihood the legislation in question would achieve that purpose.¹⁴⁹ Courts could certainly include consideration of the magnitude of the potential harm to the public in their analysis without running afoul of existing precedent. Indeed, cases have suggested an “inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in the regulation of the conduct at issue.”¹⁵⁰

146. 355 U.S. 131 (1957).

147. In negligence cases, Judge Hand originated a formula that determines liability using a formula that weighs the burden (cost) of taking precautions (B) against the probability of an event occurring (P), times the gravity of the resulting injury (L). Under the resulting formula, liability depends on whether $B < PL$. See generally Linda J. Silberman, *Injunction by the Numbers: Less than the Sum of its Parts*, 63 CHI.-KENT L. REV. 279, 281 n.15 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (the case in which Judge Hand's negligence formula first appeared)).

148. See, e.g., *Farmer v. United Bhd. of Carpenters & Joiners of Am.*, 430 U.S. 290, 300 (1977) (“the cases reflect a balanced inquiry into such factors as the nature of the federal and the state interests in regulation and the potential for interference with federal regulation”); *Vaca v. Sipes*, 386 U.S. 171, 180 (1967) (“the decision to preempt . . . must depend on the nature of the particular interests being asserted and the effect upon the administration of national labor policies . . .”).

149. *Southern Union*, 306 F. Supp. 2d at 129, 135-37.

150. *Farmer*, 430 U.S. at 302. See also *Sears, Roebuck & Co.*, 436 U.S. at 188 (1978) (“Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion.”).

The other question courts must consider, however, is the nature of the intervention. In *Youngdahl*, the injunction that withheld scrutiny was a court injunction restraining violent and intimidating conduct by picketers; an injunction prohibiting all picketing was not upheld.¹⁵¹ Cases permitting state intervention in labor disputes, while recognizing the police power exception, have required the state action be narrowly focused on remedying the imminent threat.¹⁵² Ordering utility management to end the lockout of thousands of utility workers without the ability to tie those thousands of workers to a specific threat of imminent harm would have been unprecedented. Still, there are a number of ways the NYPSC could have gotten involved in the Con Edison labor dispute short of ordering the entire lockout to end.

First and foremost, the NYPSC could have done exactly what Governor Cuomo insisted—used its position as regulator to bring both sides to the bargaining table. While forcing two parties into a room does not necessarily bring an end to a dispute, it is a necessary step in the process, and does not unduly upset the balance of power between the two entities.

Second, the NYPSC could have initiated a “show cause” proceeding in which it demanded proof that Con Edison’s system was being operated in a safe and reliable fashion.¹⁵³ Were it unable to do so, the agency could find Con Edison was not meeting its statutory obligations, and it could use other regulatory tools (i.e., levy fines or adjust rates) to insist on those obligations being met. In a similar vein, the NYPSC could have initiated an investigation into the staffing of the Con Edison system, not unlike what the PUC did in the DPUC investigation of Connecticut Natural Gas’ proposed layoffs, in order to determine if the public health or welfare was being threatened by inadequate numbers of employees. If so, the NYPSC would have been justified in imposing financial penalties on the utility until adequate staffing had been achieved.

A third option worth exploring would have been for the NYPSC to promulgate emergency rules requiring utilities to maintain certain inspection,

151. *Youngdahl*, 355 U.S. at 139-40.

152. In *United Mine Workers of Am. v. Gibbs*, the Court noted that while it had consistently recognized the right of states to “deal with violence and threats of violence appearing in labor disputes,” it had nonetheless required that remedies must be “carefully limited to the protection of the compelling state interest in the maintenance of domestic peace.” 383 U.S. 715, 729-30 (1966). In a case involving a labor dispute with health care workers, only state action narrowly targeted to protecting the health of nursing care residents was allowed. *See generally New England Health Care*, 221 F.Supp.2d at 339 (“the local interest exception in public safety would extend no further than actions taken to avoid actual or imminent safety concerns”). *See also Youngdahl*, 355 U.S. at 139 (limiting injunction to conduct that was itself violent, or had established a “pattern of violence” that would resume after picketing was allowed to continue).

