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THE LABOR PREEMPTION DOCTRINE: HAMILTONIAN RENAISSANCE OR LAST HURRAH?

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I. INTRODUCTION

The supremacy clause of the United States Constitution¹ is the foundation of federal preemption in areas of overriding national interest. The commerce clause of the Constitution² provides the means for legislative solutions to national problems. Through its commerce power, Congress has regulated labor relations, and generally has enjoyed the broad judicial deference historically accorded to congressional regulation of commerce.³

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This article is drawn from one chapter of my J.S.D. dissertation in progress, to be submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law at the Yale University School of Law. I thank Professor Jack Getman for his many invaluable comments on earlier drafts.

1. U.S. CONST. art. VI, cl. 2. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. In interpreting the supremacy clause, Chief Justice Marshall once noted:

[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

2. U.S. CONST. art. I, § 8, cl. 3; *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (states excluded from regulating interstate commerce because the Constitution grants that power to Congress).

3. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Congress' use of the commerce power to regulate labor relations through the National Labor Relations Act held constitutional). For a thorough examination of the application of the commerce clause to labor regulation, *see Gregory, Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950).

For the past quarter century, however, the Supreme Court consistently has undercut the labor preemption doctrine, which applies the federal preemption principles of the supremacy clause to labor relations issues. Concomitantly, the Court implicitly has repudiated some of the core theories underlying both the supremacy clause and the commerce clause. As a result, the judicial erosion has extended beyond the labor preemption doctrine into the broader area of federal labor policy. Ascertaining whether the constitutional decay began with the erosion of the labor preemption doctrine or with the broader collapse of federal labor policy misperceives the inquiry; the labor preemption doctrine and labor policy are inextricably interrelated.

In addition to these constitutional precepts, the labor preemption doctrine is grounded in the National Labor Relations Act⁴ (NLRA). Although the NLRA is no longer the sole source of employment law,⁵ it remains at the heart of federal labor policy.⁶ The NLRA now is a mature statute with a fifty-year history, but whether it is enjoying a golden anniversary is the subject of considerable debate.⁷ Although the many established exceptions to the

4. 29 U.S.C. §§ 151-169 (1982).

5. Employment law has several other active cutting edges, including federal statutes such as the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 301-309, 441, 1001-1461 (West 1985 & Supp. 1986), title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), and the Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 553, 671-678 (West 1985), as well as state statutes governing matters such as workers' compensation. Another increasingly important source of employment law is the protection against unjust discharge extended to nonunionized employees through statutes and, more often, through case law in a growing number of jurisdictions. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); *see also* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (advocating protection against arbitrary and unjust dismissal from employment).

6. Most of the post-NLRA employment law has reflected the NLRA's labor law policy. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982).

7. *See, e.g.*, Gregory & Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's "Celebration" of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985). Several recent labor law symposia also have examined the status and role of the NLRA at this historic juncture. *See, e.g.*, *Labor and Employment Law: A New Focus for the Eighties*, 62 DEN. U.L. REV. 389 (1985); *Symposium: The Role of Unions in the 1980's*, 52 FORDHAM L. REV. 1061 (1984); *The Conceptual Foundations of Labor Law: A Symposium*, 51 U. CHI. L. REV. 945 (1984); *see also* St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631 (1985) (summarizing the

integrated labor preemption doctrine⁸ of the NLRA appear valid when considered alone, the cumulative effect of these exceptions is an unacceptable fragmentation of the doctrine without a sufficient offsetting contribution to labor and employment policy. Centralization of labor policy is essential because the NLRA, despite its political defects,⁹ is far better suited to anchor and to guide the development of labor policy than are the fifty separate states. If labor policy loses this centralization, state courts will yield a volatile checkerboard of inconsistent decisions, and labor law practice will disintegrate into raw forum shopping.

The judicial erosion of the labor preemption doctrine has debilitated federal labor law policy. Fueled by the Supreme Court's usual predisposition to find against preemption in labor cases for

positions of current critics and defenders of the NLRA); Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1 (1986) (cautioning labor law theoreticians and labor leaders about the need to reexamine and to reform fundamental labor law precepts); Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C.L. REV. 725 (1984) (arguing that the NLRA has failed to live up to its expectations).

8. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *infra* notes 71-89 and accompanying text.

9. Political controversy has characterized the entire history of the National Labor Relations Board (NLRB), which administers the NLRA. During the Board's first decade, employers criticized the NLRB as a tool of organized labor. *Cf., e.g., What Business Thinks*, FORTUNE, Oct. 1939, at 52 (business criticism of New Deal legislation and of labor unions). This criticism prompted Congress to extend the coverage of the NLRA to unfair practices by labor unions. See Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 140-188 (1982). The political controversy and debate has continued, and has accelerated in this decade. See, *e.g.*, HOUSE COMM. ON GOV'T OPERATIONS, DELAY, SLOWNESS IN DECISION MAKING, AND THE CASE BACKLOG AT THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 1141, 98th Cong., 2d Sess. 6 (1984) (concluding that the NLRB faced an administrative crisis because of procedural delays and case backlogs); HOUSE SUBCOMM. ON LABOR MGMT. RELATIONS OF THE HOUSE COMM. ON EDUC. & LABOR, 98TH CONG., 2D SESS., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS 26 (Comm. Print 1984) (criticizing the performance and the perceived anti-labor philosophy of the NLRB); *Criticism of Labor Department*, 115 LAB. REL. REP. (BNA) 195 (Mar. 5, 1984) (reporting statement by Lane Kirkland, president of the AFL-CIO, characterizing NLRB members during the Reagan Administration as "anti-labor ideologues" and as advocates of "the most narrow, retrograde employer interests").

This controversy may be more virtue than vice. The highly politicized nature of the NLRB gives the Board the ability to shape evolving labor policy to respond to changing political contexts. See Gregory, *The National Labor Relations Board and the Politics of Labor Law*, 27 B.C.L. REV. 39 (1985); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); *supra* note 7.

most of the past quarter century,¹⁰ labor law decisionmaking has devolved into little more than ineffectual crisis management. Absent restoration of the labor preemption doctrine, labor policy could deteriorate into a state of total confusion analogous to the doctrinal chaos afflicting capital punishment cases in criminal law¹¹

10. See *infra* note 111 and accompanying text.

Apart from the labor preemption doctrine, the Burger Court led a more general "states' rights" assault on centralized national authority through revitalization of the tenth and eleventh amendments. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that federal courts have no jurisdiction to order state officials to comply with state law). The Court's recent decision in *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985) (subjecting localities to the federal minimum wage law), in which the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), arguably signaled the last hurrah of the nationalist wing of the Court. The elevation of Justice Rehnquist to the position of Chief Justice, however, as well as other factors, will guarantee that the broad ideological and jurisprudential assault on nationalism will continue. See *Garcia*, 105 S. Ct. at 1033 (Rehnquist, J., dissenting) (observing that the principle in *National League of Cities* "will, I am confident, in time again command the support of a majority of this Court"); see also *Hillsborough County v. Automated Medical Labs., Inc.*, 105 S. Ct. 2371 (1985) (holding that the FDA does not preempt local blood donor regulations). For thorough analyses of the rich history of federalism, see Amyx, *New Federalism: How Is It Working?*, 15 WASHBURN L.J. 229 (1976); Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977); Fein, *The Waning and Waxing of Federalism*, A.B.A. J., Jan. 1, 1986, at 118; Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263 (1984); Lamb, "New Federalism" and *Civil Rights*, 9 U. TOL. L. REV. 816 (1978); Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982); Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34 VAND. L. REV. 249 (1981); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Werhan, *Pullman Abstention After Pennhurst: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449 (1986); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereinafter cited as Note, *Shifting Perspectives*]; Note, *The Burger Court and Labor Preemption Doctrine: Federalism in the Balance*, 60 NOTRE DAME L. REV. 1233 (1985); Note, *Judicial Examination of Deregulation: Exploring the Boundaries of Executive Discretion*, 59 ST. JOHN'S L. REV. 86 (1984); Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism—Past and Present*, 35 VAND. L. REV. 161 (1982); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981).

11. With virtually every case, criminal law jurisprudence becomes more fragmented. The landmark capital punishment cases of *McGautha v. California*, 402 U.S. 183 (1971), and *Furman v. Georgia*, 408 U.S. 238 (1972), best exemplify the confusion. In *McGautha*, the Court held that the jury had absolute discretion to decide whether to impose the death penalty. 402 U.S. at 207. One year later, however, the Court suggested in *Furman* that the

Fortunately, all hope for recentralized labor law theory and practice is not lost. Although the labor preemption doctrine largely remains an ensnared Gulliver, left to the mercies of the state courts by an irresponsible Congress and, until very recently, by the "states' rights" jurisprudence of the Burger Court, the doctrine has not yet been rent completely asunder. In 1986, the Supreme Court may have begun the return to a refined labor preemption doctrine¹² and to a responsible national labor policy that ultimately would obviate the need for legislative reform.¹³

This Article advocates the renaissance of the labor preemption doctrine. The Article begins by synthesizing the constitutional basis of the doctrine, and then examines the application of these principles by the Supreme Court. Rather than reviewing the entire fifty-year compilation of case law, the Article highlights the salient early labor preemption cases, tracing the development of the

eight amendment mandated courts to give juries standards regarding the death penalty. See 408 U.S. at 313 (White, J., concurring). For comprehensive analyses of the confused judicial treatment of capital punishment issues, see R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982); W. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* (1984).

12. The Burger Court, with near unanimity, surprisingly endorsed a broad view of the labor preemption doctrine in three cases decided in 1986. See *International Longshoremen's Ass'n v. Davis*, 106 S. Ct. 1904 (1986); *infra* note 395; *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395 (1986); *infra* notes 366-95 and accompanying text; *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 106 S. Ct. 1057 (1986); *infra* notes 341-65 and accompanying text.

13. Previous attempts at legislative reform of the NLRA generally have been unsuccessful. The last significant attempt to amend the NLRA, the Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess., 123 CONG. REC. 23,712, failed to pass the Senate. See 124 CONG. REC. 18,400 (recommitting the bill to the Senate Comm. on Human Resources, from which it never emerged). Congress has adopted only two significant amendments since the NLRA was passed in 1935. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 140-188 (1982); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 153, 158-160, 164, 186-187, 401-531 (1982).

According to one commentator, Congress' inability to address the labor preemption doctrine indicates that "[i]t is unrealistic to look to Congress for particular changes in this branch of labor law." Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1377 (1972) [hereinafter cited as Cox, *Preemption Revisited*]. This commentator explains: "[F]ew senators or representatives have the time or patience to study out all the implications of federalism in labor law and then formulate a workable generalization. To write the generalization into a statute would scarcely be wise even if it were feasible." Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1346-47 (1954) [hereinafter cited as Cox, *Federalism*]; see also *infra* notes 28 & 395 and accompanying text (noting the lack of an express directive from Congress concerning the labor preemption doctrine).

doctrine up to the Court's landmark decision in *San Diego Building Trades Council v. Garmon*.¹⁴ The Article then reviews the key subsequent decisions in which the *Garmon* doctrine has been applied. This analysis reveals that, while the Court's approach to the doctrine has been contradictory and generally hostile, some recent cases offer hope for eventual full restoration of the doctrine.

The Article concludes that the Supreme Court should lead the return to a discriminating, refined approach that would vest labor law decisionmaking with the National Labor Relations Board (NLRB), absent compelling countervailing considerations. Of course, this new approach cannot be rigid and absolute. The panoply of federal and state employment laws generally should be retained because the NLRA cannot encapsulate all labor and employment law theory and practice. Allowance must be made for the operation of healthy Brandeisian pluralism.¹⁵ A revitalized labor preemption doctrine and a centralized national labor policy, however, could be the underpinning for a new, proactive labor law jurisprudence extending into the twenty-first century. Whether 1986 will represent the renaissance of the labor preemption doctrine, or its last hurrah, will hinge on resolution of the tension between the rejuvenated nationalist spirit and the states' rights jurisprudence of the new Rehnquist Court.

II. CONSTITUTIONAL FOUNDATIONS OF THE LABOR PREEMPTION DOCTRINE

Through the United States Constitution, the people of the several states delegated exclusive power to the federal government in many enumerated areas.¹⁶ In some enumerated areas, the supremacy clause¹⁷ operates so that federal law totally preempts state law. Total preemption classically occurs in four situations: first, when Congress passes express preemptive legislation;¹⁸ second, when comprehensive federal regulation in a particular area impels a reasonable inference that Congress intended to leave no

14. 359 U.S. 236 (1959).

15. See *infra* note 22 and accompanying text.

16. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 320 (1851).

17. U.S. CONST. art. VI, cl. 2; see *supra* note 1.

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

room for concurrent state regulation;¹⁹ third, when a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject";²⁰ and fourth, when state law in an area actually or potentially would conflict with federal law or with congressional objectives.²¹ In other enumerated areas, the states generally have concurrent power. In most nonenumerated areas, reflecting Brandeisian pluralism,²² the states theoretically retain exclusive authority by operation of the tenth amendment.²³ This scheme represents the classic constitutional calculus in the federal system. As one commentator put it, "[T]he very first principle of American constitutionalism is federalism."²⁴

19. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

20. *Id.*

21. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

22. The Burger Court may be primarily responsible for the contemporary revitalization of states' rights jurisprudence, but it did not invent the concept. Healthy pluralism, according great deference to the states, was strongly supported by Justice Brandeis more than a half century ago. In *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Justice Brandeis stated:

Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311 (Brandeis, J., dissenting).

The Court has continued to enunciate a Jeffersonian concept of states' rights throughout the past quarter century. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), for example, the Court stated:

[T]he "exercise of federal supremacy is not lightly to be presumed." As we recently reiterated "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'"

Id. at 522 (citations omitted) (quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952), and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)); see also P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 470-71 (2d ed. 1973) ("Federal law is generally interstitial in nature. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law. ").

23. See U.S. CONST. amend. X.

24. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630, 637 (1972).

The preemption doctrine defines the precise contours of federal and state authority over substantive legal matters. This doctrine, which has been described as "one of the more intricate structures of legal theory,"²⁵ determines what areas of law are reserved to the exclusive authority of the federal government and what areas are left to exclusive or concurrent state regulation.²⁶

In the context of labor preemption, the difficult task of defining federal and state authority ultimately is left to the Supreme Court²⁷ because of Congress' inaction and its failure to address the complexities of the issue.²⁸ The Court often has been nonplussed by both the semantic confusion and the self-engendered substantive confusion surrounding general preemption principles.²⁹ The predictable consequence generally is further obfuscation. The

25. Comment, *Federal Preemption in Labor Relations*, 63 NW. U.L. REV. 128 (1968).

26. *See id.*

The preemption doctrine has antecedents in English law. According to Blackstone, preemption was the first priority right of the Crown to purchase necessary commodities before the general citizenry. 1 W. BLACKSTONE, COMMENTARIES *287; *see* Freeman, *supra* note 24, at 630 n.1.

27. *See* Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 681 (1961); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959); Note, *Labor Law—Preemption—Lodge 76*, International Association of Machinists v. Wisconsin Employment Relations Commission (Kearney), 18 B.C. INDUS. & COM. L. REV. 494, 498 (1977); Comment, *supra* note 25.

28. According to one commentary:

[P]roblems of supremacy and accommodation are essentially issues of legislative policy. Yet it is the practice for Congress to avoid the decision, thus leaving the problems to the Supreme Court. And the Court, paradoxically, then draws the necessary lines by asking—in form if not in actuality—where Congress drew them.

Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 212 (1950). This congressional inaction has not escaped the attention of the Court:

Congress has never said a word about pre-emption of state-court jurisdiction. "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

International Longshoremen's Ass'n v. Davis, 106 S. Ct. 1904, 1917-18 (1986) (Rehnquist, J., dissenting) (quoting *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 488 (1953)); *see also infra* note 395 and accompanying text (quoting another opinion of Justice Rehnquist noting the same problem).

29. A frequently quoted phrase from Justice Frankfurter aptly describes the Court's unenviable but indispensable task when it addresses preemption issues. According to Justice Frankfurter: "The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness

Court, according to one commentator, "has never articulated a single, distinct formula for determining when the doctrine operates to preclude or limit state action."³⁰ The observation that "the Supreme Court has not yet faced the question of the true

by the process of litigating elucidation." *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

The problem was addressed in greater detail in an earlier decision:

This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

Hines v. Davidowitz, 312 U.S. 52, 67, 78-79 (1941) (footnote omitted); *see also supra* note 28 (noting lack of congressional direction to guide labor preemption decisions); *infra* note 395 and accompanying text (same).

Although *Hines* was not a labor preemption case, it is significant because it was the first case in which the Court found a congressional intent to preempt state law when the federal law was not passed under the commerce clause of the Constitution. The Court held that the Alien Registration Act of 1940, ch. 439, 54 Stat. 670, which required aliens to register with the federal government and to carry identification cards, preempted a similar Pennsylvania law. 312 U.S. at 74. *Hines* represented the emergence of an activist policymaking Court in the preemption context:

Hines broke new constitutional ground. The Court redefined the judicial function in preemption cases, demanding a determination whether the state statute under scrutiny "stands as an obstacle to the full purpose and objectives of Congress." This approach substituted a purportedly objective assessment of the needs attending a statute's operation for the practice of defining the occupied field through total reliance upon Congress' subjective will. It amounted to a judicial assumption of competence to find preemption, notwithstanding the absence of clear congressional intent to occupy the field or actual conflict, when the nature of the federal regulation called for exclusive operation.

Note, *Shifting Perspectives*, *supra* note 10, at 631 (emphasis by the Court) (footnotes omitted).

30. Benke, *The Apparent Reformation of Garmon: Its Effect on the Federal Preemption of Concerted Trepassory Union Activity*, 9 U. Tol. L. Rev. 793 (1978) (footnote omitted).

constitutional place of preemption,"³¹ made in 1972, unfortunately remains true today.

