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Federalism in Labor Relations—The Last Decade

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> The National Labor Relations Act . . . 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.[1]

I. INTRODUCTION

Chief Justice Rehnquist has expressed concern over the growth of "the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress."[2] In his view, the National Labor Relations Board (NLRB), management, and labor compete "in urging the Court to sweep into the maw of labor relations law concerns that would have been regarded as totally peripheral to that body of law by the Congresses which enacted the Wagner Act and the Taft-Hartley Act."[3]

Distinguished labor scholars have observed that "[n]o legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently in the past thirty years than that of the preemption of state law, and perhaps no other legal issue has been left in quite as much confusion."[4] This essay reviews the course of labor preemption doctrine during the last decade.

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1. Garner v. Teamsters Union, 346 U.S. 485, 488 (1953). *See* Belknap, Inc. v. Hale, 463 U.S. 491, 523 (1983) (Brennan, J., dissenting):

> Pre-emption cases in the labor law area are often difficult because we must decide the questions presented without any clear guidance from Congress. . . . We have developed standards to assist us in our task . . . but those standards are by necessity general ones which may not provide as much assistance as we would like in particular cases. This is especially true when the case is an unusual one.

Id.

2. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting).

3. *Id.*

4. A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 895 (10th ed. 1986). Professors Meltzer and Henderson make the following observation:

> The customary difficulties created by the absence of legislative guidance were aggravated by two considerations: first, continuing divisions in the community over the adequacy of the national regulation; and, second, unions generally argued for (while employers opposed) preemption of state authority. Consequently, courts and ultimately the Supreme Court and the Justices individually seemed to be choosing not only between the merits of state and federal regulation, but also between one interest or the other. Such choices involved obvious tensions with an objective of the Norris-LaGuardia Act—limiting judicial policy making.

B. MELTZER & S. HENDERSON, LABOR LAW CASES, MATERIALS AND PROBLEMS 731 (3d ed. 1985).

II. The Regulatory Framework

The early years of this century saw the gathering storm of the labor wars and the ultimate federal legitimization of employee combination.[5] Congress extended legislative protection for employee organizational rights, curtailed judicial intervention in labor disputes, and endorsed collective bargaining as a system of industrial self-government.[6] The Railway Labor Act of 1926,[7] the Norris-LaGuardia Act of 1932,[8] and the Wagner Act of 1935,[9] envisaged equalization of bargaining power, worker betterment, and a framework for labor peace. In this legislation Congress safeguarded against employer interference in the rights of employees to self-organization, to collective bargaining through their chosen representatives, and to other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[10]

Toward mid-century the pendulum swung in response to perceived excesses of union power.[11] The Taft-Hartley Act of 1947[12] protected employee rights to refrain from unionism, limited union control over the employment relationship, and curtailed labor's strike and boycott weapons. The Landrum-Griffin Act of 1959[13] further restricted labor's picketing and boycott activities,[14] and regulated internal union affairs.[15]

III. Traditional Preemption Analysis

By mid-century the essential federal statutory framework for labor relations had thus been laid.[16] While the federal scheme was extensive if not comprehensive, Congress did not totally exclude state authority from the area.[17] "The [National Labor Relations Act (NLRA)] . . . leaves much to the states, though Congress has refrained from telling us how much."[18] The danger of conflict between the state and

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5. *See generally*, F. Dulles, Labor in America: A History (3d ed. 1966); P. Taft, Organized Labor in American History (1964).

6. *See generally*, I. Bernstein, The New Deal Collective Bargaining Policy (1950); F. Frankfurter & N. Greene, The Labor Injunction (1930); J. Gross, The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law 1933–1937 (1974).

7. 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (1982)).

8. 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (1982)).

9. National Labor Relations Act (NLRA), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1982)).

10. *See generally*, C. Gregory & H. Katz, Labor and the Law (3d ed. 1979).

11. *See generally*, J. Gross, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition 1937–1947 (1981); H. Millis & E. Brown, From the Wagner Act to Taft-Hartley (1950).

12. Labor Management Relations Act (LMRA), 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (1982)).

13. Labor-Management Reporting and Disclosure Act (LMRDA), 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401–531 (1982)).