153. It appears the NYPSC was engaging in some monitoring of Con Edison’s provision of service. The memorandum from the NYPSC explaining the agency’s analysis of its legal authority states, “Prior to the current Con Ed lockout, Con Ed was required to develop contingency plans for the provision of safe and reliable service, and the Department is monitoring the implementation of the contingency plans on-site on a daily basis.” *See also* NYPSC Memorandum, *supra* note 25, at 2. However, the NYPSC still appeared to conclude they could only take action against Con Edison after something were to go wrong. “A failure of the contingency plan to prevent a severe event compromising safety or disrupting the provision of reliable service could expose the utility to a claim that it acted imprudently and trigger corrective action ordered by the Commission.” *Id.* The legal basis for the agency’s conclusion that it had to wait until *after* damage had been done to act is not presented.

repair, or maintenance schedules, or setting minimum qualifications for utility service and repair technicians.¹⁵⁴ Such a rule would undoubtedly have been challenged as a pretext to interfere in the labor dispute, as occurred in the *Southern Union* case,¹⁵⁵ and the NYPSC would have had to show that the rules: (1) were necessary for safety and reliability of the system; (2) had general applicability to utilities (i.e., were not limited to Con Edison); and (3) were not simply a pretext for intervention.¹⁵⁶

Enforcement of general standards related to employee safety or the operation of the utility system should not be preempted even if they have an incidental effect on a labor dispute. However, promulgating extensive and detailed rules relating to the management and oversight of a utility's workforce—even rules related to safety standards—would have been a significant departure for a PUC. As previously noted, PUCs are generally not found to have the authority to direct the management of utilities.¹⁵⁷ While they do have authority to ensure that utility systems are operated safely and reliably, that authority is generally exercised by reviewing utility outages and setting high-level standards for system reliability. For example, NYPSC staff prepare an annual Electric Reliability Performance Report that relies primarily on two high level metrics: System Average Interruption Frequency Index (SAIFI) and Customer Average Interruption Duration Index (CAIDI).¹⁵⁸ Using these two pieces of data, along with some other service-related metrics, the NYPSC assesses a broad range of utility performance issues.¹⁵⁹ Notably, there is no revenue impact as a result of missing targets, only a requirement for the utility to establish a remedial plan to address the problem.¹⁶⁰ Micromanaging individual decisions such as the frequency of inspections or the qualifications of utility technicians would be a significant departure from past practice, and would require NYPSC staff to direct the day-to-day management of the utility's operations—something it is arguably neither qualified for, nor legally authorized to do.

In the end, none of these options would have resulted in an immediate end to the lockout. If Con Edison management and labor had not agreed on a new contract, and a major storm threatened the residents of New York City with blackouts and possibly long delays in the restoration of service, was there anything more the NYPSC could have done? While the NYPSC believed the answer to that

154. For a description of the procedures for instituting an emergency rulemaking, see N.Y. A.P.A. § 202(6). Emergency rules generally cannot remain in force for longer than 90 days, unless a permanent rule is adopted during that time period. *Id.* § 202(6)(b).

155. See *supra* notes 90-92 and accompanying text.

156. See *supra* Part II.A.

157. See *supra* note 54 and accompanying text.

158. See generally 2012 Electric Reliability Performance Report: Distribution Systems Office of Electric, Gas, and Water, at 1 (N.Y. Dep't of Pub. Serv. June 13, 2013), available at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/D82A200687D96D3985257687006F39CA?OpenDocument>.

159. As the NYPSC explains, “[SAIFI/Frequency] is influenced by factors such as system design, capital investment, maintenance, and weather . . . [CAIDI/Duration] . . . is affected by work force levels, management of the workforce, and geography Recent data is also compared with historic performances to identify positive or negative trends.” *Id.*

160. *Id.* at 5-6.

question was “no,” the next Part answers that question “yes,” and proposes a re-examination of existing preemption doctrine to support that conclusion.