Classic preemption analysis is grounded in the supremacy clause and in Congress' authority to regulate interstate commerce.³² In context of labor relations, the Supreme Court has construed the commerce power broadly to sustain comprehensive federal statutory regulation.³³ In tandem with the supremacy clause, this broad commerce power often sanctions exclusive federal authority, and thus preempts state regulation.³⁴ Much concurrent state regulation of labor relations, however, has escaped preemption. Because Congress did not include express preemption provisions within the NLRA, the Court in labor relations cases must inquire "whether a particular kind of state legislative or judicial action conflicts with federal policy to a degree sufficient to justify suppression of the action on the authority of the Supremacy Clause."³⁵

The Supreme Court generally begins preemption analysis by examining congressional intent. The Court first attempts to ascertain the existence and extent of the congressional intent to preempt a particular field, and then attempts to determine whether the particular state conduct falls within the area that Congress intended to preempt.³⁶ Unfortunately, this analysis is rarely expeditious or convenient. Congressional intent often is hopelessly obtuse and inscrutable, if not entirely absent.³⁷ Consequently, judicial deference to legislative intent usually is an exercise in futility. Frustrated by Congress' failure to speak, the Court is forced to act by congressional default. The core reality in preemption doctrine is judicial

31. See Freeman, *supra* note 24, at 631 (footnote omitted).

32. See *supra* notes 1-2 and accompanying text.

33. See *supra* note 3 and accompanying text.

34. See, e.g., *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

35. Comment, *supra* note 25, at 131.

36. See *id.*

37. In the landmark labor preemption case, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), Justice Frankfurter confessed the frustration inherent in judicial attempts to ascertain congressional intent. *Id.* at 240. Justice Rehnquist recently echoed these problems in his dissent in *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395, 1403 (1986) (Rehnquist, J., dissenting). Many commentators also have noted this difficulty. See Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations*, 59 COLUM. L. REV. 6, 9 (1959); Michelman, *supra* note 27, at 647-48; Wellington, *supra* note 27, at 545; Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Comment, *supra* note 25, at 131.

policymaking in the face of congressional silence, disguised by the occasional cosmetic judicial "divination of congressional purpose" and "fabrication of 'intent.'"³⁸ Judicial discernment of legislative intent usually is a myth designed to camouflage judicial policymaking. Nowhere is the problem any more apparent than in labor preemption.³⁹

Even if legislative intent were clear, however, labor preemption decisions still would have to transcend mechanistic determinations. Only the Court properly can make these complex policy decisions because they are not the product of statutory construction alone; they also are the product of overriding federalism and supremacy principles grounded in the Constitution.⁴⁰ After ascertaining, manipulating, inventing, or abandoning the fruitless search for legislative intent, the Court must undertake a constitutional analysis in every preemption decision, balancing federal and state interests.⁴¹ Because of the need for this balancing, Congress in the labor preemption area could provide only a general preemption principle to guide the Court. Even with such a principle, the Court still would have to apply its usual two-step constitutional preemption analysis, ascertaining whether a constitutional conflict exists between federal and state law⁴² and whether national uniformity is necessary to address problems that are national in scope.⁴³

This constitutional analysis does not mandate an all-encompassing, inflexible labor preemption doctrine that precludes any and all

38. See Michelman, *supra* note 27, at 648.

39. See *infra* note 205 and accompanying text (noting that even justices on the same side of the Court's decision in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), had difficulty agreeing on the congressional intent underlying the NLRA); see also *infra* note 395 and accompanying text (noting problems ascertaining intent underlying the NLRA in light of Congress' silence concerning its preemptive effect).

40. Note, *supra* note 37, at 224 ("Pre-emption can never be the product of statutory construction alone, since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause."); see also Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

41. See Comment, *supra* note 25, at 132.

42. See Note, *Shifting Perspectives*, *supra* note 10, at 625-26; Note, *Federal Preemption: Governmental Interests and the Role of the Supreme Court*, 1966 DUKE L.J. 484.

43. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319-20 (1851).

state resolution of labor issues.⁴⁴ That extreme would be nearly as abhorrent to an integrated labor law jurisprudence as the current morass of fragmented state court labor decisions. Labor preemption best is posed as "the troublesome, teasing, and vexing question: on what terms shall the national labor statute and the surrounding legal system live with each other?"⁴⁵

Although difficult, the question is not insoluble. The best answer would be a flexible but strong labor preemption doctrine that would recentralize most labor law adjudication within the ambit of the NLRA and within the jurisdiction of the NLRB. This approach would protect the national labor law structure from state fragmentation. The result would be consonant with Hamiltonian⁴⁶ federalism, which prefers a strong national government to the Jeffersonian⁴⁷ alternative of a pro forma central government dominated by virtually autonomous states.⁴⁸ A revitalized Hamiltonian labor preemption doctrine ultimately would lead to more stable and coherent labor law theory and practice.

44. Professor Archibald Cox, the leading authority on labor preemption, has suggested that "preemption should extend to, but should also be confined to, those cases in which the relief sought under state law is based upon a judgment that focuses upon the interests of employers, unions, employees, and the general public in employee self-organization, collective bargaining, or a labor-management dispute." Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 281 (1980).

45. Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 SW. L.J. 201, 202 (1982) (footnotes omitted).

46. "Hamiltonian" refers to Alexander Hamilton's philosophy of a powerful central federal government. Hamilton coauthored the *Federalist Papers* with James Madison. These powerful essays, designed to promote ratification of the Constitution, remain the principal elucidation of the Constitution and of our republican form of government. For general background concerning the foundations of Hamiltonian federalism, see D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984); C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* (1964); L. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948); Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483 (1978).

47. "Jeffersonian" refers to Thomas Jefferson's philosophy of decentralized government, with power vested primarily in state and local governments. For general background concerning the foundations of the Jeffersonian philosophy, see C. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* (1953).

48. The terms "Hamiltonian" and "Jeffersonian" are simple synopses, culled from the rich political and philosophical history of federalism. "Federalism" continues to be manipulated across the political spectrum. For example, the Reagan Administration's "new federalism" is the current rubric for revitalizing states' rights and for shifting power away from the federal government. "New federalism" stands Hamiltonian federalism on its head. See *supra* notes 10 & 46-47 (citing authorities analyzing the historical and current connotations of "federalism").

Unfortunately, the Court's answers to labor preemption questions for more than a quarter century generally have been unsatisfactory. From early national dominance, troubled coexistence marked an interim period that ushered in the fragmentation and debilitation of federal labor policy. The following sections trace the early establishment of the doctrine and its subsequent erosion.⁴⁹

III. INITIAL SUPREME COURT INTERPRETATION OF THE LABOR PREEMPTION DOCTRINE

A. Early Cases

Under the NLRA, labor-related activities either are protected,⁵⁰ are prohibited as "unfair labor practices,"⁵¹ or are neither protected nor prohibited.⁵² Analysis of activities using these statutory categorizations, rather than the less tangible, nonstatutory, and broader structural analysis employed in more recent cases, once was the dominant means of resolving labor preemption questions.⁵³ In the first two decades following enactment of the NLRA, the Court

49. This Article does not attempt an exhaustive treatment of individual cases because, as other commentators already have observed, numerous voluminous studies of early labor preemption cases already exist. See, e.g., Benke, *supra* note 30; Brody, *supra* note 45; Brody, *Federal Preemption Comes of Age in Labor Relations*, 5 LAB. L.J. 743 (1954); Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970); Come, *Federal Preemption Since Garmon*, 17 LAB. L.J. 195 (1966) [hereinafter cited as Come, *Since Garmon*]; Cox, *Federalism*, *supra* note 12; Cox, *Preemption Revisited*, *supra* note 12; Cox, *supra* note 44; Cox & Seidman, *supra* note 28; Hafer, *A Pragmatic Article Concerning Federal Preemption and Labor Law*, 1960 WIS. L. REV. 279; Hays, *Federalism and Labor Relations in the United States*, 102 U. PA. L. REV. 959 (1954); Hooton, *The Exceptional Garmon Doctrine*, 26 LAB. L.J. 49 (1975); Knee, *Federal Supremacy in Labor Management Relations*, 27 FORDHAM L. REV. 373 (1958); Meltzer, *supra* note 37; Michelman, *supra* note 27; Rose, *The Labor Management Relations Act and the State's Power to Grant Relief*, 39 VA. L. REV. 765 (1953); Roumell & Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. DET. L.J. 17 (1954); Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593 (1948); Updegraff, *Preemption, Predictability and Progress in Labor Law*, 17 HASTINGS L.J. 473 (1966); Wellington, *supra* note 27; Woll & St. Antoine, *Who Goes There?: Recent Moves Along the Federal-State Front in Labor Law*, 11 SYRACUSE L. REV. 1 (1959).

50. See 29 U.S.C. § 157 (1982).

51. See *id.* § 158(a)-(b).

52. One commentator has noted that "in practice it was often difficult to determine whether a given action was protected or prohibited, and if prohibited, whether this foreclosed the use of supplemental remedies by state courts." Comment, *supra* note 25, at 140 (footnote omitted).

53. See *id.* at 133.

routinely decided that the Act preempted any conduct that it regulated.⁵⁴

Under this statutory analysis, exceptions to the general rule of preemption developed in areas of conduct that were not governed directly by federal law. The most notable exception to federal preemption was regulation of violence associated with labor unrest, which was left to the states.⁵⁵ The violence exception was part of the larger exception for inherently local concerns.⁵⁶ In contrast to decisions in the past two decades, in which the Court has interpreted these exceptions so broadly that they threaten to swallow the classic preemption rules,⁵⁷ the Court interpreted these local exceptions narrowly in early cases.

In cases involving violent labor activity, the Supreme Court cautioned state courts to separate locally regulable violence from protected labor conduct to which the preemption doctrine applied.⁵⁸

54. See, e.g., *Bethlehem Steel Co. v. New York State Labor Bd.*, 330 U.S. 767 (1947) (state agency could not certify bargaining representatives for supervisors even though NLRB had not acted); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945) (state law setting qualifications for union office conflicted with union members' rights under the NLRA to choose bargaining representatives, and therefore was preempted); see also Salny, *Jurisdictional Conflicts Under National and State Labor Relations Acts*, 10 U. PITT. L. REV. 327 (1949) (discussing *Bethlehem Steel*); Note, *Labor Law—State Statute Regulating Labor Unions—Repugnancy to National Labor Relations Act*, 94 U. PA. L. REV. 114 (1945) (discussing *Hill*); Note, *State Regulation of Labor Unions*, 55 YALE L.J. 440 (1946) (discussing *Hill*). But see *International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Emp. Rel. Bd.* (Briggs & Stratton), 336 U.S. 245 (1949) (intermittent work stoppage short of strike neither protected nor condemned by NLRA; state regulation therefore permissible); Getman, *The Protected Status of Partial Strikes After Lodge 76: A Comment*, 29 STAN. L. REV. 205 (1977) (discussing case overruling *Briggs & Stratton*); Lopatka, *The Unprotected Status of Partial Strikes After Lodge 76: A Reply to Professor Getman*, 29 STAN. L. REV. 1181 (1977) (same); Note, *supra* note 27 (same).

55. See *United Auto., Aircraft & Agr'l Implement Workers v. Wisconsin Emp. Rel. Bd.*, 351 U.S. 266 (1956) (although violence is an unfair labor practice under the NLRA, the states have concurrent authority to prevent violence); *Allen-Bradley Local 1111, United Elec., Radio & Machine Workers v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740 (1942) (state use of police power to prevent union violence does not conflict with the NLRA).

56. See *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 556 (1945) (Frankfurter, J., dissenting) ("[T]his Court has been extremely cautious in upsetting State regulation unless it has found that the regulation devised by Congress and that by which the State dealt with some local concern cannot, in a practical world, coexist."); see also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (noting exception for conduct that touches interests "deeply rooted in local feeling and responsibility"); *infra* note 77.

57. See *infra* notes 87-88 and accompanying text.

58. See *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139-40 (1957).

In cases that did not fit this narrow exception, the Court readily invoked preemption. The Court especially was inclined to find preemption when federal labor law conflicted directly with state labor laws. In these cases, the Court properly held that the state regulations were wholly preempted.⁵⁹ The Court also applied preemption when state remedies paralleled potentially conflicting federal remedies.⁶⁰

This analysis, which looked exclusively at whether the NLRA regulated the conduct in question, constituted the "primary jurisdiction" wing of the labor preemption doctrine.⁶¹ Historically, this

59. See *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, Div. 998 v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 383, 394 (1951) ("[W]here, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.").

60. See *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490-91, 498 (1953). In *Garner*, the Court held that the NLRA preempted state courts from enjoining union recognition picketing because such injunctions create the danger of conflict with federal labor policy: "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Id.* at 499-500.

61. The "primary jurisdiction" wing of the labor preemption doctrine suggests that the NLRB has primary jurisdiction over any conduct actually or arguably regulated by the NLRA. The strongest judicial statement of this doctrine came from Justice Jackson in *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 (1953):

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so.

Id. at 490-91; see also Benke, *supra* note 30, at 809 ("[T]he primary jurisdiction rationale clearly requires that when the same controversy can be presented to the state court or the National Labor Relations Board, it should be brought before the Board."); Note, *supra* note 27, at 503 ("*Garner* articulated the concept that there is an area of labor combat intended to be free of governmental regulation.").

Later, a second, "unregulable activity" wing of the labor preemption doctrine developed. See *infra* note 138 and accompanying text.

analysis was the foundation of the preemption doctrine in labor law cases.⁶² Under this analysis, for example, state law remained preempted even if the NLRB exercised its discretion to decline to hear a particular case, creating a "no man's land" that left some parties without an effective remedial forum.⁶³ In practical effect, the primary jurisdiction scheme was virtually indistinguishable from pure preemption.⁶⁴

In applying the primary jurisdiction approach in early cases, the Court identified a number of factors that were helpful in determining whether the NLRA regulated a particular area of conduct and therefore preempted state regulation. In a variety of essentially tort-based cases, for example, the Court refused to preempt an analogous state remedy if the federal remedy was inadequate, and thus was "non-parallel" and not potentially in conflict with the state remedy.⁶⁵ The Court also looked to whether the particular

62. See Benke, *supra* note 30; Shute, *State Versus Federal Jurisdiction in Labor Disputes: The Garner Case*, 19 Mo. L. Rev. 119 (1954).

63. See *Guss v. Utah Labor Rel. Bd.*, 353 U.S. 1, 10-11 (1957). In *Guss*, the Court held that the NLRA preempted the state court from taking action against prohibited activity, even though the NLRB exercised its discretion not to handle the case. *Id.* at 9-10. The "no man's land" problem first arose in *Guss*, as one commentator noted:

If the pre-emption doctrine were pushed to its logical end, the businesses affecting commerce, but not satisfying the Board's jurisdictional standards, would be beyond state control. This would result in a "non-man's land" in which anarchy would replace law. A majority of the courts dealing with the problem could not believe that Congress had intended so drastic a result. The Supreme Court thought otherwise and so expressed itself in *Guss v. Utah Labor Relations Board*.

Comment, *Preemption in Labor Relations*, 35 TEX. L. REV. 555, 560 (1957) (footnotes omitted); see Cohen, *Congress Clears the Labor No Man's Land: A Long-Awaited Solution Spawns a Host of New Problems*, 56 NW. U.L. REV. 333 (1961); Gould, *The Garmon Case: Decline and Threshold of "Litigating Elucidation"*, 39 U. DET. L.J. 539, 567 (1962); Kadish & Degnan, *Some Light on the Twilight Zone*, 5 UTAH L. REV. 336 (1957); McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Note, *Does the NLRB Have the Power to Decline to Exercise Its Jurisdiction?*, 26 GEO. WASH. L. REV. 446 (1958).

64. See Michelman, *supra* note 27, at 645.

65. See, e.g., *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 621 (1958) (expelled union member could collect damages against the union under state contract law); *International Union, United Auto., Aircraft & Agr'l Implement Workers v. Russell*, 356 U.S. 634, 645-46 (1958) (employee forcibly denied access to work by a picket line could recover damages against the union under state law for medical expenses, pain and suffering, and property damages because these items of recovery were beyond the scope of the NLRB remedial order); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665

case involved an assertion of collective "public" rights, to which the NLRA was pertinent, or an assertion of primarily individualized "private" rights, which the NLRA would not preempt.⁶⁶

Because state courts generally are unsuited to make complex decisions concerning whether the NLRA protects or prohibits labor conduct and thus preempts state regulation,⁶⁷ the Court determined that these decisions in the first instance should be left exclusively to the NLRB.⁶⁸ The Court correctly perceived that the risk of discordant state decisions was too great.⁶⁹ This perception, which characterized the Court's early labor preemption cases, culminated in 1959 in the landmark decision of *San Diego Building Trades Council v. Garmon*.⁷⁰

B. San Diego Building Trades Council v. Garmon

*San Diego Building Trades Council v. Garmon*⁷¹ is the classic modern labor preemption case.⁷² In *Garmon*, the Court

(1954) (damages under state tort law allowed for losses from violent union conduct even though the union acts also constituted an "unfair labor practice" under the NLRA).

66. See, e.g., *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954) ("The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law."). But cf. *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 500 (1953) ("Whatever purpose a classification of rights as public or private may serve, it is too unsettled and ambiguous to introduce into constitutional law as a dividing line between federal and state power or jurisdiction.").

67. See Hays, *State Courts and Federal Preemption*, 23 Mo. L. Rev. 373, 376-82 (1958).

68. See *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 489 (1953) ("It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy. The power and duty of primary decision lies with the Board, not with us."); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 478 (1955) ("[T]he Board, and not the state court, is empowered to pass upon such issues [concerning § 8(b)(4)(D) unfair union labor practices] in the first instance.").

The primary jurisdiction of the NLRB also can preempt federal courts in favor of the Board, although these occurrences are less frequent. See *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 284 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

69. According to one commentator, "The essential dilemma of preemption in the field of concerted employee activities, then, is whether we are prepared to undertake the risk of admitting improper state action for the sake of preserving desirable state action." Michelman, *supra* note 27, at 683.

70. 359 U.S. 236 (1959).

71. *Id.*

72. For thoughtful, thorough discussions of *Garmon*, see Gould, *supra* note 63; Michelman, *supra* note 27; Shultz & Husband, *Federal Preemption Under the NLRA: A*

promulgated broad rules of labor preemption in deciding that a state court lacked jurisdiction to award tort damages to an employer under state law for loss of business caused by union picketing. The NLRB had exercised its discretion to decline jurisdiction because the amount of business in interstate commerce did not meet the Board's minimum jurisdictional standards.⁷³ Despite the Board's refusal to take the case, the Supreme Court held that state court jurisdiction was preempted.⁷⁴

The importance of *Garmon* stems from the general rules that the Court laid out to govern labor preemption:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.⁷⁵

Under *Garmon*, if labor activity clearly is protected or clearly is prohibited, preemption applies. More significantly, however, the

Rule in Search of a Reason, 62 DEN. U.L. REV. 531 (1985); Note, *supra* note 27, at 499-501; Comment, *State Common Law Actions for Damages and the NLRA—The Problem of Federal Preemption*, 26 MO. L. REV. 250 (1961); Comment, *supra* note 25, at 141-47.

73. See 359 U.S. at 238.

74. *Id.* at 245-46.

75. *Id.* at 244-45 (citations omitted).

Court in *Garmon* also extended preemption to conduct *arguably* prohibited or protected.⁷⁶

The decision represented a significant expansion of the labor preemption doctrine, without an abrogation of the well-established exceptions to the doctrine.⁷⁷ The Court rejected a painstaking case-by-case analysis,⁷⁸ and instead recognized that the most efficacious judicial approach was one "confined to dealing with classes of situations."⁷⁹ Rather than struggling with the "precise nature and

76. Professor Cox has been very critical of the "arguably protected" rule in *Garmon*: [T]o avoid the risk of a state court misinterpretation or misfinding, the "arguably protected" rule shuts the door to determination of the question, and thus denies the hope of remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court.

Cox, *Preemption Revisited*, *supra* note 12, at 1363.

77. The Court recognized the local concerns exception, and the violence exception that it incorporated, *see supra* notes 55-56 and accompanying text, reasoning that these matters should be left to state regulation. According to the Court, such "conduct touched interests so deeply rooted in local feeling and responsibility that [the Court] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 244. The Court also recognized a "catch-all" exception for labor conduct of only "peripheral" concern to the NLRA, which supplemented the local concerns exception: "[D]ue regard for the presuppositions of our embracing federal system has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act." *Id.* at 243.

78. *See* 359 U.S. at 243. Professor Cox had advocated this broader judicial approach to the labor preemption doctrine in his early influential article concerning labor preemption:

If the applicability of each state law is to be decided ad hoc by inquiring into how seriously it will interfere with national policy, litigation will continue until each little point is decided by the Supreme Court; meanwhile the litigants and all persons similarly situated will be left to speculation. State judges have shown extraordinary ingenuity in discovering grounds for applying state law in fields apparently foreclosed by Supreme Court decisions.