IV. STARTING FRESH: RE-EXAMINING NLRA PREEMPTION IN A TIME OF ELECTRIC NECESSITY

As Part III demonstrates, both perception and legal precedent limit the authority of PUCs to intervene in staffing and labor issues. While some authority does exist for independent regulatory action, it is likely courts would find most PUC efforts to intervene in a lockout or strike situation preempted, leaving the state with no remedy for a dangerous situation. Given the extensive harm that could result from such an event, in this Part I suggest two possible alternatives: first, a re-examination and reimagining of existing precedent in light of the importance of safe and reliable utility service to public safety; and second, an amendment to the NLRA permitting a state to intervene in a labor dispute if the state determines that a strike or lockout at an electric utility creates a significant threat to public safety.

A. *Reconsidering the Police Power Exception*

Since *Garmon* was decided in 1959, the scope of NLRA preemption has widened,¹⁶¹ and a confusing tapestry of exceptions, extensions, and balancing tests has been created.¹⁶² While an overwhelmingly broad preemption doctrine has been applied to a variety of cases, the fundamental legal principles that *should* be applied to preemption have not changed, and require a fresh look. First, it is well settled that when dealing with a “compelling state interest . . . in the maintenance of domestic peace,” the presumption against preemption should be applied.¹⁶³ This principle has often been glossed over, and should be reconsidered. Second, a fresh reading of *Garmon* suggests that too much has been made of the need to show violence or an imminent threat of violence, and that the state can and should be given greater latitude to intervene in a labor dispute that threatens the provision of reliable and safe utility service.

As the Supreme Court has often noted, determining the contours of NLRA preemption is challenging because of the “failure of the Congress to furnish precise guidance in either the language of the Act or its legislative history.”¹⁶⁴ However, *Garmon* clearly recognized the presumption against preemption and the state’s compelling interest in the maintenance of domestic peace.¹⁶⁵ As a result, when the state is acting to preserve the health and safety of its citizens, preemption can only be found where “the repugnanc[y] or conflict is so ‘direct and positive’

161. Sachs, *supra* note 20, at 1166 (describing the extension of the preemption doctrine since *Garmon*).

162. Drummonds, *supra* note 21, at 176-78.

163. *Garmon*, 359 U.S. at 247.

164. *Linn*, 383 U.S. at 58. Or, as the Court noted in *Garner v. Teamsters Union*, “We must spell out from conflicting indications of congressional will the area in which state action is still permissible.” 346 U.S. 485, 488 (1953).

165. *Garmon*, 359 U.S. at 247.

that the two acts cannot ‘be reconciled or consistently stand together.’”¹⁶⁶ Considering the Con Edison dispute specifically, a court would have to determine if the NYPSC’s intervention in a lockout at an electric utility in advance of extreme weather was repugnant to the federal purpose of “entrust[ing] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.”¹⁶⁷

In fact, PUC intervention in a utility labor dispute, with the purpose of ensuring safe and reliable utility service and to remedy an emergency situation, would not threaten NLRB jurisdiction. It is important to remember the NLRB cannot intervene in a circumstance like that presented in the Con Edison lockout, or for that matter, in the *SoCal Edison* case. There, aggressive picketing threatened the ability of certain employees at a generation facility to get to their jobs.¹⁶⁸ This could have, in turn, threatened the reliability of that facility, and in an extreme case, the larger electric grid. However, the NLRB has no authority to act in local disputes or emergencies. Thus, if the NLRA preempted state action, the customers and citizens of California or New York would have been left *without* a remedy or means for the protection of their electric service. The lack of overlap between the state and NLRB has been an important consideration in preemption cases because it suggests there would be no chance of contradictory remedies by the state and federal agencies.¹⁶⁹

On the other hand, an employer’s right to use lockouts as a means of exerting bargaining pressure on employees is well settled,¹⁷⁰ suggesting that state action limiting management’s authority to use this remedy would conflict with the purpose of the Act. Given this conflict, the next step for a reviewing court would be to balance the extent of the conflict against the state’s interest.¹⁷¹ Here, the court would have to consider both the nature of the intervention and the potential magnitude of the harm. Any intervention would have to be targeted to remedying a substantial public safety concern, and limited to the achievement of that purpose. A rule preventing *any* strike at a utility would certainly be struck down under

166. *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

167. *Garmon*, 359 U.S. at 242.

168. *SoCal Edison*, 140 Cal. App. 4th at 1091.

169. *See, e.g., Sears, Roebuck & Co.*, 436 U.S. at 198 (1978) (state action for trespass allowed where it would “create no realistic risk of interference with the Labor Board’s primary jurisdiction to enforce the statutory prohibition against unfair labor practices”); *Linn*, 383 U.S. at 63 (1966) (civil action for libel should be allowed to proceed where conduct complained of could not be addressed or remedied by NLRB); *Farmer*, 430 U.S. at 304 (1977). *But cf. Motor Coach*, 403 U.S. at 274 (1971) (contract claim for wrongful termination as a result of union action preempted).

170. *See generally* *Am. Shipbuilding Co. v. NLRB*, 380 U.S. 300, 342 (1965) (employer does not commit unfair labor practice when he shuts down operations to avoid employee strike); *see also* Duff, *supra* note 19, at 464-66 (describing legal authority and boundaries—or lack thereof—for employer lockouts).

171. *Vaca*, *supra* note 147, at 180 (“the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.”).

precedent established in *Motor Coach* and *Missouri*.¹⁷² This does not mean, however, that more limited action would not be permissible.

For example, the NYPSC could have ordered the utility to reinstate locked out workers while severe weather was pending, because the threat of outages was significant and predictable. Alternatively, the NYPSC could have ordered a limited number of maintenance or repair crews to be allowed to return to work to address backlogs of inspection or repairs deemed to threaten the reliability of the system. In *SoCal Edison*, the state should have been permitted to order picketers to stay a reasonable distance from the generating station and to desist in any threatening or intimidating conduct that might have interfered with the employees' ability to return to work. Any of these remedies would have been targeted and limited, and their conflict with the overall purpose of the Act would have been minimal.

In *SoCal Edison*, the court concluded the "possibility" of disruption of utility service was not sufficient to constitute a "deeply rooted and significant state interest."¹⁷³ This bald conclusion lacks support in either NLRA preemption or public utility case law. It appears in drawing this conclusion, the court was looking for evidence of actual violence or intimidating behavior,¹⁷⁴ rather than permitting the state to exercise the discretion to prevent such dangerous conduct before significant damage was done to the electric grid. This raises an important and common misunderstanding of existing precedent. *Garmon* does *not* require evidence of actual violence or imminent harm.¹⁷⁵ While it pointed favorably to allowing state intervention in cases "marked by violence and imminent threats to the public order" it did not establish imminence or violence as a standard for preemption.¹⁷⁶ If the threat of imminent harm were a *requirement*, cases in which states sought to allow recovery of damages for the consequences of past violent acts could not survive, because the threat of harm would have passed.¹⁷⁷ Similarly, *Linn v. United Plant Guard Workers*,¹⁷⁸ which permitted state action in a libel case that contained no hint of physical violence, would have been wrongly decided. The *Garmon* exception is for any conduct touching "interests . . . deeply rooted in local feeling and responsibility"¹⁷⁹—not only cases involving imminent violence.¹⁸⁰

172. 403 U.S. at 274; 374 U.S. at 75.

173. *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers*, 132 Cal. App. 3d at 7 (summarizing the court findings in *SoCal Edison*).

174. As the court states, "no evidence was presented that the pickets *in fact* behaved in a violent, threatening or intimidating manner." *Id.*

175. See generally *Garmon*, 359 U.S. 236 (1959).

176. *Id.* at 247.