Cox, *Federalism*, *supra* note 12, at 1317 (footnote omitted).

79. 359 U.S. at 242. Justice Frankfurter noted that this approach freed the courts from discordant, isolated case-by-case decisionmaking, and left precise refinements for particular cases to Congress and the NLRB, which were more capable of making those refinements:

Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal and the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with

degree of federal-state conflict,"⁸⁰ the Court focused on identifying general areas of federal-state conflict "in its broadest sense."⁸¹ The result was a sweeping preemption doctrine that vested the NLRB with exclusive jurisdiction to decide the full panoply of labor activities either clearly or arguably prohibited or protected by the Act.⁸² Absent one of the historically recognized exceptions, the rule enunciated in *Garmon* created a strong presumption in favor of preemption, which extended even to legitimate state action.⁸³

Garmon is the classic example of the primary jurisdiction rationale for NLRB authority.⁸⁴ According to this rationale, the NLRB should determine whether particular conduct is prohibited, protected, or unregulated. According to the Court, Congress "entrusted administration of the labor policy for the Nation to a centralized administrative agency equipped with its specialized knowledge and cumulative experience."⁸⁵

Garmon had many virtues. The rule in *Garmon* was easy to apply, and it provided a workable bright-line test that generally was

its own procedures, and equipped with its specialized knowledge and cumulative experience.

Id. These classic principles, which favor a general, broad labor preemption rule to a case-by-case approach, stand in stark contrast to the badly fragmented, ad hoc approach of the Burger Court. See *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985) ("The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.").

80. 359 U.S. at 242.

81. *Id.* at 243.

82. The Court noted: "[T]o allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246.

83. According to the Court:

Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

Id. at 247.

In his concurring opinion in *Garmon*, Justice Harlan expressed reservations about the sweeping scope of the majority's holding. He especially feared that, in cases in which the Board declined to exercise jurisdiction, states would be precluded permanently from rectifying violations of local law. *Id.* at 253 (Harlan, J., concurring).

84. See *supra* notes 61-64 and accompanying text.

85. 359 U.S. at 242.

fair. The rule promoted uniformity, policy integration, stability, and consistency. Under *Garmon*, inexpert or hostile state courts could not impair employees' federally protected rights. With a few refinements, the doctrine would be far preferable to a babel of contradictory decisions rendered by fifty states on critical labor issues, even if the refined doctrine ran some risk of becoming a rigid, absolutist preemption doctrine.⁸⁶

Unfortunately, the Court since 1959, for the most part, has eroded *Garmon* seriously. The litany of exceptions to *Garmon*, in areas wholly removed from the well-established violence and local concerns exceptions, threatens to swallow the doctrine, and has compromised the practicality of its application.⁸⁷ As a result, the rule in *Garmon* "can now be described only by reference to its exceptions."⁸⁸

A labor policy grounded on a rule riddled with exceptions is worthless.⁸⁹ Without a coherent national labor policy, labor statutes provide no more than spasmodic partial protection. This pernicious negative synergy robs labor law theory of vitality. The following sections first describe the judicial erosion of the labor preemption doctrine since *Garmon*, and then examine the promise in recent decisions of a return to a coherent labor policy through the long overdue renaissance of the doctrine.

IV SIGNIFICANT SUPREME COURT DECISIONS IN THE 1960'S AND 1970'S: THE DEMISE OF A COHERENT LABOR PREEMPTION DOCTRINE

A. Initial Applications of *Garmon* by the Warren Court

Only four years after *Garmon*, the Supreme Court began its retreat from the labor preemption doctrine in a decision that simultaneously dealt a disastrous blow to organized labor. In *Retail Clerks International Association, Local 1625 v. Schermerhorn*,⁹⁰

86. Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1058 (1973).

87. See Recent Development, *Labor Law—Preemption—State Court May Exercise Jurisdiction to Restrain Peaceful Union Trespass Both Arguably Protected and Arguably Prohibited by National Labor Relations Act*, 64 CORNELL L. REV. 595, 608 (1979).

88. Bryson, *supra* note 86, at 1041.

89. See Hooton, *supra* note 49, at 64.

90. 375 U.S. 96 (1963).

nonunion employees had sued in state court to enjoin an "agency shop" clause that violated a state right-to-work law. The state court had granted the injunction, and the union had appealed.⁹¹ The United States Supreme Court upheld the injunction, holding that the NLRA did not preempt the state court's authority to issue it.⁹²

The Court rejected the union's contention that the NLRB had exclusive jurisdiction to enforce state right-to-work laws. Noting that section 14(b) of the NLRA permitted states to pass right-to-work legislation,⁹³ the Court recognized the anomaly that would result from holding that the NLRA preempted state courts from enforcing right-to-work laws through injunctive relief.⁹⁴ The Court found *Garmon* neither dispositive nor even persuasive because it "[did] not state a constitutional principle; it merely rationalize[d] the problems of coexistence between federal and state regulatory schemes."⁹⁵

The Supreme Court established another major exception to *Garmon* in *Linn v. United Plant Guard Workers, Local 114*.⁹⁶ In *Linn*, the plaintiff sued the union for distributing allegedly defamatory leaflets during an organizational campaign. The Court held that the NLRB did not have exclusive jurisdiction over the matter, and that the NLRA did not preempt the state court from awarding damages for defamation under state law. Recognizing the unique

91. See *id.* at 98.

92. *Id.* at 105.

93. See *id.* at 99. Section 14(b) provides: "Nothing in [the Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).

94. The Court stated, "[I]t would be odd to construe § 14(b) as permitting a State to prohibit the agency clause by barring it from implementing its own law with sanctions of the kind involved here." 375 U.S. at 99.

95. *Id.* at 103.

96. 383 U.S. 53 (1966). For more complete commentary concerning *Linn*, see Come, *Since Garmon*, *supra* note 49; Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 VA. L. REV. 1 (1967); Note, *Labor Law: The "Compelling State Interest" Exception to the Federal Preemption Doctrine*, 51 MARQ. L. REV. 89 (1967); Note, *Libel in Labor Disputes—Federal Versus State Jurisdiction*, 20 SW. L.J. 884 (1966); Comment, *supra* note 25, at 149-54.

dynamics of labor law, however, the Court held that the plaintiff had to prove both malice and injury to prevail.⁹⁷

The Court in *Linn* recognized that section 7 of the NLRA at least arguably protected statements not involving malice and injury, and that the conduct surrounding such statements fell within the exclusive jurisdiction conferred upon the NLRB under the rule in *Garmon*.⁹⁸ The Court refused to find total preemption, however, because in its view defamation was within both the peripheral concern exception and the local interest exception to *Garmon*.⁹⁹ By interpreting these exceptions so broadly, the Court in *Linn* significantly compromised the NLRB's primary jurisdiction.

In a subsequent case, the Supreme Court ruled that the NLRA also did not preempt a suit for breach of a union's duty of fair representation, even though the NLRB had characterized such breaches as unfair labor practices.¹⁰⁰ In *Vaca v. Sipes*,¹⁰¹ the Court

97. The Court held:

In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy [we] limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times Co. v. Sullivan* are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption.

383 U.S. at 64-65.

98. *Id.* at 60-61.

99. *Id.* at 61.

100. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Under the doctrine of *Miranda Fuel*, a discharged employee covered by a collective bargaining agreement with a provision forbidding discharge except for "just cause" can bring an action not only against the employer, but also against the union. According to the doctrine, the union's failure to enforce the employee's rights under the collective bargaining agreement can constitute a breach of the union's duty of fair representation. *Id.* at 185-86 (holding that such a failure violated § 8(b) of the NLRA, as well as other provisions); see also Labor Management Relations (Taft-Hartley) Act of 1947, ch. 20, § 301, 61 Stat. 150, 156 (codified at 29 U.S.C. § 185 (1982)) (authorizing suits for breaches of labor contracts). Although the Second Circuit had refused enforcement in *Miranda Fuel*, 326 F.2d 172 (2d Cir. 1963), the existence of a statutory duty of fair representation had been recognized in a number of court decisions following *Miranda Fuel* and preceeding *Vaca v. Sipes*. See, e.g., *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *enforcing* 150 N.L.R.B. 312 (1964).

For comprehensive explanations of the dynamics of a hybrid lawsuit for breach of the duty of fair representation, and for unjust discharge, under section 301 of the Labor Management Relations Act, see Gregory, *A Call for Supreme Court Clarification of the Union*

rejected the argument that, because the union breach was an unfair labor practice, preemption should apply and the NLRB should have exclusive jurisdiction over the matter.¹⁰²

Vaca is significant because it signaled increasing judicial reliance on a balancing approach, rather than a pure primary jurisdiction approach, in labor preemption cases. The Court in *Vaca* intimated that, in labor preemption cases, it would look both to the nature of the particular interests involved and to the impact on national labor policy.¹⁰³ The Court proceeded to apply these factors, reasoning that the duty of fair representation was intended to protect "individuals stripped of traditional forms of redress by the provisions of federal labor law"¹⁰⁴ and that the individual interests at stake were unique and were not recognized fully by the NLRB.¹⁰⁵ The Court also reasoned that a dispute between individual union members and the union only peripherally implicates federal labor policy.¹⁰⁶ These complex interrelated factors, rather than the

Duty of Fair Representation, 29 ST. LOUIS U.L.J. 45 (1984); Gregory, *Union Liability for Damages After Bowen v. Postal Service: The Incongruity Between Labor Law and Title VII Jurisprudence*, 35 BAYLOR L. REV. 237 (1983).

101. 386 U.S. 171 (1967). For thorough commentary on *Vaca*, see Note, *Labor Law—Federal Preemption—NLRA Does Not Preempt Court Jurisdiction of Suit Against Union for Breach of Its Duty of Fair Representation*, 13 WAYNE L. REV. 602 (1967); Comment, *The Implications of Vaca v. Sipes on Employee Grievance Processing*, 17 BUFFALO L. REV. 165 (1967); Comment, *Union's Duty to Fairly Represent Its Members in Contract Grievance Procedures—The Impact of Vaca v. Sipes*, 19 SYRACUSE L. REV. 66 (1967); Comment, *Protection of Individual Rights in Collective Bargaining: The Need for a More Definitive Standard of Fair Representation Within the Vaca Doctrine*, 14 VILL. L. REV. 484 (1969); Comment, *Individual Control over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559 (1968).

102. See 386 U.S. at 176-88.

103. The Court stated:

While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt 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.

Id. at 180.

104. *Id.* at 182.

105. *Id.* at 181-83.

106. *Id.* at 180; see Cox, *supra* note 44, at 284.

simple *Garmon* rules, were crucial to the Court's decision not to find preemption.¹⁰⁷

B. Further Erosion of the Labor Preemption Doctrine by the Burger Court in the 1970's

During the tenure of the Burger Court, many interesting and important labor preemption cases were decided. Through these decisions, the Burger Court was primarily responsible for severely debilitating the labor preemption doctrine. Ironically, however, some decisions in the early 1980's placed the Court in the best position to resuscitate the doctrine. In 1986, the Court signaled that the renaissance finally may have begun. The open question, however, is whether the restored doctrine will be sustained and nurtured, or precipitously repudiated, by the Rehnquist Court.

The Burger Court's approach to labor preemption cases was consistent with its general tendency to vest greater authority in the states.¹⁰⁸ Unless Congress clearly evidenced an intent that the federal government should occupy a particular field, the Burger Court generally refused to presume "that a federal statute was intended to supersede the exercise of the power of the state."¹⁰⁹ According to the Court, "The exercise of federal supremacy is not lightly to be presumed."¹¹⁰ Consistent with this tendency, the Burger Court usually found against preemption of state court jurisdiction in its labor preemption decisions, with only a few significant exceptions.¹¹¹

107. The Court also grounded its refusal to find preemption on the concurrent state and federal jurisdiction that section 301 of the Labor Management Relations Act provides for suits alleging violations of collective bargaining agreements. *See id.* at 183-88.

108. *See supra* note 10.

109. *New York State Dep't of Social Serv. v. Dublino*, 414 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

110. *Id.*

111. The Court has found in favor of preemption in only a handful of labor preemption decisions in the quarter century since *Garmon*. *See International Longshoremen's Ass'n v. Davis*, 106 S. Ct. 1904 (1986); *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395 (1986); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 106 S. Ct. 1057 (1986); *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985); *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669 (1983); *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

This erosion of *Garmon* left the labor preemption doctrine without a coordinated theoretical foundation. Until 1986, the Court reacted to individual cases, paying little regard to broad principles. As one commentator put it, the Court's decisions "t[ook] on an ad hoc unprincipled quality, seemingly bereft of any consistent doctrinal basis."¹¹² For most of its tenure, the Burger Court endorsed this ad hoc approach to labor preemption,¹¹³ which commentators feared would "presage a [continuing] return to a state-directed preemption doctrine."¹¹⁴ Fortunately, however, the Burger Court's labor preemption decisions "cannot be viewed as a doctrinal monolith,"¹¹⁵ because they lacked a principled basis and, just as importantly, because the Burger Court eventually seemed to return to broad labor preemption principles.

The Burger Court's labor preemption jurisprudence probably should be bifurcated. During the 1970's, the states' rights jurisprudence of the Burger Court was at its zenith, and the labor preemption doctrine underwent a steady erosion. During the 1980's, on the other hand, the doctrine went through a confused interim transition period, which culminated with the unexpected, but very welcome, apparent renaissance of the doctrine in 1986. This section chronicles the erosion of the doctrine during the first of these two periods.

The Burger Court first confronted the labor preemption doctrine directly in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*.¹¹⁶ In that case, a union had suspended Wilson Lockridge for failing to pay dues for the prior month. Invoking the union security clause in the collective bargaining agreement, the union had prevailed on the employer to discharge Lockridge. Lockridge then had sued the union in state court, alleging that the union constitution provided only for suspension in delinquent dues cases, and not for discharge.¹¹⁷ The

112. Note, *Shifting Perspectives*, *supra* note 10, at 624.

113. See *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985).

114. Note, *Shifting Perspectives*, *supra* note 10, at 624.

115. *Id.* at 651.

116. 403 U.S. 274 (1971).

117. *Id.* at 277-82.

Court held that the state court was preempted from hearing the case.¹¹⁸

The Court's finding of preemption, which amounted to a reaffirmation of *Garmon*, was termed by one commentator "a climax in the dominance of the federally protective approach."¹¹⁹ Nonetheless, some justices in *Lockridge* already were expressing dissatisfaction with the broad preemption rules of *Garmon*. Justice White, for example, pointedly stated that the labor preemption "'rule' of uniformity is at best a tattered one, and at worst little more than a myth."¹²⁰ Justice Harlan's majority opinion, however, reemphasized the need for broad general preemption rules. After serious reflection on the problems posed by labor preemption, Justice Harlan concluded that broad rules would eliminate the need for case-by-case analysis, and would remain consistent with the

118. See *id.* at 293. See generally Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972) (discussing *Lockridge*).

Before *Lockridge*, the Court's stance concerning the issue had wavered. *Compare International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958) (union member's wrongful expulsion suit against union in state court, seeking reinstatement and lost wages, not preempted by NLRA § 8(b)(2) because state court action was based on contract between the individual and the union) with *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690 (1963) (union member's suit against union in state court, seeking damages for discrimination in job referrals, was preempted) and *Local No. 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963) (union member's suit against union in state court, seeking damages for discharge, was preempted). In both *Borden* and *Perko*, the Court had invoked the broad preemption principles in *Garmon*. See *Borden*, 373 U.S. at 693-94; *Perko*, 373 U.S. at 706. The Court had distinguished *Gonzales* in those cases because *Gonzales* had involved solely internal union matters and not conduct arguably protected or prohibited by sections 7 and 8 of the NLRA. *Borden*, 373 U.S. at 696-97; *Perko*, 373 U.S. at 705.

119. Note, *Shifting Perspectives*, *supra* note 10, at 652. The need for federal dominance in *Lockridge*, in the form of exclusive NLRB jurisdiction to determine whether a union acted illegally in procuring a discharge for failure to pay dues, seems questionable and incongruous with the preemptive NLRB setting. As a result, Professor Cox deemed *Lockridge* "woodenly mechanical—detached from any rational basis in policy and inconsistent with related precedents." Cox, *Preemption Revisited*, *supra* note 12, at 1374.

120. 403 U.S. at 318 (White, J., dissenting). Chief Justice Burger and Justices Douglas and Blackmun also dissented.

Many commentators expressed their dissatisfaction even more pointedly. One commentator, for example, maintained: "The time has long since come to eschew entirely the traditional 'primary jurisdiction' rationale implicit in the 'protected or prohibited' aphorism which has served as the guiding wisdom in the area. Virtually every aspect of this rubric is analytically disquieting, doctrinally misleading, or both." Lesnick, *supra* note 118, at 472.

emphasis in *Garmon* on resolving entire classes of cases.¹²¹ According to Justice Harlan, judicial adherence to *Garmon* was imperative:

While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed.¹²²

Six months after authoring the majority opinion in *Lockridge*, Justice Harlan died. Not long after his death, the Court apparently forgot Justice Harlan's cautions. With few exceptions, the Burger Court during the next decade methodically dismantled the labor preemption doctrine. In *NLRB v. Boeing Co.*,¹²³ decided two years after *Lockridge*, the Court held that the NLRB had no authority to review the reasonableness of union disciplinary fines because those issues involved purely internal union affairs.¹²⁴ Although *Boeing* was not strictly a labor preemption case, it did have preemption implications because the Court deemed the matter an issue for state courts and not for the NLRB.¹²⁵ *Boeing* was patently irreconcilable with the general preemption approach of *Lockridge* and *Garmon*. This setback, however, represented only the first of the many major blows that the Burger Court would deliver to the *Garmon* doctrine.

The Court's next significant labor preemption decision, *Lodge 76, International Association of Machinists v. Wisconsin*

121. 403 U.S. at 289-90.

122. *Id.* at 302.

123. 412 U.S. 67 (1973). For interesting commentary on *Boeing*, see Craver, *The Boeing Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556 (1974).

124. *See id.* at 74, 78.

125. *See id.* at 75-77.

Employment Relations Commission,¹²⁶ represented a rare, isolated adherence to the *Garmon* rule¹²⁷ rather than an extension of the misgivings about labor preemption expressed in *Boeing* and in the dissents to *Lockridge*. In *Machinists*, the Court considered whether the NLRA preempted state sanctions against a union that had directed its members not to work any overtime. The refusal to work overtime was the union's tactical response to a unilateral announcement by the employer of new workday, workweek, and overtime provisions when negotiations toward a new collective bargaining agreement had reached an impasse concerning these issues. Rather than disciplining employees who refused to work overtime, the employer had filed an unfair labor practice charge with the NLRB and a complaint with the Wisconsin Employment Relations Commission. The regional director of the NLRB had dismissed the unfair labor practice charge, but the state commission had decided that the overtime ban was an unfair labor practice under state law and had ordered the union to cease and desist.¹²⁸ The commission had concluded that the NLRA did not preempt an order based on state law because the NLRA neither arguably protected nor arguably prohibited the union's conduct.¹²⁹ The Wisconsin Court of Appeals and the Wisconsin Supreme Court both had affirmed the commission's order.¹³⁰

The United States Supreme Court reversed the commission and the state courts, holding that state regulation was preempted

126. 427 U.S. 132 (1976). For complete discussions of *Machinists*, see Getman, *supra* note 54; Note, *State Regulation of Peaceful Self-Help Conduct Is Pre-empted by National Labor Policy—Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 26 DEPAUL L. REV. 696 (1977).