177. See, e.g., *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954) (allowing recovery of damages under state tort law for construction company that asserted it had lost projects due to union threats and intimidation); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966) (allowing recovery for libel damages).

178. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

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

180. It is worth recalling here that regulation of public utilities has been held to be a deeply rooted local interest. See *supra* note 43 and accompanying text.

The *SoCal Edison* decision also ignored the potential magnitude of the harm the state sought to prevent. A quick review of the damages from the 2003 East Coast blackout—\$6 billion in economic damages¹⁸¹ and approximately ninety deaths¹⁸²—suggests California was justified in being cautious in its approach to the disruption of utility service. States have a long and deep tradition of utility regulation, and we have no reason to believe Congress meant to undermine this authority by the passage of the NLRA. Courts must recognize states may need to intervene more quickly in cases involving electric utilities than those involving threats to a limited number of individuals. Even where protected conduct threatens only a single generation facility, an outage at one facility can affect millions, and the damage to public safety can be extreme. The exercise of the state's police power to enjoin the picketing at a generation facility should be permitted more liberally, given the extent of the harm that can result if the facilities fail.

In today's electricity-dependent world, courts and regulators cannot blithely ignore the potential harm that would be caused by blackouts or disruption to the utility grid. Misreading key cases as requiring a show of "imminent harm" has led to a de facto refusal to allow state intervention, except in cases where either direct physical threats or actual physical harm can be shown. This is not an accurate reading of *Garmon*. Where the state intervenes to protect the health and safety of its citizens, the state's interest should be balanced against the impairment of the federal objective behind the Act. Where the state would be acting in a limited manner to address a specific threat at a utility, preemption is not appropriate or necessary.

B. Amending the NLRA

In *Motor Coach*, the Court considered whether special consideration should be given to public utilities when it comes to the application of the NLRA and concluded it should not.¹⁸³ "[W]hen separate treatment for public utilities was urged upon Congress in 1947, the suggested differentiation was expressly rejected. Creation of a special classification for public utilities is for Congress, not for this Court."¹⁸⁴ As discussed in Part IV(A), there is more leeway for courts when it comes to NLRA preemption than is currently acted upon. However, when agencies like the NYPSC insist they have no authority to intervene in a labor dispute, it may require a change in the law to change the minds of government officials.

Such reform would not be easy. As Professor Sachs notes, "Given the repeated failure of substantive labor law reform efforts over the past several

181. Electricity Consumers Res. Council (ELCON), *The Economic Impacts of the August 2003 Blackout 2* (Feb. 9, 2004), available at <http://www.elcon.org/Documents/EconomicImpactsOfAugust2003Blackout.pdf>. ELCON summarizes a variety of analyses of the economic damage caused by the 2003 blackout, and concludes a figure of \$6 billion, offered by the U.S. Department of Energy, is the most often cited. *Id.* at 1-2.

182. G. Brooke Anderson & Michelle L. Bell, *Lights out: Impact of the August 2003 Power Outage on Mortality in New York, NY*, 23 EPIDEMIOLOGY 189, 189 (Mar. 2012).

183. *Motor Coach*, 403 U.S. at 285, 302.

184. *Motor Coach*, 340 U.S. at 392.

decades, skepticism about the practical likelihood of changing the NLRA's preemption regime is warranted."¹⁸⁵ However, given the devastation that followed Superstorm Sandy, which left millions without power and disrupted everything from the treatment of drinking water to the delivery of gasoline,¹⁸⁶ Congress may be more willing to act in this area than in others.¹⁸⁷

One legislative option would be to exempt electric utilities completely from the NLRA, making clear the authority of the state to intervene in labor disputes. Another, less drastic option, would be to craft an exception that would allow a PUC or other state agency to intervene in a labor dispute when it deemed intervention necessary to protect public safety or to ensure the reliability of the electric grid.¹⁸⁸ Many countries, including Canada, allow an "essential services" exception to protections for striking workers that could provide a model for an amendment to the NLRA.¹⁸⁹ While either option may be an uphill climb, it may be worth pressing, in order to prevent future significant disruptions to the reliability of the electric grid.