127. Including *Lockridge*, the Court has decided only seven cases in which it has upheld the rules in *Garmon* and has found that state action was preempted. See *supra* note 111.

128. See 427 U.S. at 133-36. The commission had concluded that the union had violated Wis. STAT. ANN. § 111.06(2) (West 1974), which provided:

It shall be an unfair labor practice for an employee individually or in concert with others:

To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

Id.

129. See 427 U.S. at 135.

130. See *id.* at 136 (citing 67 Wis. 2d 13, 226 N.W.2d 203 (1975)).

because it would frustrate Congress' intent to leave activities neither protected nor prohibited by the NLRA to the free forces of the market.¹³¹ The Court relied on Congress' perceived intent to leave federally unregulated union conduct, such as partial strikes or overtime refusals, to a free market balance "between the uncontrolled power of management and labor to further their respective interests."¹³² According to the Court, "the crucial inquiry regarding pre-emption is whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'"¹³³ The Court did not apply the primary jurisdiction approach of *Garmon*, even though that approach could have resolved the question, because it viewed that analysis as "largely inapplicable to the circumstances of th[e] case."¹³⁴

The Court did not address explicitly whether the union overtime refusal arguably was prohibited as a section 8(b)(3) unfair labor practice. The force of the Court's reasoning, however, implies that not only the state court but also the NLRB should refrain from interfering with such partial strike activity. In effect, the Court in *Machinists* based its decision that the state court was preempted on the premise that "the activity [was] unregulable because Congress meant to leave it to the free play of the opposing economic forces."¹³⁵ The same premise would apply to attempted NLRB regulation.¹³⁶ As a result, the Court recognized a limbo-like *laissez faire* state of labor conduct that was "entirely unregulable."¹³⁷

Although the "unregulable activity" principle of *Machinists* eventually became the second major wing of the labor preemption doctrine,¹³⁸ it never enjoyed a broad application. Subsequent to

131. *Id.* at 155.

132. *Id.* at 146 (quoting *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 259 (1964)).

133. *Id.* at 147-48 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

134. *Id.* at 155.

135. See Lopatka, *supra* note 54, at 1182.

136. The Court, in fact, stated that "Congress meant that these activities, whether of employer or employees, were not to be regulable by states any more than by the NLRB." *Machinists*, 427 U.S. at 149.

137. See Lopatka, *supra* note 54, at 1183.

138. See *infra* notes 381-85 and accompanying text.

Machinists, the Court classified few activities in the unregulable free market category. Most labor preemption cases continued to arise under the *Garmon* "primary jurisdiction" wing of the labor preemption doctrine. Regardless of which doctrinal wing the Burger Court applied, it continued its steady attack on the doctrine as a whole, continuing its strong predisposition against preemption.

The next significant labor preemption decision was *Farmer v. United Brotherhood of Carpenters*.¹³⁹ In that case, the Court offered a new balancing test, finding that the NLRA did not preempt state court jurisdiction in a suit by a carpenter against his union under state law seeking damages for intentional infliction of emotional distress.¹⁴⁰ The Court's balancing test, which was analogous to the well-established local concerns exception to the preemption doctrine,¹⁴¹ involved an examination of both "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme."¹⁴² Under this formula, the Court had no trouble concluding that, in the type of suit it was considering, the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens."¹⁴³

Significantly, the Court in *Farmer* avoided any serious discussion of whether the NLRA "arguably" protected or prohibited the union's conduct. Instead, in a more contextually fluid analysis, the Court articulated a new congeries of considerations in labor preemption determinations. The Court indicated that it would look first to whether the NLRA protects the conduct under

139. 430 U.S. 290 (1977).

140. *Id.* at 292-95. The NLRA may preempt suits against employers under state law seeking damages for alleged bad faith breaches of contract when the plaintiff fails to pursue his labor contract remedies. See *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985) (finding preemption "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract"). The stubborn ad hoc quality of the Court's decision in *Lueck*, however, enables continuing state law exceptions from federal labor preemption. See, e.g., *Heckler v. IBEW*, 772 F.2d 788 (11th Cir. 1985) (union member allowed to bring state tort law suit against union, claiming a negligent failure to ensure that plaintiff had safety training adequate to prevent injury), *cert. granted*, 106 S. Ct. 1967 (1986). The Court's ruling in *Lueck* eventually may dampen the state tort law suits against unions endorsed in *Farmer*.

141. See *supra* note 77.

142. 430 U.S. at 297.

143. *Id.* at 304.

consideration,¹⁴⁴ but that it also would look to arguably more important factors such as whether a state decision would present a significant risk of fundamentally compromising congressional intent¹⁴⁵ and whether the activity was an inherently local concern.¹⁴⁶ This panoply of manipulable variables rarely would point toward preemption, because the possibility of state interference with national labor policy purportedly is not great.

The formula in *Farmer* dictated a return to painstaking case-by-case analysis rather than the analysis of broad classes of situations dictated in *Garmon*.¹⁴⁷ One commentator noted: "After *Farmer*, the ability to merely discuss or argue applicability of federal law is no longer sufficient to invoke preemption. There must be a 'realistic argument' that federal law applies."¹⁴⁸ As a result, *Farmer* reduced *Garmon* to a mere starting point for labor preemption questions.¹⁴⁹ Although *Farmer* initially appeared consonant with *Garmon*,¹⁵⁰ it ultimately proved to be a judicial device to reject labor preemption. *Farmer* hastened the devolution toward atomistic and fitful case law.

One year later, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,¹⁵¹ the Court continued its attack

144. See *id.* at 302.

145. See *id.*

146. See *id.* at 296-97.

147. See Benke, *supra* note 30, at 804; see also *supra* note 79 and accompanying text (noting broader *Garmon* approach).

148. Benke, *supra* note 30, at 804.

149. See *id.* at 807.

150. See Note, *The Preemption Doctrine: New York Balks*, 29 SYRACUSE L. REV. 739, 743 (1978).

151. 436 U.S. 180 (1978). *Sears* has been the subject of much commentary. See, e.g., Brody, *supra* note 45; Note, *Accommodating Nonemployees: NLRA Protection of Concerted Union Conduct in the Wake of Sears*, 29 CATH. U.L. REV. 185 (1979) [hereinafter cited as Note, *Accommodating Nonemployees*]; Note, *The Role of State Courts in Labor-Related Access Disputes*, 57 TEX. L. REV. 131 (1979); Note, *Union Trespass: Sears v. Carpenters and Labor Law Preemption*, 40 U. PITT. L. REV. 779 (1979); Comment, *Union Pickets at the Shopping Center: Protected Conduct or Actionable Trespass Under Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 32 BAYLOR L. REV. 91 (1980); Comment, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters: The Demise of Federal Preemption of Labor Disputes*, 16 SAN DIEGO L. REV. 921 (1979); Comment, *Labor Law Preemption After Sears—Problems in Concurrent Jurisdiction—Wiggins & Co. v. Retail Clerks Local 1557*, 47 TENN. L. REV. 373 (1980) [hereinafter cited as Comment, *Concurrent Jurisdiction*]; Comment, *Sears, Roebuck & Co. v. San Diego County District Council of*

on preemption. In *Sears*, the Court held that the California state courts had jurisdiction to enforce state trespass laws against non-employee union picketers.¹⁵² Significantly, the picketing in *Sears* arguably was protected by the NLRA,¹⁵³ which, under the primary jurisdiction approach of *Garmon*, would have mandated preemption.¹⁵⁴ The Court, however, termed the primary jurisdiction rationale "relative[ly] unimportan[t] in this context,"¹⁵⁵ and instead looked to other factors. Noting, among other things, that the union had not filed an unfair labor practice charge with the NLRB and that the employer could not have brought the matter directly before the Board,¹⁵⁶ the Court in *Sears* found that the state court was not preempted from issuing injunctive relief. As a result, the Court for the first time granted a state court jurisdiction over conduct that arguably was protected by federal labor law.¹⁵⁷

Carpenters: *Garmon Reconsidered and the Reaffirmation of Property Rights*, 13 U. RICH. L. REV. 351 (1979).

For general discussions of the picketing/preemption problem, see Benke, *supra* note 30; Broomfield, *Preemptive Federal Jurisdiction over Trespassory Union Activity*, 83 HARV. L. REV. 552 (1970); Modjeska, *The Supreme Court and the Diversification of National Labor Policy*, 12 U.C.D. L. REV. 37 (1979).

152. 436 U.S. at 207. Before *Sears*, the Court had not resolved whether the NLRA preempted state courts from deciding peaceful trespass and union picketing issues. See *Amalgamated Meat Cutters & Butcher Workmen, Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Taggart v. Weinacker's, Inc.*, 283 Ala. 171, 214 So.2d 913 (1968), *cert. granted*, 396 U.S. 813 (1969), *cert. dismissed per curiam*, 397 U.S. 223 (1970). State courts were divided concerning whether they had jurisdiction in these cases. See Note, *State Court Jurisdiction over Trespassory Union Picketing: Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 20 B.C.L. REV. 558 (1979) (discussing state court cases).

153. See 436 U.S. at 199. The NLRA also arguably may have prohibited the union's trespassory picketing if the union's purpose was to force Sears to assign carpentry work only to carpenters from the union hiring hall, see 29 U.S.C. § 158(b)(4)(D) (1982), or if the picketing was "recognitional," see *id.* § 158(b)(7)(C).

154. See *supra* note 76 and accompanying text.

155. 436 U.S. at 200.

156. See *id.* at 201-02.

157. The Court's decision to allow state court jurisdiction over arguably protected activity was especially significant because of the Court's express statement that federal supremacy is a greater consideration in cases of protected labor activity than in cases of prohibited labor activity:

Apart from notions of "primary jurisdiction," there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct prohibited by the federal Act. But there is a constitutional objection to state-court interference with conduct actually protected by the Act. Considerations of federal supremacy, therefore, are implicated to a greater extent when labor-related activity is protected than when it is prohibited.

One commentator stated that the Court in *Sears* created "a new balancing approach to preemption under which it will weigh both the employer's and the state's interest in state court jurisdiction against the potential interference with national labor policy in order to determine whether a state court may assert jurisdiction over some aspect of a labor dispute."¹⁵⁸ This "balancing approach" certainly has supplemented, if not supplanted, the *Garmon* analysis. In fact, the Court in *Sears* virtually ignored *Garmon*.¹⁵⁹

The Court's balancing analysis in *Sears* focused on the risk of state interference with the NLRB. This risk was minimal, according to the Court, because of the substantive differences between the concerns of the state court and the NLRB. While the Board was concerned with the purpose of the picketing, according to the Court in *Sears*, the state court was concerned with the fact that the picketing occurred on the employer's private property.¹⁶⁰ The Court concluded, based on this difference, that "permitting the state court to adjudicate *Sears*' trespass claim would create no realistic risk of interference with the Board's primary jurisdiction

Id. at 199-200 (footnotes omitted).

The concurring opinion of three justices in *International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), had augured this result. In *Ariadne Shipping*, the union had picketed foreign Caribbean cruise vessels that used Florida ports, because these vessels employed nonunion labor. The Florida state courts had enjoined the picketing, holding that state action was not preempted because the union's conduct was beyond the regulatory power of the NLRB. *See id.* at 196-98. Applying *Garmon*, the Supreme Court found that the union picketing arguably was protected by section 7, and therefore that the state court's jurisdiction was preempted. *Id.* at 200-01. Justice White's concurring opinion, however, candidly called for a relaxation of the strictures of *Garmon*:

So long as employers are effectively denied determinations by the NLRB as to whether "arguably protected" picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent [*Garmon*] should be reconsidered.

397 U.S. at 202 (White, J., concurring) (citation omitted); *see also* Benke, *supra* note 30, at 799 ("For the first time, members of the United States Supreme Court called for a reconsideration of the *Garmon* preemption doctrine and suggested that state power should be preempted only if the activity complained of was actually protected.").

158. Note, *supra* note 152, at 560.

159. *See supra* note 155 and accompanying text; Note, *Labor Law—Federal Preemption—The Aftermath of Sears*, 27 WAYNE L. REV. 313, 333 (1980); *infra* note 161.

160. 436 U.S. at 198.

to enforce the statutory prohibition against unfair labor practices."¹⁶¹

The Court also applied a balancing analysis to the quandry that the employer would have faced if a state forum had been denied. The Court noted that unless Sears was willing to commit an independent unfair labor practice, it would have been unable to secure direct review of the union's conduct by the NLRB.¹⁶² If Sears could not secure review by the NLRB because of these problems, preemption of the state jurisdiction would totally deny Sears a forum.¹⁶³ On the other hand, the Court held that review by a state

161. *Id.*, see also Note, *supra* note 152, at 566 ("[U]nder the Court's new balancing approach, federal labor law did not preempt the California court's jurisdiction over Sears' trespass action [because t]he arguably prohibited nature of the union's conduct alone was 'insufficient to preclude a State from exercising jurisdiction limited to the trespassory aspects' of the union's picketing." (quoting *Sears*, 436 U.S. at 198)).

Two years after *Sears*, one commentator astutely pointed out the weaknesses of the Court's balancing approach:

The most unsettling aspect of *Sears* is that it impedes the doctrine of primary jurisdiction. The Supreme Court plucked certain conduct from the Board's exclusive jurisdiction and placed it within the grasp of the state courts. State courts now may decide whether an activity is actually or arguably protected. If the conduct is actually protected, then the state court may not decide the case; it must defer to the Board's jurisdiction. If the conduct is arguably protected, then the state court proceeds with the two-prong test. Since *Sears* did not establish explicit standards for determining whether conduct was actually or arguably protected, the classification of conduct depends on the interpretation of the particular state court. This seems to foster inconsistent interpretations of labor disputes, and is in sharp opposition to the policy of entrusting the administration of the NLRA to a centralized agency.

Note, *supra* note 159, at 333.

162. See 436 U.S. at 201. Even if Sears was willing to go to such lengths, it still could not have obtained direct review by the NLRB unless it could have proved that the union's picketing actually was prohibited by section 8 of the NLRB, and not just that it was not protected by section 7. See Brody, *supra* note 45, at 208 & n.9.

163. See 436 U.S. at 202. One commentator succinctly described the problems associated with denial of a state forum:

If state action in all forms is precluded, a determination as to whether the nonemployee activity is protected must await a decision by the National Labor Relations Board. Since it would be difficult to conclude at the outset that an unfair labor practice is involved, the employer might conclude he could not bring the matter before the Board. Even if the employer brings such action, he still must wait for the Board's decision. While he might resort to self-help to oust the union organizers, thus perhaps prompting the union to seek a determination from the Board, he would clearly do so at his own peril. If it were to develop that the activity was indeed protected, the employer would be subject to an unfair labor practice charge. In any event, whether the activity is

forum would present little risk because the state court probably would not misinterpret federal law and restrain protected union conduct.¹⁶⁴ The Court concluded that this low risk justified its decision that state jurisdiction was not preempted despite the arguably protected nature of the union's conduct.¹⁶⁵

Three justices dissented in *Sears*, issuing perceptive warnings about the serious dangers that the majority opinion posed for a functioning labor jurisprudence. The dissenters noted the tangible risk that state courts could misinterpret the NLRA, prohibiting protected activity and protecting prohibited activity in diametric opposition to Congress' intent that labor policy be uniform.¹⁶⁶ Even if a state court properly interpreted federal labor law, the dissenters noted, the state court might provide remedies that transcend the scope of equitable relief available under the Act.¹⁶⁷ Most ominously, according to the dissenters, the attitudes of many state courts toward organized labor, and these courts' relative lack of

protected or not, such action is fraught with potential violence. The most that can be hoped for is that the organizers will take the dispute to the Board. Even this, however, provides no speedy resolution to the dilemma the employer finds himself in, since the organizers have thirty days within which to bring such action. What is worse, there may be no resolution of the matter at all if the organization chooses not to take the matter to the Board. The employer is thus placed in the unenviable position of taking a chance on either violating the rights of the union organizers, or abstaining from the exercise of his own property rights, permanently or until he or the union organizers can take the issue to the Board. Such a dilemma is legally and ethically intolerable, particularly at a time when emotions may be high and the line between right and wrong so thinly drawn.

It would have been the height of injustice to preclude *Sears* from seeking a resolution of the dispute because of the inaction of the union. Indeed, as Justice Blackmun noted in his concurring opinion, the problem of *Garmon's* "no-man's land" is basically the problem of assuring that a question which might be taken to the NLRB, is ultimately presented to that agency for its solution.

Benke, *supra* note 30, at 809-10 (footnotes omitted); see also Comment, *Concurrent Jurisdiction*, *supra* note 151, at 386 ("The majority's decision and the dissent's reaction are best understood not as a judgment on the relative value of an employer's right to be heard by a judge and the union's right to be heard by the public but as a judgment whether equal access to some tribunal is more important than the character of the tribunal.").

164. 436 U.S. at 206.

165. See *id.* at 207.

166. See *id.* at 219 (Brennan, J., dissenting).

167. See *id.*

expertise in labor matters, could result in misapplication of the NLRA in a way that would restrain protected conduct.¹⁶⁸ In the dissenters' view, these considerations more than counterbalanced the majority's concern that *Garmon* would leave the employer without a forum to challenge the trespassory picketing.¹⁶⁹ Although the Court in *Sears* had closed the "no man's land" loophole of *Garmon*¹⁷⁰ and had guaranteed a forum to the employer,¹⁷¹ it had done so at a far greater cost to national labor policy.¹⁷²

The Court's focus in *Sears* on the difference between the issue presented to the state court and the issue that would have been presented to the NLRB¹⁷³ was artificial, as one commentator noted: "[T]he *Sears* plurality discussion of the same or different controversies seems to artificially subdivide the activity in order to emphasize the difference between the state and the NLRB cases. In the real world, the pickets engage in a single activity—picketing. Location and purpose cannot be so easily separated."¹⁷⁴ The more pronounced danger of *Sears*, however, was the Court's apparent attitude that NLRB preemption no longer

168. *Id.* at 224; see also Note, *Accommodating Nonemployees*, *supra* note 151, at 197 ("Sears creates the risk that the pro-management or pro-union inclinations of each state court judge will be outcome determinative.").

169. See 436 U.S. at 216.

170. Brody, *supra* note 45, at 207; see *supra* note 63 and accompanying text.

171. See note 163.

172. *Sears* was even more inimical to labor policy in light of the Court's decision two years earlier in *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens*, employees of a shoe manufacturer had picketed the employer's retail outlet in a private shopping center as a part of contract negotiation tactics. The shopping center owner had threatened the employees with arrest, forcing them to leave. The employees then had filed an unfair labor practice complaint with the NLRB against the owner. See *id.* at 509-10. After the NLRB had issued a cease and desist order, and the case had gone through several appeals and remands, the United States Court of Appeals for the Fifth Circuit had enforced the Board's order, holding that competing constitutional considerations outweighed the protected nature of the union's conduct. See *id.* at 510-12. The Supreme Court reversed, holding that "the constitutional guarantee of free expression has no part to play in a case such as this" because "the primary responsibility for making this accommodation [of private property rights and union rights protected under section 7 of the NLRA] must rest with the Board in the first instance." *Id.* at 521, 522. The aberrational decision in *Sears*, which guaranteed decisions against preemption, is fundamentally inconsistent with the important ancillary considerations underlying *Hudgens*.