V. SUMMARY

The world we live in today is very different from a decade ago, let alone the world that existed in the 1950s and 1960s, when many of the seminal cases of NLRA preemption doctrine were decided. Since then, courts and states have mistakenly concluded they are helpless to intervene in labor disputes, even those involving threats to public safety and the potential disruption of electric service to

185. Sachs, *supra* note 20, at 1212. See also Joseph E. Slater, *Collective Bargaining in the Public Sector under Obama: Public-Sector Labor Law in the Age of Obama*, 87 IND. L.J. 189 (2012) (noting, "The National Labor Relations Act (NLRA) seems almost immune to amendment").

186. See generally Abi-Samra, *supra* note 1. Extensive coverage in the New York Times reveals the overwhelming impact of power outages on gas stations, which was followed by disruptions in the supply chain and days of rationing. See, e.g., *Hurricane Sandy: Covering the Storm*, N.Y. TIMES (Nov. 6, 2012), http://www.nytimes.com/interactive/2012/10/28/nyregion/hurricane-sandy.html?_r=0.

187. It is worth recalling the NLRA does not protect public sector employees, with at least part of the rationale being public sector employees provide "essential services." Kate Montgomery Swearengen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 COLUM. J.L. & SOC. PROBS. 513, 533 (2011) (citing Anne M. Ross, *Public Employee Unions and the Right to Strike*, MONTHLY LAB. REV., Mar. 1969, at 14, 15); see also Merton C. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 462 (1971). Arguably, the same rationale should be applied to public utility employees. Indeed, Kate Montgomery suggests the failure to include utility workers in the category of essential services employees undermines the exemption for public sector employees. Swearengen at 533-534.

188. Ironically, of course, such an exception would simply codify the existing police power/*Garmon* exception discussed herein. However, because it would appear in the text of the statute, there would be no question of preemption; controversy, would shift instead to the determination by the PUC of the necessity for intervention.

189. See generally SEAN MCGEE & JULIAN WALKER, ESSENTIAL SERVICES: USHERING IN THE NEW REGIME UNDER PSLRA 1-2, available at http://www.nelligan.ca/e/pdf/Essential_Services.pdf (last visited May 6, 2014); JOHANNA WILLOWS & SYLVAIN SCHETAGNE, MAPPING FUNDAMENTAL LABOUR RELATION LAWS IN CANADA: 2011/2012 at 21-26 (Canadian Labour Congress, Oct. 2011) available at <http://prairies.psac.com/sites/prairies.psac.com/files/mappinglabourrelationslaws.pdf> (last visited May 4, 2014); see also Swearengen, *supra* note 187, at 540 (suggesting New York's Taylor Law be amended to allow non-essential public workers to strike, while including a restriction on strikes by essential employees). The International Labour Organization defines essential services as "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population." *Id.*

millions of customers. The sweeping breadth of NLRA preemption doctrine suggests agency hands are tied, but in fact they are not.

After reviewing relevant case law and considering evidence of actual blackouts and resulting damages, this article concludes that public utility commissions, as the primary agencies regulating electric utilities, do have significant power over labor conditions and staffing. They can exercise this authority in the form of generic regulations, reviews of utility staffing plans and restrictions on revenue requirements, and actual intervention in protected activity—including picketing and lockouts—where necessary to protect public safety. This authority does not extend to blanket prohibitions on the right to strike, but does permit states to intervene in limited, targeted ways.

Our utter dependence on electricity for the maintenance of public safety, and the vulnerability of the grid to localized disturbances, suggests the need for a fresh look at the NLRA preemption doctrine. If courts and agencies cannot see through past precedent, it may be time for an amendment to the Act.