173. According to Justice Stevens, this was the "critical inquiry" in *Sears*. 436 U.S. at 197.

174. Brody, *supra* note 45, at 218.

was a prerequisite for labor relations stability.¹⁷⁵ If state courts are not preempted, they may resolve important labor activity questions in a variety of ways.¹⁷⁶ By introducing and implicitly endorsing this lack of uniformity,¹⁷⁷ *Sears*, more than any other post-*Garmon* decision, seriously damaged realistic prospects for achieving either procedural or substantive coordination of a workable labor preemption doctrine.

The dissenters in *Sears* accurately predicted that "erroneous determinations of non-pre-emption will occur and rights and interests protected by the [NLRA] will be irreparably damaged."¹⁷⁸ They aptly described the majority opinion in *Sears* as a "drastic abridgement of established principles [which] is unjustified and unjustifiable."¹⁷⁹ Many commentators have shared these concerns.¹⁸⁰ Professor Cox, for example, has stated that "the logical consequence [of *Sears*] is that the wider a state's departure from the national balance of the interests in union organization and

175. See Note, *supra* note 152, at 572.

176. See *Sears*, 436 U.S. at 233 n.14 (Brennan, J., dissenting).

177. See *supra* note 166 and accompanying text.

178. 436 U.S. at 233 n.14 (Brennan, J., dissenting). One commentator, however, took issue with the dissenters' assertion:

It is unlikely that *Sears* will fling open the doors to state interference in federal policy. Indeed, it appears the only time a state court will have unfettered power to resolve an access issue will be when (1) the union involved could have taken, but did not take, the issue in a timely manner to the National Labor Relations Board, and (2) the issue is clearly one that is not a matter for federal resolution by the National Labor Relations Board.

Benke, *supra* note 30, at 814.

179. 436 U.S. at 216 (Brennan, J., dissenting).

180. For example, one commentator has suggested that the Court in *Sears* "failed to simplify the doctrine of preemption." According to this commentator, the Court "put additional embroidery onto an already complicated legal structure," which "will not encourage the coherent development of the preemption doctrine." Brody, *supra* note 45, at 223. On the other hand, this same authority asserted that although the problems presented by state court entry into complex labor preemption decisionmaking are formidable, they are surmountable through greater cooperation between the state courts and the NLRB:

Garmon and *Sears* have created a situation under which the NLRB's jurisdiction, supposedly primary and exclusive, will to some indeterminate extent be shared with state tribunals. The boundary between the areas of exclusive and concurrent jurisdiction is uncertain and extremely difficult for anyone, and especially state courts, to find. The NLRB is best able to provide expert guidance in this field. Therefore, let the state courts consult the Board, and let the Board cooperate with the state courts in deciding preemption questions.

Id. at 236.

collective bargaining, the greater freedom the state will have to upset the national policy."¹⁸¹ *Sears*, according to Professor Cox, "lessens the predictability of preemption law."¹⁸² In different ways, all of the commentators criticizing *Sears* have identified the most dangerous aspect of it and other anti-preemption cases—the radical fragmentation and destabilization of the law.

Unfortunately, this erosion of the labor preemption doctrine continued unabated. Less than a year later, in *New York Telephone Co. v. New York State Department of Labor*,¹⁸³ the Court ruled that the NLRA did not preempt New York from providing unemployment compensation to strikers in an industry subject to NLRB jurisdiction.¹⁸⁴ The Court rejected the employer's argument

181. Cox, *supra* note 44, at 285.

182. *Id.* at 291; see also Cox, *Federalism*, *supra* note 12, at 1343 ("Even if all states were to adopt statutes phrased exactly like the NLRA secondary boycott prohibition, it would not be surprising to find at least thirty different interpretations—it is not uncommon to get two or three different interpretations from NLRB members on a single issue.").

183. 440 U.S. 519 (1979). For exhaustive commentary on *New York Telephone*, see Cox, *supra* note 44, at 291-96; Note, *NLRA Preemption of State Unemployment Compensation Law Providing Benefits for Strikers—New York Telephone v. New York State Department of Labor*, 29 DEPAUL L. REV. 115 (1979); Note, *State Unemployment Benefits to Strikers and the Preemption Doctrine*, 11 U. TOL. L. REV. 143 (1979) [hereinafter cited as Note, *Unemployment Benefits*]; Comment, *New York Telephone v. New York State Department of Labor: Limiting the Doctrine of Implied Labor Law Preemption*, 46 BROOKLYN L. REV. 297 (1980).

184. Although the Court's decision was seriously fragmented, six justices voted to uphold the state unemployment compensation benefit payments to the strikers. See 440 U.S. at 546 (opinion of Stevens, J., joined by White and Rehnquist, JJ.); *id.* at 547 (Blackmun, J., concurring, joined by Marshall, J.); *id.* at 546-47 (Brennan, J., concurring). Chief Justice Burger and Justice Stewart joined Justice Powell in a vitriolic dissent. *Id.* at 551 (Powell, J., dissenting).

The Court's decision completed a line of federal court decisions concerning preemption in the context of unemployment benefits for strikers, in which courts generally had found that state action was not preempted. See *Ohio Bureau of Unemployment Serv. v. Hodory*, 431 U.S. 471 (1977) (Congress did not preclude states from denying unemployment benefits to those involved in labor disputes); *I.T.T. Lamp Div. v. Minter*, 435 F.2d 989, 993 (1st Cir.) (NLRA did not preempt state welfare law that provided benefits to strikers because the state law arguably did not interfere with the NLRA or "palpably infringe" upon federal labor policy), *cert. denied*, 402 U.S. 933 (1970); see also *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977) (New Jersey not preempted from conditioning operating subsidies to transit companies on adherence to restrictions on wages, despite possible state interference with the national labor policy of free and unimpeded collective bargaining). But see *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 124 (1974) (recognizing that state welfare benefit payments to strikers influence labor management relations and relative bargaining power); *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir.) (complaint

that state unemployment compensation to strikers, financed in part by employer contributions, was inimical to national labor policy and therefore invalid under the supremacy clause.¹⁸⁵

The dispute in *New York Telephone* had begun in July 1971, when Bell Telephone Company had become the target of a nationwide strike. Although the strike had been settled in most states within a week, it had continued in New York for seven months.¹⁸⁶ Under the New York state unemployment insurance law,¹⁸⁷ the 33,000 strikers in New York had been entitled to unemployment compensation during the last five months of the strike.¹⁸⁸ At an average benefit rate of \$75 per week, the strikers had received more than \$49,000,000 in unemployment compensation.¹⁸⁹

New York Telephone objected to these payments primarily because state law required employers to underwrite most of the cost.¹⁹⁰ According to New York Telephone, the state law forced the phone company to finance the strike against itself. This anomaly, the phone company maintained, fundamentally distorted the equilibrium in bargaining power between the parties, and was grossly inimical to sound labor relations policy.¹⁹¹

Justice Stevens, writing for a plurality of the Court, acknowledged the finding of the federal district court that "New York's law has altered the economic balance between labor and management."¹⁹² Justice Stevens, however, stated that the state unemployment compensation law was not intended primarily to regulate

challenging state unemployment benefits to striking workers, claiming preemption by the NLRA, stated cause of action), *cert. denied*, 414 U.S. 858 (1973).

A related issue is whether ERISA preempts state regulation of employee benefit plans. See *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985); *infra* notes 313-39 and accompanying text; see also *infra* note 321 (citing authorities discussing ERISA preemption).

185. See 440 U.S. at 525, 527.

186. *Id.* at 522.

187. N.Y. LAB. LAW §§ 590-591, 592.1 (McKinney 1977).

188. See 440 U.S. at 523.

189. See *id.*

190. See *id.* at 523-24; N.Y. LAB. LAW §§ 570, 581.1(d)-(e), .2 (McKinney 1977).

191. See 440 U.S. at 526, 531-32.

192. *Id.* at 531-32. Justice Powell's dissenting opinion also acknowledged this finding, noting that the benefits "substantially cushioned the economic impact of the lengthy strike on the striking employees, and also made the strike more expensive for employers." *Id.* at 556 (Powell, J., dissenting).

collective bargaining, but "instead to provide an efficient means of insuring employment security."¹⁹³ According to Justice Stevens, this objective was primarily a matter of state interest, and had "limited relevance" to federal labor law. These findings, according to Justice Stevens, supported the conclusion that the NLRA did not preempt the New York state law.¹⁹⁴

The Court also found support for its decision in the NLRA and the Social Security Act, as well as in the legislative histories of these acts. Both statutes were completely silent concerning the payment of unemployment benefits to strikers, which, according to the Court, implied that Congress intended that the states should be free to decide for themselves whether to pay benefits to strikers.¹⁹⁵ Statements in the legislative histories¹⁹⁶ and subsequent actions of Congress¹⁹⁷ partially confirmed the Court's conclusion. Despite the at least incidental influence that the payment of unemployment benefit to strikers would have on the balance of power in the collective bargaining process, the Court held that a state plan providing such payments would not be preempted "in the absence of compelling congressional direction."¹⁹⁸

An important area of disagreement among the justices concerned the treatment of the Court's earlier decision in *Machinists*,¹⁹⁹ in which the Court had found against preemption in an arguably analogous situation. As one commentator pointed out, the Court in

193. *Id.* at 533.

194. *See id.*

195. *Id.* at 544.

196. *Id.* at 541-43.

197. *Id.* at 544-45.

198. *Id.* at 540 (quoting *Garmon*, 359 U.S. at 244).

At least one commentator has noted that the Court's scrutiny of the amorphous congressional intent at issue in *New York Telephone* was destined to be, at best, an obfuscatory exercise in frustration:

In short, the legislative history of both the NLRA and the SSA provides little basis for concluding that Congress specifically intended to permit state benefits to strikers such as those provided by the New York system. Congress's silence in 1935 and its subsequent failure to prohibit such state interference are ambiguous. Thus, Justice Stevens was correct not to rest his opinion on a finding of clear legislative intent; the inferences of intent that he did venture are themselves open to question.

Comment, *Balancing in Labor Law Preemption Cases*: *New York Telephone Co. v. New York State Department of Labor*, 32 STAN. L. REV. 827, 832 (1980).

199. *See supra* notes 126-38 and accompanying text.

Machinists had "established a general rule that, even when clear evidence of congressional intent as to the particular practice was lacking, the Court would *presume* congressional intent to preempt virtually any state law that affected the balance of power between labor and management."²⁰⁰ Justice Stevens attempted to distinguish *Machinists* by asserting that the New York unemployment compensation law, unlike the state law at issue in *Machinists*, was not focused on labor conduct because only a small minority of the unemployed workers who received benefits were unemployed as a result of labor disputes.²⁰¹ Instead, the Court asserted, New York's unemployment compensation insurance scheme was a law of "general applicability" in which the State had a deep local interest.²⁰² As one critic astutely observed, Justice Stevens' attempt to distinguish *Machinists* was unconvincing: "[S]ince 'general applicability' refers only to the scope of a state law, and not its effect, the label is an undependable indication of the state and federal interests involved."²⁰³

Fortunately, six justices disagreed with Justice Stevens concerning this issue. These justices agreed that *Machinists* provided the proper rules.²⁰⁴ Even these justices, however, could not agree on the congressional intent underlying the NLRA.²⁰⁵

Although at first glance the Burger Court appeared to accord a rare victory to organized labor in *New York Telephone*, the broader principle furthered was states' rights, at the ultimate expense of both organized labor and labor law jurisprudence. The Court's strong preference for a diffusion of federal power to the states transcended the labor relations interests of either the Court or the parties to the case. One commentator noted: "In an era of increasing centralization of government with the concomitant concentration of power in federal hands, [*New York Telephone*] may

200. Comment, *supra* note 198, at 835 (emphasis in original).

201. 440 U.S. at 32-33.

202. *Id.* at 533.

203. Comment, *supra* note 198, at 838.

204. See 440 U.S. at 546 (Brennan, J., concurring); *id.* at 549 (Blackmun, J., concurring); *id.* at 560 (Powell, J., dissenting).

205. See 440 U.S. at 556-57 (Blackmun, J., concurring); *id.* at 564-66 (Powell, J., dissenting).

be viewed as an important victory for states' rights."²⁰⁶ Because of this states' rights thrust, *New York Telephone* had ominous implications concerning the prospects for a coordinated and centralized Hamiltonian federal labor policy. As a result of the decision, the exceptions to the preemption doctrine were expanded radically because "general applicability" and "local concerns" concepts were construed far more broadly than in the past. Under this broad construction, almost any state action could be classified within the exceptions to preemption. If the Court persists in this broad construction, power in many regulated areas may shift gradually from the federal government to state governments. Such a shift of power would significantly increase the potential for conflict between state and federal regulatory schemes, contrary to the Court's longstanding policy of avoiding such conflicts.²⁰⁷

Sears and *New York Telephone* marked the Burger Court's most concentrated debilitation of the strong labor preemption doctrine embodied in *Garmon*. Distressingly, this unwise doctrinal dismantling was undertaken without clear direction. As Professor Cox pointed out, *Sears* and *New York Telephone*

do nothing to clarify the principles that govern federal preemption in labor law. One perceives little interest in logical consistency and less interest in building a coherent and continuing body of law. Perhaps it reflects a predominance of Justices who are primarily pragmatists more concerned with the immediate outcome than with building a coherent body of law.²⁰⁸

Unfortunately, this deliberate disavowal of the congressional policies that originally vitalized the NLRA has had continuing adverse effects on national labor policy. As one commentator wrote in the aftermath of *Sears*: "[T]he policy is no longer national uniformity of union and employee rights in labor disputes, but rather a compromise between the exercise of state and federal jurisdiction."²⁰⁹

206. Comment, *Constitutional Law—Preemption—Preemption of State Labor Law by National Labor Relations Act—New York Telephone Company v. New York State Department of Labor*, 26 N.Y.L. Sch. L. Rev. 855, 883 (1981).

207. See Note, *Unemployment Benefits*, *supra* note 183, at 163.

208. Cox, *supra* note 44, at 300.

209. Note, *supra* note 159, at 335.

Indeed, after *Sears* and *New York Telephone*, labor preemption had little relation to labor law jurisprudence. Instead of focusing on national labor law policies and issues, the Burger Court consciously was devoting itself to shifting the federal-state balance in favor of state autonomy. Vitiating of the labor preemption doctrine was one major consequence of that overarching objective.

V LABOR PREEMPTION DECISIONS IN THE 1980'S: CONFUSION COMPOUNDED, HOPE RENEWED, AND RENAISSANCE BEGUN

Four years passed between *New York Telephone* and the Burger Court's next major labor preemption decision. When the Court finally did reenter the field in 1983 and 1984, it produced three opinions that added to the confusion enveloping national labor policy.²¹⁰ Amidst the confusion, however, were hints of renewed judicial cognizance of the policies favoring labor preemption. This unexpected but welcome development set the stage for two 1985 decisions in which the Court came to opposite results,²¹¹ epitomizing the confusion afflicting the labor preemption doctrine. More importantly, the Court's decisions between 1983 and 1985 laid the groundwork, however fitfully, for the renaissance of the preemption doctrine that may have begun in 1986.²¹²

A. *Confusion Compounded: Labor Preemption Decisions in 1983 and 1984*

The Court's first labor preemption decision in four years came in *Local 926, International Union of Operating Engineers v.*

210. See *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984); *infra* notes 252-88 and accompanying text; *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *infra* notes 235-51 and accompanying text; *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669 (1983); *infra* notes 213-34 and accompanying text.

211. See *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985) (holding that the NLRA and the Employee Retirement Income Security Act (ERISA) did not preempt a state mandated benefit law); *infra* notes 313-39 and accompanying text; *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985) (holding that section 301 of the Labor Management Relations Act of 1947 did preempt state tort law claims "substantially dependent" upon analysis of labor contract terms); *infra* notes 289-312 and accompanying text.

212. See *International Longshoremen's Ass'n v. Davis*, 106 S. Ct. 1904 (1986); *infra* note 395; *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395 (1986); *infra* notes 366-95 and accompanying text; *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 106 S. Ct. 1057 (1986); *infra* notes 341-65 and accompanying text.

Jones.²¹³ In that case, Jones, a supervisor, had taken a vacation after his second day of work, by mutual agreement with his employer. When Jones had returned from vacation, the employer had discharged him. Jones, who had joined a union in 1969 but had left it in 1974, alleged that his resignation from the union had prompted it maliciously to procure his discharge. He had filed an unfair labor practice charge, but the NLRB had refused to issue a complaint against the union.²¹⁴ Jones then had sued the union in state court for tortious interference with contractual relations.²¹⁵

The trial court had dismissed Jones' lawsuit on preemption grounds.²¹⁶ The Georgia Court of Appeals had reversed, concluding that the local interest exception to preemption applied, and the Georgia Supreme Court had denied review.²¹⁷ The United States Supreme Court again reversed, holding that the NLRA preempted the state tort action.²¹⁸

The Court began its analysis by stating the general principles governing labor preemption analysis, which, according to the Court, "have been stated and restated."²¹⁹ The Court then stated: "Not only is this case a variant of a familiar theme, but we have

213. 460 U.S. 669 (1983).

214. *Id.* at 671-73. In his unfair labor practice charge, Jones had alleged that the union had "'procured' his discharge, 'and thereby [had] coerced [the Company] in the selection of its supervisors and bargaining representatives, because [Jones] had not been a member in good standing of said labor organization.'" *Id.* at 672. The regional director had found insufficient evidence that the union had procured the discharge or that the union had restrained or coerced the employer in the selection of representatives for collective bargaining, instead concluding "that Jones' discharge had been part of changes in the Company's supervisory structure and that the Union had merely participated in discussions regarding the changes." *Id.* at 673.

215. *Id.* at 673-74. Jones also had sought relief from his employer. *Id.*

216. *See id.* at 674. The trial court had concluded that the subject matter of the complaint was arguably within the exclusive jurisdiction of the Board. *See id.*

217. *See id.* at 674-75. According to the Supreme Court:

[T]he State Court of Appeals held the cause of action not pre-empted because Georgia had a deep and abiding interest in protecting its citizens' contractual rights and because the cause of action, which sounded in tort, was so unrelated to the concerns of the federal labor laws that it would not interfere with the administration of those laws. As an additional reason for not finding preemption, the court stated that the Union's acts were not even arguably within the ambit of § 7 or § 8 of the NLRA.

Id.

218. *Id.* at 678.

219. *Id.* at 676. The Court outlined its "familiar" approach as follows:

heard this tune before [in *Local No. 207, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko*]."²²⁰ In *Perko*, the Court had held that the NLRA preempted a tort action against a union for interference with contractual relations because the conduct arguably was within the scope of the NLRA.²²¹

Although the Georgia Court of Appeals had distinguished *Perko*,²²² the Supreme Court concluded that the facts of *Perko* were indistinguishable from *Jones*, and therefore that preemption also should apply in *Jones*. The Court held that sections 8(b)(1)(A) and 8(b)(1)(B) of the NLRA,²²³ which forbid union interference with employees' protected rights and union attempts to coerce employers in the selection of bargaining representatives, respectively, arguably applied to the conduct in *Jones*, just as they arguably had applied to the conduct in *Perko*.²²⁴ According to the Court, "it

First, we determine whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion," if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act, we refuse to invalidate state regulation or sanction of the conduct. The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens.

Id. (citations omitted).

220. *Id.* at 677 (citing *Perko*, 373 U.S. 701 (1963)).

221. See 373 U.S. at 708. *Perko* involved an employee who had been laid off from his job as "superintendent and foreman" after the union had suspended him for violating a union rule. The discharged employee had alleged that the union, in retaliation for his transgression, had conspired to deprive him of his right to earn a living by refusing to take orders from him in his capacity as superintendent, which rendered him incapable of performing that job, and by preventing him thereafter from obtaining work as a foreman, because he had been suspended from the union. See *id.* at 703-04 & n.1.

222. See 460 U.S. at 675.

223. 29 U.S.C. § 158(b)(1)(A)-(B) (1982).

224. See 460 U.S. at 678-80. The Georgia court had held that neither of these sections arguably applied in *Jones*, and thus had purported to distinguish *Perko*. See *id.* at 675.

was for the Board, not the state courts, to decide whether Jones was the kind of a supervisor who could invoke § 8(b)(1)(B)."²²⁵

On the other hand, the Court distinguished *Sears*, upon which Jones relied. Jones argued that, under the test in *Sears* looking to the similarity between the state court action and the potential complaint before the NLRA,²²⁶ the Court should find against preemption because section 8(b)(1)(A) allows the NLRB only to examine coercive union conduct while the state court could consider any tortious interference.²²⁷ The Court rejected Jones' argument for several reasons.²²⁸ Most significantly, the Court noted that the major distinction between the state court and the NLRB in *Sears* was that the state court was concerned only with the location, and not the purpose, of the labor conduct. In *Jones*, as the Court pointed out, the purpose of the union's conduct clearly had been at issue in both forums.²²⁹

In his dissenting opinion, Justice Rehnquist forcefully argued that the "rigid" rules in *Garmon* had not survived recent labor preemption decisions.²³⁰ Essentially, Justice Rehnquist maintained that Jones' state tort suit and unfair labor practice allegations did not meet the "identical controversies" test of *Sears*, and therefore that preemption should not apply.²³¹ According to Justice Rehnquist, Jones' suit in state court presented a far simpler decision than his complaint before the NLRB, and it focused on substantially different facts.²³²

Despite the continuing vitality of *Sears* resulting from the valid distinctions drawn in *Jones*, the Court's opinion contains perceptive, albeit implicit, acknowledgments of earlier criticisms of *Sears* and its ramifications. The Court recognized that, read broadly, *Sears* would vest state courts with virtually unrestrained authority to decide complex labor law questions:

225. See *id.* at 680. The Court also rejected Jones' contentions that his action in state court only peripherally concerned federal labor policy and that it fell under the deeply rooted local interest exception to the labor preemption doctrine. *Id.* at 683.

226. See *supra* note 173 and accompanying text.

227. 460 U.S. at 681.

228. See *id.* at 682-83.

229. See *id.*

230. *Id.* at 685 n.2, 687 n.4 (Rehnquist, J., dissenting).

231. See *id.* at 690-92.

232. *Id.* at 691-92.

[P]ermitting state causes of action for noncoercive interference with contractual relationships to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or noncoercive, and thus the proper subject of a state suit. Decision on such questions of federal labor law should be resolved by the Board.²³³

Obviously, not all state courts attempting to exercise such broad authority would possess sufficient labor law expertise. Many state court decisions on labor preemption issues at best would be discordant and inimical to national labor policy. As a result, the Court in *Jones* carefully reined in an unduly broad reading of *Sears*.

This hobbling of *Sears* was desirable and long overdue. In effect, the Court finally had recognized, and at least partially had neutralized, the potential abuse of the *Sears* rationale. At the time, however, *Jones* was only an isolated instance in which the Court had found a state labor law action preempted.²³⁴

Fortunately, the Court's next labor preemption decision, *Belknap, Inc. v. Hale*,²³⁵ was more an object lesson to employers than a further decay of the labor preemption doctrine. Although the Court held that the NLRA did not preempt the state cause of action in question,²³⁶ *Belknap* was not fundamentally inimical either to labor preemption or to *Jones*.

In *Belknap*, an employer had promised permanent employment to several strike replacements. After the strike had ended, however, the employer had laid off the replacements to make room for the returning strikers. The employer had agreed to reinstate the strikers as a condition to settlement of an unfair labor practice charge that the union had brought before the NLRB, complaining that the employer had granted a wage increase to all employees

233. *Id.* at 682.

234. See *supra* note 111.

235. 463 U.S. 491 (1983). For commentary on *Belknap*, see Note, *Federal Labor Law Preemption and Right to Hire Permanent Replacements: Belknap, Inc. v. Hale*, 26 B.C.L. REV. 63 (1984); Note, *Labor Law—Preemption and the Rights of Replacement Employees*, 57 TEMP. L.Q. 911 (1984); Comment, *Belknap, Inc. v. Hale—Problems With Preemption and the Rights of Economic Strikers*, 46 OHIO ST. L.J. 381 (1985); Comment, *Labor Law Preemption and the Rights of Strike Replacements*, 5 U. BRIDGEPORT L. REV. 311 (1984).

236. See *infra* note 248 and accompanying text.

who chose not to strike.²³⁷ Twelve of the laid-off strike replacements had sued the employer in a Kentucky state court for misrepresentation and breach of contract.²³⁸

The trial court had granted the employer's motion for summary judgment, holding that the NLRA preempted the state action.²³⁹ The Kentucky Court of Appeals had reversed, holding that the breach of contract and misrepresentation actions were not preempted because they "were of only peripheral concern to the NLRA and were deeply rooted in local law."²⁴⁰ After the Kentucky Supreme Court had vacated its order granting review,²⁴¹ the United States Supreme Court took the case on writ of certiorari and affirmed the court of appeals.²⁴²

The employer in *Belknap* argued that the NLRA preempted the state court suit because the state suit interfered with the employer's right to hire strike replacements, and thus upset the bargaining equilibrium of the parties.²⁴³ The Court, however, rejected this argument. The Court noted that, although an employer can hire strike replacements, the NLRA does not shield employers from liability for misrepresentations to the strike replacements.²⁴⁴

Having disposed of the employer's contentions, the Court applied the general labor preemption tests outlined in *Garmon* and *Sears*. According to the Court, it had "emphasized [in *Sears*] that a critical inquiry in applying the *Garmon* rules . . . is whether the controversy presented to the state court is identical with that which could be presented to the Board."²⁴⁵ The Court held that the controversies were not identical. First, the Court noted that

237. 463 U.S. at 493-96.

238. *Id.* at 496-97.

239. *See id.* at 497.

240. *See id.*

241. *See id.*

242. *Id.*

243. *Id.* at 499.

244. The Court noted:

It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but it is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.

Id. at 500.

245. *Id.* at 510.

the state court action had concerned the impact on the replacements rather than the impact on the strikers, making the issues distinct.²⁴⁶ Second, the Court pointed out that the state court action involved deep local concerns such as protecting citizens from misrepresentations. These concerns, the Court held, were at most only peripherally related to the policies underlying the NLRA.²⁴⁷ As a result, the Court concluded that the state suit was not preempted.²⁴⁸

Justice Brennan filed a dissenting opinion primarily to express concern about the effect that the decision would have on the equilibrium between labor and management during a strike. Although the majority suggested in a footnote that the impact on employers would be minimal because an employer could avoid breach of contract and misrepresentation suits merely by conditioning its offer to replacements to "avoid conflicting obligations to strikers and replacements in the event of a settlement providing for reinstatement,"²⁴⁹ the dissent maintained that the need to condition offers would work to the detriment of an employer in a strike situation and thus would "interfere with the system of labor-management relations established by Congress."²⁵⁰ Such interference, in the dissent's view, would have a critical impact on the labor preemption doctrine:

Permitting respondents to pursue their breach-of-contract and misrepresentation claims in state court will subject employers to potentially conflicting state and federal regulation of their activities; interfere with the orderly administration of the National Labor Relations Act; and alter the balance of power between labor and management struck by Congress. For these reasons, the claims should be pre-empted. ²⁵¹

The dissent's concerns were misplaced, because *Belknap* was not deeply inimical to labor preemption principles. Although the Court found that the NLRA did not preempt the state suit, its decision

246. *Id.*

247. *Id.* at 511.

248. *Id.* at 512.

249. *Id.* at 505 n.9.

250. *Id.* at 543 (Brennan, J., dissenting).

251. *Id.* at 544.

was more significant as a pointed lesson in labor relations to an imprudent employer. If the employer merely had conditioned his offers to the replacements as suggested by the Court, the employer could have avoided the state suit. Despite the Court's discussion of labor preemption principles, the preoccupation of both the majority and the dissent with how easily the employer could have avoided the misrepresentation and contract claims indicates that the Court really was focusing its pointed criticism on the employer's labor relations tactics rather than on preemption issues.

The Court's next major labor preemption decision came one year later, in *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*.²⁵² In that case, the Court held by a narrow 4-3 margin that the NLRA did not preempt a New Jersey law that imposed strict limitations on whom casino industry employees could choose as officials of their union.²⁵³

The New Jersey statute in question had been passed in 1976, when New Jersey had amended its state constitution to allow casino gambling in Atlantic City. To protect against organized crime and to gain public confidence, the New Jersey legislature had passed the Casino Control Act,²⁵⁴ which imposed strict regulation upon the gambling industry. The New Jersey act required annual registration by all persons and entities connected with the gambling industry,²⁵⁵ including "labor organizations that represent or seek to represent persons employed in casinos or casino hotels."²⁵⁶ Section 86 authorized the New Jersey Casino Control Commission to disqualify any registrant that violated certain prohibitions designed to prevent the involvement of organized crime in the gambling industry.²⁵⁷ For unions, section 86 had proved particularly harsh because, if any officer, agent, or principal employee of the union was disqualified under its provisions, another section of

252. 468 U.S. 491 (1984).

253. *Id.* at 512-13.

254. N.J. STAT. ANN. §§ 5.12-1 to 5.12-183 (West Supp. 1986).

255. *See* 468 U.S. at 495-96 (describing various provisions of the New Jersey act).

256. *Id.* at 496 (describing N.J. STAT. ANN. § 5.12-93(a) (West Supp. 1986)).

257. N.J. STAT. ANN. § 5.12-86 (West Supp. 1986). The legislature's intent to prevent organized criminal activity is demonstrated by several prohibitions contained in the list. *See, e.g., id.* § 5.12-86(f) (providing, in part, for disqualification of any individual identified "as a career offender or a member of a career offender cartel").

the New Jersey act required discontinuation of the union's privilege to collect membership dues,²⁵⁸ an action that could result in a demolition of the union's effectiveness and ultimately of its members' rights under section 7 of the NLRA.

The dispute in *Brown* had begun in 1978, when Local 54 had filed its first annual registration statement with the Casino Control Commission. After a lengthy investigation, the commission in 1981 had determined that the union's president, secretary-treasurer, and grievance manager should be disqualified for violations of section 86. When the commission had refused to hear the union's constitutional challenge to the New Jersey act, holding that it had no authority to do so, the union had sought a preliminary injunction against enforcement of the law in federal district court, claiming that the law was preempted by various federal labor laws, including the NLRA.²⁵⁹ The federal court had denied injunctive relief, and the commission had proceeded to disqualify two of the three officials implicated in the original investigation,²⁶⁰ as well as the business manager, and to order the union to remove the officials from office.²⁶¹ The commission had warned that, in the event of noncompliance, "Local 54 would be barred from collecting dues from any of its members who were licensed or registered employees under the Act."²⁶²

After the commission's final order, the union had appealed the district court's denial of the injunction to the United States Court of Appeals for the Third Circuit. The court of appeals found in favor of the union, holding that section 7 of the NLRA preempted section 93 of the New Jersey Casino Control Act insofar as section

258. *Id.* § 5.12-93(b). Section 93(b) provided, in pertinent part:

No labor organization, union or affiliate representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act.

Id.

259. 468 U.S. at 498-99.

260. The third official named in the original investigation, the secretary-treasurer, had died prior to the commission's final decision. *Id.* at 499 n.7.

261. *Id.* at 499.

262. *Id.*

93 authorized the New Jersey commission to disqualify union officials otherwise properly elected pursuant to employee rights protected under section 7.²⁶³ On appeal, however, the United States Supreme Court held that the New Jersey act was not preempted, and it remanded the case to the Third Circuit.²⁶⁴

The Supreme Court relied on indications from *New York Telephone* and other cases that preemption should not be overextended. Citing these cases, the Court stated: "Section 7 of the NLRA neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations."²⁶⁵ Although in 1945 the Court had held in *Hill v. Florida ex rel. Watson*²⁶⁶ that section 7 conferred on employees an unfettered right to choose their own bargaining representatives, the Court stated that *Hill* was not controlling because Congress later had restricted this right in the Labor-Management Reporting and Disclosure Act of 1959²⁶⁷ (LMRDA), in which Congress had imposed precise federal restrictions on the ability of individuals to hold union office.²⁶⁸ Based on these restrictions, the Court found that "the right of employees [under section 7 of the NLRA] to select the officers of their bargaining representatives is not absolute and necessarily admits of some exception."²⁶⁹

The Court bolstered its finding by noting several other relevant considerations. First, it pointed out that section 603(a) of the LMRDA contains "'an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided.'"²⁷⁰ Second, the Court contended that Congress had passed the LMRDA because state

263. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54 v. Danziger*, 709 F.2d 815 (3d Cir. 1983), *rev'd sub nom. Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179 (1984).

264. 468 U.S. at 512-13.

265. *Id.* at 501.

266. 325 U.S. 538 (1945); *see supra* note 54.

267. 29 U.S.C. §§ 401-531 (1982).

268. *See* 468 U.S. at 505. Specifically, section 504(a) of the LMRDA, 29 U.S.C.A. § 504(a) (West 1985), prohibits anyone convicted of certain enumerated crimes from holding union office for five years following conviction or imprisonment. 468 U.S. at 505.

269. 468 U.S. at 505.

270. *Id.* at 505-06 (quoting *De Veau v. Braisted*, 363 U.S. 144, 157 (1960) (plurality opinion)); *see* 29 U.S.C. § 523(a) (1982) (codifying § 603(a) of the LMRDA).

governments had not done enough to fight corruption in union activities, and would not have intended to prevent states from doing more to address the problem.²⁷¹ Third, the Court noted that, in upholding a similar New York statute against a preemption attack in *De Veau v. Braisted*,²⁷² it had found even more direct evidence of Congress' intent concerning preemption of such statutes. In *De Veau*, New York had passed the statute pursuant to a bi-state compact between New York and New Jersey designed to fight crime and corruption on those states' mutual waterfront. Congress specifically had approved the compact, despite the contention of union officials in committee hearings that it conflicted with federal labor policy.²⁷³ According to the Court, Congress in approving the compact over this objection apparently had concluded that, "at least where the States were confronted with the 'public evils' of 'crime, corruption, and racketeering,' more stringent state regulation of the qualifications of union officials was not incompatible with the national labor policy as embodied in § 7 [of the NLRA]."²⁷⁴ Based on these considerations, the Court concluded that both federal law and state law legitimately can restrict the right of employees under section 7 to select certain individuals as officials of their institutional bargaining representative.²⁷⁵ The Court limited its finding, however, by stating that its decision did "not implicate the employees' express § 7 right to select a particular labor union as their collective-bargaining representative, but only their subsidiary right to select the officials of that union organization,"²⁷⁶ because the federal and state racketeering statutes focused only on the individual conduct of union officials and not on the qualifications of institutional bargaining representatives.

The Court then focused on the New Jersey act at issue in *Brown*. The Court found that the New Jersey legislature, like the New York legislature in *De Veau*, had passed the act to "vindicate a legitimate and compelling state interest, namely, the interest in

271. 468 U.S. at 506-07.

272. 363 U.S. 144 (1960).

273. See 468 U.S. at 507.

274. *Id.* at 508.

275. *Id.* at 509.

276. *Id.*

combatting local crime infesting a particular industry.’ ”²⁷⁷ Because this intent focused on individual conduct rather than regulation of labor organizations, and was indistinguishable from the intent behind the statute upheld in *De Veau*, the Court held that the NLRA did not preempt the state law.²⁷⁸

Although this portion of the opinion was not controversial because of Congress’ clear intent not to preempt state law in the area,²⁷⁹ the remainder of the opinion *was* controversial—not because of what the Court did decide, but because of what the Court refused to decide. The controversial issue arose because the remedy under the New Jersey statute for a union’s refusal to remove disqualified union officials was suspension of the union’s right to collect membership dues.²⁸⁰ This sanction could wreak havoc on a union, and consequently on the union members’ section 7 right to select a union as their bargaining representative free from outside interference. In *Brown*, eighty-five percent of the union’s income came from the monthly dues of its members.²⁸¹ If the State deprived the union of its ability to collect dues, the union quickly would collapse as an effective bargaining representative.²⁸² The Court dodged this issue, however, purportedly “because of the procedural posture of th[e] litigation.”²⁸³ Noting that the “factual allegations [concerning the effect of the sanction on the union] were never addressed by the District Court and the Court of Appeals,” the Supreme Court remanded the case to the Third Circuit with instructions to remand the case to the district court for “requisite findings of fact to determine whether imposition of the dues collection ban will so incapacitate Local 54 as to prevent it from performing its functions as the employees’ chosen collective-bargaining agent.”²⁸⁴ The Court, however, sent a clear signal that even a

277. *Id.* (quoting *De Veau*, 363 U.S. at 155).

278. *Id.*

279. See *supra* notes 267-75 and accompanying text.

280. N.J. STAT. ANN. § 5.12-93(b) (West Supp. 1986).

281. 468 U. at 511.

282. Without the ability to collect dues, the union argued, “it could no longer process employee grievances, administer collective-bargaining agreements, bargain for new agreements, organize the unorganized, or perform the other responsibilities of a collective-bargaining agent.” *Id.*

283. *Id.*

284. *Id.*

lower court finding that the dues prohibition provision was preempted would not affect the other provisions of the New Jersey law.²⁸⁵

The problem with this position, as the dissent noted, was that the dues sanction by definition impaired the union's ability to function effectively as a bargaining agent because it imposed sanctions on the union itself rather than its individual officers.²⁸⁶ A remand was not necessary, according to the dissent, to determine that a deprivation of operating income would prevent the union from functioning effectively as a bargaining agent.²⁸⁷

The dissent is important because it points out the majority's failure to conduct rigorous scrutiny of the separate sections of New Jersey's statutory scheme. If New Jersey could not enforce the statute by preventing recalcitrant unions from collecting dues, the only alternative would be a mechanism that allowed the State to act directly by compelling the union to remove objectionable individuals from office, rather than indirectly by suspending the right to collect dues.²⁸⁸ The problem with a direct enforcement mechanism, however, is that it would require state intervention into union governance, creating ancillary problems because this state supervision would raise troublesome labor preemption questions. The dissenting justices may have recognized these issues, and realized that the unanswered labor preemption questions associated with alternative enforcement mechanisms could overwhelm the otherwise unassailable portion of the majority's decision. Thus, the dissent perhaps augured the future result of judicial failure to conduct rigorous scrutiny of state statutory schemes potentially in consonant with labor preemption principles.

B. Preemption Decisions in 1985: Hope Renewed

In *Jones*, *Belknap*, and *Brown*, the Court had taken a frustrating half step toward, several steps laterally, and several steps away

285. The Court stated: "We observe that even a finding that § 7 prohibits imposition of the dues collection sanction need not imply that New Jersey's disqualification standards are not otherwise enforceable by the Commission." *Id.*

286. *Id.* at 514 (Brennan, J., dissenting).

287. *See id.* at 515-16.

288. *Cf. id.* at 514 n.2 (suggesting that a direct sanction would not be preempted by the NLRA).

from a strong labor preemption doctrine. Given the bleak case law that had preceded these decisions, however, even a half step forward was encouraging. These three decisions set the stage for the Court's two 1985 labor preemption decisions, in which the Court reached opposite results concerning preemption. Although those opposite results perfectly highlighted the confusion afflicting the labor preemption doctrine, they laid the groundwork for the doctrine's renaissance in the Court's 1986 preemption decisions.

In the first of the two 1985 decisions, *Allis-Chalmers Corp. v. Lueck*,²⁸⁹ the Court built on the hopes that it had raised two years earlier in *Jones* by finding that federal labor law preempts state tort law claims that are "substantially dependent" on analysis of labor contract terms.²⁹⁰ In *Allis-Chalmers*, Roderick Lueck sued his corporate employer, as well as the insurer that handled the company's group health and disability plan pursuant to the collective bargaining agreement, for allegedly handling his insurance claim in bad faith.²⁹¹ Under the grievance arbitration provisions in the collective bargaining agreement, Lueck was required to pursue "any insurance-related issues that may arise from provisions of the [Collective-Bargaining] Agreements'"²⁹² through expedited grievance arbitration.²⁹³ Despite this contractual mandate, Lueck had sought redress by filing a tort action in state court, seeking recovery for alleged bad faith in handling his claim for a nonoccupational back injury. In his complaint, Lueck had alleged that the company and the insurer "intentionally, contemptuously, and repeatedly failed" to make disability payments under the negotiated disability plan, without a reasonable basis for withholding the payments."²⁹⁴

289. 105 S. Ct. 1904 (1985). For other discussions of *Lueck*, see Kinyon & Rohlik, "Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees, 30 ST. LOUIS U.L.J. 1, 18-24 (1985); Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1, 25-28 (1986); Comment, *Employment At-Will in the Unionized Setting*, 34 CATH. U.L. REV. 979, 1011-13 (1985).

290. *Id.* at 1916.

291. *See id.* at 1907-08.

292. *Id.* at 1908 (quoting from the collective bargaining agreement).

293. *See id.* at 1907-08 (describing the four-step grievance procedure mandated by the agreement).

294. *Id.* at 1908 (quoting Lueck's complaint).

Although the lower state courts had held that Lueck's claim was "preempted by federal labor law,"²⁹⁵ the Wisconsin Supreme Court had reversed.²⁹⁶ The state supreme court relied on the fact that Lueck's claim was for "bad faith," which under Wisconsin law was "distinguishable from a bad-faith breach of contract claim [because,] even though a breach of duty exists as a consequence of the relationship established by contract, it is independent of that contract."²⁹⁷ Because the terms of the labor contract purportedly were not directly involved, the court reasoned that Lueck's claim did not arise under section 301 of the Labor Management Relations Act²⁹⁸ (LMRA), which provided a federal cause of action for breaches of contracts among employers, employees, and labor organizations.²⁹⁹ The Wisconsin court then proceeded to inquire whether Lueck's state law claims nonetheless were preempted by the NLRA. Applying a balancing test reminiscent of *Sears*,³⁰⁰ the court determined that the claims were not preempted because the bad faith tort was of substantial interest to the State of Wisconsin, while the disability claim procedures were only of peripheral concern to federal labor law.³⁰¹

The United States Supreme Court reversed, holding that section 301 of the LMRA preempted Lueck's state law tort action.³⁰² After reviewing its precedent regarding section 301,³⁰³ the Court concluded that the range of section 301 extended beyond contract suits per se.³⁰⁴ According to the Court, it also included a tort claim that "is inextricably intertwined with consideration of the terms of

295. *Id.* at 1909 (quoting the appendix to Lueck's petition for certiorari).

296. *See id.* at 1909 (citing *Lueck v. Aetna Life Ins. Co.*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984)).

297. *Id.*

298. 29 U.S.C. § 185 (1982).

299. *See* 105 S. Ct. at 1909. Section 301 provides, in pertinent part: "Suits for violation of contracts between an employer and a labor organization may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a) (1982).

300. *See supra* note 158 and accompanying text.

301. *See* 105 S. Ct. at 1909.

302. *See id.* at 1916.

303. *See id.* at 1910-11 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

304. 105 S. Ct. at 1911.

the labor contract.”³⁰⁵ “Any other result,” the Court asserted, “would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract.”³⁰⁶ The Court then considered whether Lueck’s claim fell under section 301 using this test. The Court first noted that the insurance contract implicated federal labor law because “it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers’ conduct breached that implied contract provision.”³⁰⁷ The Court then concluded that, because Lueck’s state tort suit inevitably would involve interpretation of the contract’s provisions, his claim had to be adjudicated using federal labor law.³⁰⁸

The Court summarized its holding by stating: “[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law.”³⁰⁹ The Court’s holding was sound, not only because it represented a proper construction of section 301, but also because it repudiated Lueck’s attempt to bypass the contractual grievance procedure that had been agreed to in the collective bargaining agreement.³¹⁰ Unfortunately, the effect of the decision was limited, because the Court declined to establish a general labor preemption rule to deal with entire classes of cases.³¹¹ Instead, the Court reaffirmed its approval of the case-by-case approach to labor preemption cases: “The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.”³¹²

The convoluted retention of ad hoc decisionmaking in *Allis-Chalmers* epitomized the confusion that debilitated the labor

305. *Id.* at 1912.

306. *Id.* at 1911.

307. *Id.* at 1913.

308. *See id.* at 1914-15.

309. *Id.* at 1916 (citation omitted).

310. *See id.* at 1915 (“Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator’s role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims.”).

311. *See id.* at 1916 (emphasizing the “narrow focus” of the Court’s decision).

312. *Id.*

preemption doctrine during the quarter century following *Garmon*. Despite this confusion, and the Court's express reservations about a strong labor preemption doctrine, however, *Allis-Chalmers* offered grounds for some cautious optimism. The decision represented a step, albeit a tentative one, toward a revitalized labor preemption doctrine that would restabilize national labor law theory and practice by repudiating ad hoc atomism and dealing with entire classes of cases rather than with individual fact situations.

Two months after *Lueck*, the Court decided its second labor preemption case in 1985, *Metropolitan Life Insurance Co. v. Massachusetts*.³¹³ In that case, the Court held that neither the NLRA nor the Employee Retirement Income Security Act of 1974³¹⁴ (ERISA) preempted a Massachusetts statute that mandated a minimum floor for mental health care benefits.³¹⁵ *Metropolitan Life* involved a challenge by two insurance companies to a Massachusetts minimum benefit law that required health insurance policies to "provide 60 days of coverage for confinement in a mental hospital, coverage for confinement in a general hospital equal to that provided by the policy for non-mental illness, and certain minimum outpatient benefits."³¹⁶ The Massachusetts statute

313. 105 S. Ct. 2380 (1985). For a further discussion of *Metropolitan Life*, see McGill & Moon, *NLRA Preemption: The Free Play Doctrine in Metropolitan Life Insurance v. Massachusetts*, 11 EMP. REL. L.J. 206 (1985).

314. 29 U.S.C.A. §§ 301-309, 441, 1000-1461 (West 1985 & Supp. 1986).

315. 105 S. Ct. at 2399.

316. *Id.* at 2384 (describing MASS. GEN. LAWS ANN. ch. 175, § 47B (West Supp. 1985)). In a footnote, the Court quoted the pertinent portion of the Massachusetts law:

Any blanket or general policy of insurance or any policy of accident and sickness insurance or any employees' health and welfare fund which provid[es] hospital expense and surgical expense benefits and which [is] promulgated or renewed to any person or group of persons in this commonwealth shall, provide benefits for expense of residents of the commonwealth covered under any such policy or plan, arising from mental or nervous conditions as described in the standard nomenclature of the American Psychiatric Association which are at least equal to the following minimum requirements:

(a) In the case of benefits based upon confinement as an inpatient in a mental hospital the period of confinement for which benefits shall be payable shall be at least sixty days in any calender [sic] year.

typified the laws then in force in a majority of the states.³¹⁷

The Court first examined whether the Massachusetts statute was preempted by ERISA. The Court began by examining the purpose of the state law, suggesting initially that it was passed to protect uninsured workers from the high cost of private mental health care.³¹⁸ According to the Court, the Massachusetts legislature perceived that mandatory insurance would increase the incidence of treatment at private community mental health centers, which provide better, more personal private care than state institutions.³¹⁹ The Court concluded that the purpose of the statute was

to help safeguard the public against the high costs of comprehensive inpatient and outpatient mental health care, reduce non-psychiatric medical-care expenditures for mentally-retarded illness, shift the delivery of treatment from inpatient to outpatient services, and relieve the Commonwealth of some of the financial burden it otherwise would encounter with respect to mental-health problems.³²⁰

The Court then turned its attention to Congress' intent in ERISA, which provides comprehensive federal regulation of employee pension and welfare plans.³²¹ Unlike the NLRA, ERISA

(b) In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.

(c) In the case of out-patient benefits, these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished (1) by a comprehensive health service organization, (2) by a licensed or accredited hospital (3) or subject to the approval of the department of mental health services furnished by a community mental health center or other mental health clinic or day care center which furnishes mental health services or (4) consultations or diagnostic or treatment sessions.

Id. at 2384 n.11 (quoting MASS. GEN. LAWS ANN. ch. 175, § 47B (West Supp. 1985)).

317. *Id.* at 2384; see *id.* at 2384 n.10 (noting that 26 states had promulgated 69 such mandated benefit laws).

318. *Id.* at 2385.

319. *Id.*

320. *Id.*

321. See 29 U.S.C.A. §§ 301-309, 441, 1000-1461 (West 1985 & Supp. 1986). For exhaustive commentary concerning ERISA preemption, see Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23 (1978); Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 DUKE L.J. 383; Kilberg & Inman, *Preemption of State Law Under ERISA: Drawing the Line Between Laws That Do and Laws That Do Not Relate to Employee Benefit Plans*, 19

contains a broad express preemption clause that precludes any state law regulating employee benefit plans.³²² That otherwise broad provision, however, includes an "insurance saving clause" which, with one narrow exception, excludes from preemption "any State law that regulates insurance, banking, or securities."³²³ The insurance companies argued that the saving clause should not apply to the Massachusetts statute because that law "in reality [was] a health law that merely operates on insurance contracts to accomplish its end."³²⁴ The Court, however, stated that, in interpreting the saving clause, "[t]he presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope."³²⁵ Because the Court could find no indication in the legislative history of ERISA that countermanded this presumption,³²⁶ the Court concluded that the saving clause protected the Massachusetts law from preemption by ERISA.³²⁷

Having determined that ERISA did not preempt the mandated benefit law, the Court turned its attention to whether the NLRA had any preemptive effect. The insurance companies argued that it did, because the Massachusetts statute and other similar laws "in

FORUM 162 (1983); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984); Okin, *Preemption of State Insurance Regulation by ERISA*, 13 FORUM 652 (1978); Pantos, *Preemption Litigation Under ERISA*, 3 EMP. REL. L.J. 336 (1978); Turza & Halloway, *Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*, 28 CATH. U.L. REV. 163 (1979); Note, *ERISA: Preemption of State Health Care Laws and Worker Well-Being*, 1981 U. ILL. L. REV. 825; Note, *ERISA Preemption of State Law: The Meaning of "Relate To" in Section 514*, 58 WASH. U.L.Q. 143 (1980); Comment, *ERISA and the Preemption of State Law*, 6 FORDHAM URB. L.J. 599 (1978); Comment, *ERISA and State Law Preemption*, 6 N. KY. L. REV. 379 (1979); Comment, *Attachment of Pension Benefits Under ERISA*, 74 NW. U.L. REV. 255 (1979).

322. 29 U.S.C. § 1144(a) (1982) (codifying § 514(a) of ERISA) (declaring that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

323. *Id.* § 1144(b)(2)(B) (codifying § 514(b)(2)(B) of ERISA) (declaring that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities").

324. 105 S. Ct. at 2390.

325. *Id.*

326. *Id.* at 2390, 2392-93.

327. *Id.* at 2393. The Court also noted that its result was consistent with its interpretation of the term "business of insurance" in the saving clause of the preemption provision in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1982). See 105 S. Ct. at 2391.

effect mandate terms of collective-bargaining agreements,"³²⁸ conflicting with the implicit structural policies of the NLRA and the congressional intent to leave the terms of employee insurance benefit plans to the private parties' collective bargaining process, free of state regulation.³²⁹ Although the Massachusetts law did interfere to some extent with collective bargaining,³³⁰ the Court noted that such interference did not justify preemption under the primary jurisdiction analysis of *Garmon* because the conduct involved was not prohibited or protected under sections 7 or 8 of the NLRA.³³¹ Instead, according to the Court, *Metropolitan Life* implicated the second wing of the labor preemption doctrine, the unregulable activity principle, which examines whether the state law frustrated the policies implicated by the Act but not expressly included in sections 7 and 8.³³² Even though employee welfare benefits generally are a mandatory subject of collective bargaining³³³ and cannot be imposed on the parties externally absent their mutual agreement,³³⁴ the Court held that the extent of the interference with collective bargaining under the state law was not sufficiently incompatible with the NLRA to trigger preemption. According to the Court, the Massachusetts law did not work to the detriment of collective bargaining; instead, it protected employees by establishing a minimum floor for mental health benefits, beneath which the labor negotiation process was not free to go. The Court noted:

It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. It would turn the policy that animated the [NLRA] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor

328. 105 S. Ct. at 2393-94.

329. *Id.* at 2394.

330. According to the Court, "faced with § 47B, parties to a collective-bargaining agreement providing for health insurance are forced to make a choice: either they must purchase the mandated benefit, decide not to provide health coverage at all, or decide to become self-insured, assuming they are in a financial position to make that choice." *Id.*

331. *Id.*

332. *Id.*, see *supra* note 138 and accompanying text.

333. See *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (cited in *Metropolitan Life*, 105 S. Ct. at 2395-96).

334. See *H.K. Porter Co. v. NLRB*, 399 U.S. 97 (1970).

regulations imposing minimal standards on non-union employers.³³⁵

The Court concluded:

No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.³³⁶

The Court reached its holding that the Massachusetts law was not preempted by interpreting state police powers in a very expansive manner, both in analyzing preemption under ERISA and in analyzing preemption under the NLRA. In the Court's ERISA analysis, it took a giant step backward from the position in favor of broad ERISA preemption that it had established only two years earlier.³³⁷ This retreat had serious implications for the labor preemption doctrine in general, because ERISA is part of the group of federal enactments that comprises federal employment law³³⁸ and because an undeniable synergy exists between preemption principles as they are applied to the individual laws within this group. The Court's holding concerning preemption by the NLRA, however, has even more serious implications, because it will make achievement of meaningful national legislation to address the inherently national problem of coordinating national labor policy much more difficult.

The Court's decision was not particularly surprising because the statute in *Metropolitan Life*, like the one in *Brown*, had a plainly commendable purpose. Although the evils addressed by the Massachusetts statute cannot be discounted, the Court upheld that statute against a preemption attack at a greater long-term cost to the prospect for Hamiltonian federalism in federal employment law. After *Metropolitan Life*, the many states that currently have no

335. 105 S. Ct. at 2398.

336. *Id.* at 2397.

337. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

338. See *supra* note 5.

mandated benefit legislation now have no incentive not to adopt such laws. Further state enactments would add even more layers of interference with the federal scheme. More importantly, the decision debilitates any possible congressional efforts toward enacting national legislation. Although most states have mandated benefit laws,³³⁹ the many states without such laws have chosen to leave these matters solely to the collective bargaining process, a pyrrhic victory for the NLRA because workers in these states most likely will be left without mandatory benefit protection in the absence of uniform federal health benefits legislation. The Court's decision in *Metropolitan Life* to uphold state mandatory benefit laws will seduce Congress into directing its energy toward other priorities, under the erroneous assumption that all states will afford mandatory benefit protections to employees similar to the protections provided in Massachusetts.

From a narrow perspective, *Metropolitan Life* is a technically correct and narrow decision that provided a victory for some unionized and most nonunionized employees in Massachusetts, and a vindication for the State's enlightened, socially responsible use of its police powers. From a broader perspective, however, *Metropolitan Life* perpetuates the national checkerboard of inconsistent state laws that hamstring effective national labor policy. In short, the Court's decision in *Metropolitan Life* may have provided a limited, short-term advantage to weak unions and nonunionized employees in states with mandated benefit laws, but at a greater cost to the long-term national welfare. This short-term orientation, inherent in the Court's ad hoc evaluations of likely immediate winners and losers in individual cases, was very much in need of change. Fortunately, major steps toward effecting the change from ad hoc evaluations to principled general resolutions may have occurred in 1986.

C. Labor Preemption Decisions in 1986: Renaissance Begun

The unexpected but very welcome renaissance of the labor preemption doctrine finally may have begun with the unequivocal

339. See *supra* note 317.

holdings in the Supreme Court's three substantive³⁴⁰ labor preemption decisions in 1986. Although these decisions perhaps did not constitute a complete vindication of, or an absolute return to, classic labor preemption principles, they nevertheless marked a fortunate, praiseworthy moment in the confused, tortured history of the doctrine. Coming after the muddle of case law in the first half of the 1980's, during which the Court sent thoroughly mixed signals regarding labor preemption, these 1986 decisions could serve as a beacon for revitalization of the labor preemption doctrine. They enable proponents of a strong preemption doctrine to indulge in cautious optimism for the immediate future, at least until the triumph of the states' rights ideology threatened by possible realignment during the tenure of the Rehnquist Court.

The first of the 1986 decisions, *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*,³⁴¹ involved a challenge to a statute that directed the Wisconsin Department of Industry, Labor and Human Relations to maintain a list of every person or firm judicially determined to have committed three separate violations of the NLRA in three separate cases within a five-year period.³⁴² Under the statute, a name placed on the list remained there for three years.³⁴³ During that period, state procurement agents were forbidden from buying products manufactured by the violator.³⁴⁴

340. The Court decided a fourth labor preemption case in 1986, but that case involved a procedural question rather than substantive doctrinal issues. See *International Longshoremen's Ass'n v. Davis*, 106 S. Ct. 1904 (1986); *infra* note 395.

341. 106 S. Ct. 1057 (1986).

342. WIS. STAT. § 101.245 (Supp. 1985); see 106 S. Ct. at 1060 n.1 (quoting the statute).

343. WIS. STAT. § 101.245(4) (Supp. 1985).

344. WIS. STAT. § 16.75(8) (Supp. 1985). In a footnote, the Court quoted the pertinent part of the statute:

The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency.

See 106 S. Ct. at 1060 n.2 (quoting WIS. STAT. § 16.75(8) (Supp. 1985)).

Gould Inc. had been placed on the list in 1982 after four NLRB orders against divisions of the company had been judicially enforced. As a result, the State had informed Gould that it would not enter into any new contracts with the company until 1985, and that it would not honor current contracts unless the State would become subject to contractual penalties if it rejected those contracts. The State's action had affected more than \$10,000 worth of contracts and \$10,000 in bids that Gould had with the State.³⁴⁵

Gould had sought injunctive and declaratory relief in federal court, claiming that the Wisconsin statute was preempted by the NLRA.³⁴⁶ The United States District Court for the Western District of Wisconsin had granted the requested injunctive relief, finding that the NLRA preempted the state law.³⁴⁷ After the United States Court of Appeals for the Seventh Circuit had affirmed this finding,³⁴⁸ the Wisconsin department charged with enforcing the statute had appealed to the United States Supreme Court.

The unanimous Supreme Court in *Gould* relied directly on the broad preemption rule in *Garmon*, which the Court described as "[c]entral" among labor preemption principles. The Court began by restating its conception of the rule: "[T]he *Garmon* rule prevents states not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."³⁴⁹ The Court then began its application of the rule by stating that if Wisconsin had passed a law forbidding private parties from doing business with repeat labor law violators, the NLRA clearly would have preempted the law because the law "would interfere with Congress' 'integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA."³⁵⁰ The fact that the remedy would have been substantially different from remedies available under the

345. 106 S. Ct. at 1060.

346. *Id.* Gould also brought equal protection and due process claims against the statute, but neither the trial court nor the appellate courts reached these issues. *See id.* at 1060-61.

347. *See id.* at 1061.

348. *See id.* (citing *Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 750 F.2d 608 (7th Cir. 1984)).

349. *Id.* at 1061.

350. *Id.* (quoting *Garmon*, 359 U.S. at 247).

NLRA did not matter, according to the Court, because under *Garmon* "‘judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.’"³⁵¹ Preemption was necessary, the Court stated, because allowing additional remedies "‘accentuates the danger of conflict’" between the states and the NLRB.³⁵²

Wisconsin argued that the result should be different for a statute that prohibited purchases by the State rather than by private parties because such a law is an exercise of the State's spending power rather than its regulatory power.³⁵³ In essence, Wisconsin claimed that it was acting merely as a "private purchaser of services,"³⁵⁴ and thus was not subject to the usual restrictions that the commerce clause places on state regulatory power.³⁵⁵ The Court rejected the State's distinction, however, by noting that even the State conceded that the purpose of the statute was "to deter labor law violations and reward 'fidelity to the law,'" ³⁵⁶ a purpose that clearly was regulatory in nature. The Court unequivocally stated: "[F]or all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."³⁵⁷ The Court also rejected the State's distinction by asserting that approval of the debarment scheme, free from the sweep of NLRA preemption, might result in an even more broadly based conflict with the NLRA because other states might be encouraged to enact similar measures.³⁵⁸ Indeed, four other states already had done so.³⁵⁹

The obvious presence of the NLRA vitiated Wisconsin's reliance on the "state as market participant" argument.³⁶⁰ The Court as-

351. *Id.* (quoting *Garmon*, 359 U.S. at 243).

352. *Id.* (quoting *Garmon*, 359 U.S. at 247).

353. *Id.* at 1061-62.

354. *See id.* at 1063.

355. *See id.* at 1062-63.

356. *Id.* at 1062.

357. *Id.* at 1063.

358. *See id.* at 1062.

359. *See id.* at 1062 & n.6 (citing CONN. GEN. STAT. § 31-57a (Supp. 1985); MD. STATE FIN. & PROCUREMENT CODE ANN. § 13-404 (1985); MICH. COMP. LAWS ANN. §§ 423.322 to .324 (West Supp. 1985); OHIO REV. CODE ANN. § 121.23 (Page 1984)).

360. *See id.* at 1063 ("What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place.").

serted that, while private boycotts of labor law violators would not be prohibited by the NLRA, publicly enforced boycotts are different.³⁶¹ The NLRA forbids state but not private action, the Court stated, "not merely because the[se actions] take different forms, but also because in our system States simply are different from private parties and have a different role to play."³⁶²

Although the Court in *Gould* certainly revitalized the labor preemption doctrine, the decision was not absolute in its sweep. The Court concluded by carefully restating the exceptions under the labor preemption doctrine for matters of "peripheral concern" to the NLRA and for "interests deeply rooted in local feeling and responsibility,"³⁶³ which the Court had invoked in so many previous cases to avoid a finding of preemption.³⁶⁴ The ease with which the Court found that the Wisconsin statute did not fall within these exceptions,³⁶⁵ however, inspires hope that the labor preemption doctrine is beginning to return to its proper place as a part of a sound national labor policy.

The Court's second substantive labor preemption decision in 1986, *Golden State Transit Corp. v. City of Los Angeles*,³⁶⁶ followed six weeks later. The dispute in *Golden State* had arisen in 1981, when taxi drivers for Golden State Transit Corporation had gone on strike immediately before the Los Angeles City Council was scheduled to consider renewing operating franchises for Golden State and twelve other taxi companies. The city council

361. *See id.*

362. *Id.* Many scholars, primarily those affiliated with critical legal studies, condemn as illusion and artifice the purported bifurcation between the public and private realms, such as the distinction advanced by the Court in *Gould*. *See, e.g.,* Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

363. 106 S. Ct. at 1063.

364. *See supra* notes 87-88 & 111 and accompanying text.

365. The Court stated:

But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

106 S. Ct. at 1064.

366. 106 S. Ct. 1395 (1986).

had approved all but one of the other renewal applications routinely, but it had delayed action on Golden State's application.³⁶⁷ One week before the scheduled expiration of Golden State's franchise, the city council had voted overwhelmingly against renewal³⁶⁸ because it felt that Golden State had not dealt fairly with the strikers.³⁶⁹

Golden State had sought declaratory, injunctive, and monetary relief in federal court, arguing that the disapproval of the franchise renewal was an attempt to coerce it into settling its dispute with the union, and that the NLRA preempted such local interference in collective bargaining.³⁷⁰ The United States District Court for the Central District of California had found "that it was 'undisputed that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with the Teamster drivers,'"³⁷¹ and it had granted Golden State's motion for a preliminary injunction to preserve the franchise.³⁷² The United States Court of Appeals for the Ninth Circuit had found "ample evidence" for the district court's finding, but it had vacated the preliminary injunction because it felt "that Golden State had little chance of prevailing on its pre-emption claim."³⁷³ After an unsuccessful petition for certiorari to the United States Supreme Court,³⁷⁴ the district court had granted the City's motion for summary judgment,³⁷⁵ and the Ninth Circuit

367. *Id.* at 1396.

368. *Id.* at 1397.

369. In the city council's consideration of Golden State's application, according to the Court, "[t]he strike was central to the discussion. One council member charged Golden State with negotiating unreasonably, while another accused the company of trying to 'brea[k] the back of the union.' The sympathies of the council members who spoke lay with the union." *Id.* (citations omitted). The council's action had gone against the recommendation of the City's Board of Transportation Commissioners, as well as the recommendation of the council's own Transportation and Traffic Committee, which specifically had found that Golden State and the other twelve companies seeking franchise renewals were "in compliance with all terms and conditions of their franchise[s]." *Id.* at 1396.

370. *See id.* at 1397.

371. *Id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191, 193 (C.D. Cal. 1981)).

372. *See id.*

373. *Id.* (citing *Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 759, 762 (9th Cir. 1982)).

374. *See id.* (citing *Golden State Transit Corp. v. City of Los Angeles*, 459 U.S. 1105 (1983), *denying cert.* to 686 F.2d 758 (9th Cir. 1982)).

375. *See id.*

had affirmed.³⁷⁶ The court of appeals had said that it “found nothing in the record to suggest that the city’s nonrenewal decision ‘was not concerned with transportation,’ ”³⁷⁷ and it had found against preemption because it viewed such transportation regulation as only a peripheral, incidental concern of labor policy.³⁷⁸

The Supreme Court began its consideration of the case by citing with approval the strong labor preemption principles of *Garmon*, which it had reaffirmed in *Gould* just six weeks earlier.³⁷⁹ The Court, however, found reliance on the primary jurisdiction principle of *Garmon* unnecessary.³⁸⁰ Instead, the Court relied on the second major wing of labor preemption, the unregulable activity principle.³⁸¹ Under this second principle, which had originated in *Machinists*³⁸² and had been applied in *Metropolitan Life*,³⁸³ state regulation was preempted if it “‘concern[ed] conduct that Congress intended to be unregulated’ ”³⁸⁴ because of its desire to leave this conduct “‘to be controlled by the free play of economic forces.’ ”³⁸⁵

The Court ruled that the NLRA preempted the City’s action.³⁸⁶ The Court stated that the threatened denial of Golden State’s application had altered the balance of economic weapons held by the company and by the union through imposition of “a positive durational limit on the [company’s] exercise of self-help.”³⁸⁷ By intruding into the dispute, the Court held, “the city directly interfered with the bargaining process—a central concern of the NLRA.”³⁸⁸

376. See *id.* (citing *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985)).

377. *Id.* (quoting 754 F.2d at 833).

378. See *id.*

379. See *id.* at 1398.

380. The Court never reached the issue of preemption under *Garmon* because Golden State did not argue it. See *id.* at 1398 n.4.

381. See *id.* at 1398.

382. See *supra* notes 131-38 and accompanying text.

383. See *supra* notes 332-36 and accompanying text.

384. 106 S. Ct. at 1398 (quoting *Metropolitan Life*, 105 S. Ct. at 2394).

385. *Id.* (quoting *Machinists*, 427 U.S. at 140, which, in turn, was quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

386. See *id.* at 1401.

387. *Id.* at 1399.

388. *Id.* at 1400 n.8.

The City attempted to avoid this result by arguing that "it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises."³⁸⁹ The Court rejected this argument, viewing it as similar to Wisconsin's argument in *Gould* that it was acting under its spending power and not under its regulatory power.³⁹⁰ The Court also was unsympathetic to the City's contention that it was in a "no-win situation" because it would have been perceived as favoring the employer in the labor dispute if it had renewed the franchise.³⁹¹ According to the Court:

[T]he question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process.³⁹²

Having rejected these contentions, the Court concluded that the City's action was preempted because it "destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons."³⁹³

Justice Rehnquist filed a sharp dissent, in which he asserted that the majority's decision gave the labor preemption doctrine an "extraordinary breadth" that went far beyond the Court's initial labor preemption cases.³⁹⁴ In Justice Rehnquist's view:

[T]he mighty oak of this Court's labor pre-emption doctrine sweeps ever outward though still totally uninformed by any express directive from Congress.

The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

389. *Id.* at 1400.

390. *Id.*, see *supra* notes 353-59 and accompanying text.

391. See 106 S. Ct. at 1401.

392. *Id.*

393. *Id.*

394. *Id.* at 1402 (Rehnquist, J., dissenting).

I do not believe that Congress intended the labor law net to be cast this far.³⁹⁵

395. *Id.* at 1403.

The Court's third substantive labor preemption decision in 1986, *Baker v. General Motors Corp.*, 54 U.S.L.W. 5037 (U.S. July 2, 1986), involved a challenge to a Michigan unemployment compensation law which was reminiscent of the law challenged eight years earlier in *New York Telephone*. See *id.* at 5037 & n.1; *supra* notes 183-207 and accompanying text. In *Baker*, strikers at three GM foundries, where UAW locals had continued striking after the UAW and GM had reached a contract agreement at the national level, had received union strike benefits. These local strikes had caused GM to curtail operations temporarily at other GM facilities. Many of the 19,000 employees laid off as a result of this curtailment had claimed Michigan unemployment compensation benefits. 54 U.S.L.W. at 5038. The Michigan Supreme Court had upheld the State's denial of benefits to the employees, which had been based on the contention that the claimants' unemployment was caused by the strike, which had been financed by the union strike benefits. See *id.* at 5038-39.

The United States Supreme Court affirmed the Michigan court's decision, holding that the NLRA did not preempt the state law. *Id.* at 5042. This decision, considered together with *New York Telephone*, in which the Court had held that the NLRA also did not preempt a New York unemployment compensation law that *provided* benefits to strikers, illustrates perfectly the chaos in labor policy that can occur when directly opposite state labor laws are not preempted by a coherent, uniform federal labor policy. Given the Court's endorsement of a strong labor preemption doctrine in its other 1986 cases, however, *Baker* may be considered a mere aberration limited to its facts—the illegitimate but predictable progeny of *New York Telephone*.

The Court decided another labor preemption case in 1986, *International Longshormen's Ass'n v. Davis*, 106 S. Ct. 1904 (1986), which primarily involved federal procedure rather than the labor preemption doctrine as such. In *Davis*, a ship superintendent allegedly had been fired for participating in union-related activities. The superintendent had sued the union in state court for fraud and misrepresentation, claiming that the union had promised to get him reinstated if such a firing occurred but had failed to keep that promise. The union had defended the suit on the merits throughout the trial, failing to argue that the labor preemption doctrine deprived the state court of jurisdiction until after the discharged superintendent had won a jury verdict of \$75,000. *Id.* at 1907-09.

The Alabama Supreme Court had upheld the verdict, holding that the union had waived the preemption argument by failing to plead it as an affirmative defense. See *id.* at 1909. The United States Supreme Court, however, disagreed with the Alabama court's resolution of the "procedural" waiver issue, although it ultimately affirmed the decision on other grounds. The Court stated:

A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. Consequently, the state procedural rule relied on by the Alabama Supreme Court to support the judgment below was not a sufficient state ground, and the Union was and is entitled to an adjudication of its pre-emption claim on the merits.

Id. at 1913. But see *id.* at 1918 (Rehnquist, J., concurring) (disagreeing with the Court's conclusion "that National Labor Relations Act pre-emption is 'jurisdictional,' and hence can be raised at any time"). The Court then proceeded to consider the merits of the preemption

Gould and *Golden State* certainly do not guarantee the future of the labor preemption doctrine. As Justice Rehnquist pointedly noted in his dissent in *Golden State*, Congress has failed to provide any statutory clarification of its intent, which guarantees future judicial wrestling with the often delphic labor preemption doctrine. Nevertheless, these most recent decisions are strong reaffirmations of the labor preemption doctrine—a surprising development given the erosion of the doctrine that had characterized the Court's previous decisions. Whether these decisions will reverse the past quarter century of decay, marking a return to classic Hamiltonian principles, or will prove to be surprising but isolated aberrations, marking merely a temporary hiatus from continued doctrinal erosion, remains to be seen. The nearly unanimous stance of the Court in these decisions, however, justifies at least a cautiously optimistic hope that they could mark the beginning of a renaissance for the labor preemption doctrine. The ominous and indeterminate judicial "wild card" will be the extent to which Justice Rehnquist, in his new position as Chief Justice, can galvanize a new Jeffersonian majority on the Court. If states' rights jurisprudence ultimately prevails, any hope for Hamiltonian federalism will collapse, with profound adverse ramifications extending far beyond the bounds of the labor preemption doctrine and national labor policy.

VI. CONCLUSION

The quarter century after *Garmon* generally witnessed the steady erosion of the labor preemption doctrine and the debilitation of prospects for restoration of a sound national labor policy. The Court steadily engrafted many exceptions onto the labor preemption doctrine. These exceptions perhaps seemed valid when

issue, concluding that the state tort action was not preempted because the union had failed to meet its burden of proving that the discharged superintendent arguably was not a supervisor but an employee protected by the NLRA. *See id.* at 1916.

Despite its holding that preemption did not apply, and its characterization of the case as procedural, the Court in *Davis* sent yet another signal in favor of a return to a strong labor preemption doctrine. By rejecting the Alabama court's holding that a labor preemption argument could be waived, and recognizing the jurisdictional nature of the defense, the Court struck another blow in favor of Hamiltonian federalism in labor law jurisprudence.

considered alone, but cumulatively they overwhelmed both the doctrine and national labor policy.

Optimally, the primacy of federal law should be the norm in labor law theory and practice, and exceptions should be limited strictly to cases of labor violence and of direct, aggravated threats to local health, safety, and welfare.³⁹⁶ Although the labor preemption doctrine cannot be absolute, it should be broad enough to ensure national solutions to national problems while remaining flexible enough "to be adaptable to a multitude of variant situations."³⁹⁷ A strong labor preemption doctrine may be difficult, but not impossible, to achieve. As one commentator aptly noted:

Achieving a permanent accommodation between state and federal power over the labor disputes of employers subject to the National Labor Relations Act is like trying to keep a saddle on a jellyfish. If the doctrine of federal preemption is to fit properly, it must be constantly adjusted as the living creature of labor relations moves and grows.³⁹⁸

A return to the twin wings of the doctrine—the primary jurisdiction approach of *Garmon* and the unregulable activity approach of *Machinists*—with allowance for a few exceptions to ensure proper flexibility and healthy pluralism, is essential. Despite its politicization,³⁹⁹ the NLRB is the only present body with the expertise necessary to make sophisticated labor law decisions with any real continuity. Revitalization of the preemption doctrine will prevent the destructive impact of fragmented, atomistic state decisions and at least partially restore the integrity and stability of labor law jurisprudence.

Fortunately, 1986 may have marked a turning point in the history of labor preemption. Building on earlier decisions that had

396. See Wellington, *supra* note 27, at 549-56.

397. Michelman, *supra* note 27, at 651.

398. Comment, *Concurrent Jurisdiction*, *supra* note 151, at 373.

399. The NLRB has been politicized throughout its history. See *supra* note 9. Politicization is an inevitable result when the President appoints NLRB members, but that result is proper because it at least indirectly ensures political accountability to the electorate. Of course, NLRB politicization also ensures permanent controversy. See Gould, *Fifty Years Under the National Labor Relations Act: A Retrospective View*, 37 LAB. L.J. 235, 243 (1986). For comprehensive discussions of the merits and liabilities of NLRB politicization, see Gregory, *supra* note 9; Gregory & Mak, *supra* note 7.

triggered hopes for restoration of a sound Hamiltonian approach to labor policymaking, the Burger Court may have initiated the renaissance of the labor preemption doctrine. Although the Burger Court's latest decisions did not constitute a clear and complete rejection of its former counterproductive ad hoc approach, these pronouncements did at least offer hope for eventual restoration of a principled, broad labor preemption doctrine that, in turn, could usher a coordinated labor law jurisprudence into the next century.

The timing of these encouraging developments, in bursts of nationalistic spirit on the eve of the Rehnquist Court's inaugural, is deeply ironic. Given the Court's unequivocal and nearly unanimous stance during 1986 in favor of a strong labor preemption doctrine, the Rehnquist-Scalia Jeffersonian wing of the embryonic Rehnquist Court probably will not soon be able to neutralize the Burger Court's recent steps toward Hamiltonian restoration of the doctrine. Whether the mature Rehnquist Court will be able to thwart the full reemergence of strong labor preemption principles, however, remains to be seen. The tensions are obvious and the policy implications are profound, which will make the future interesting indeed. Within the next few years, the Court almost certainly will decide whether 1986 marked the renaissance of a strong labor preemption doctrine, or its last hurrah. One hopes that, on the eve of the constitutional bicentennial, the Court will choose restoration of Hamiltonian principles in labor law jurisprudence.