14. *See generally*, C. Summers & H. Wellington, Cases and Materials on Labor Law 326–39 (1968).

15. *See generally*, J. Bellace & A. Berkowitz, The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights (1979).

16. *See generally*, A. Cox, Law and the National Labor Policy (1960).

17. *See* Garner v. Teamsters Union, 346 U.S. 485, 488 (1953); Algoma Plywood Co. v. Wisconsin Bd., 336 U.S. 301, 313 (1949); Bethlehem Steel Co. v. New York Bd., 330 U.S. 767, 773 (1947); Hill v. Florida, 325 U.S. 538, 539 (1945); Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Bd., 315 U.S. 740, 748–51 (1942).

18. Garner v. Teamsters Union, 346 U.S. 485, 488 (1953). "We cannot declare pre-empted all local regulation that

federal systems remained marked in the labor law area. Diverse, conflicting, or hostile regulation could seriously undermine the uniform collective bargaining system envisaged by Congress. The Supreme Court, particularly the Warren Court,[19] filled this void with a strong preemption doctrine distinctly reflecting the Court's vision of an embracing federalism.[20]

Under traditional labor law preemption doctrine, summarized as refined in *San Diego Building Trades Council v. Garmon*,[21] the states lack jurisdiction when the activity is protected by section 7 of the NLRA[22] or prohibited by section 8.[23] "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[24]

Moreover, even where the activity is arguably, though not clearly, subject to sections 7 and 8, the state courts (and the federal courts) must defer to the exclusive primary competence of the NLRB for determination of the activity's legal status. The NLRB may ultimately never define the legal significance of particular activity, but the failure of the NLRB to so act does not give the states the power to act. "The governing consideration is that to allow the States to control activities that are

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touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 289 (1971).

19. *See generally*, Modjeska, *Labor and the Warren Court*, 8 U.C. BERKELEY INDUS. REL. L.J. 479 (1986).

20. *See* International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958): "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 by the process of litigating elucidation." Congressional power to preempt state law derives from the supremacy clause of article VI of the Constitution. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

21. 359 U.S. 236 (1959). *See Lockridge*, 403 U.S. at 276–77.

22. 29 U.S.C. §§ 151–169 (1982) (Wagner Act). The National Labor Relations Act was amended in 1947 by the Labor Management Relations Act (LMRA or Taft-Hartley Act), 29 U.S.C. §§ 141–197 (1982), and again in 1959 by the Labor-Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act), 29 U.S.C. §§ 401–531 (1982).

23. *See generally*, Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037 (1973); Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of* Garmon, 56 VA. L. REV. 1435 (1970); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980); Kirby, *Federal Preemption in Labor Relations*, 63 NW. U.L. REV. 128 (1968); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469 (1972); McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations (pts. I & II)*, 59 COLUM. L. REV. 6, 269 (1959); Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961).

24. *Garmon*, 359 U.S. at 244. "*Garmon* . . . does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations . . . ." Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

The underpinnings of *Garmon*'s broad preemptive scope were articulated in Garner v. Teamsters Union, 346 U.S. 485, 490–91 (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.

potentially subject to federal regulation involves too great a danger of conflict with national labor policy."[25]

This first line of preemption analysis is based predominately upon the primary jurisdiction of the NLRB. Central to the arguably prohibited branch of the doctrine, concerned with risk of interference with NLRB jurisdiction, are the significance of the state interest involved and whether or not the respective controversies presented to the state and federal forums are identical.[26] Central to the arguably protected branch of the doctrine are concerns not only of the NLRB's primary jurisdiction but also of federal supremacy, for there is constitutional objection to state interference with conduct actually protected by the Act.[27]

Applying the foregoing general principles over the years,[28] the Supreme Court has held that because of potential NLRA-NLRB conflict the states lack authority to award damages arising out of peaceful union organizational picketing,[29] to award damages against a union for an allegedly discriminatory refusal to refer to employment through a hiring hall,[30] to apply state antitrust laws to areas carved out for mandatory collective bargaining,[31] to impose license qualifications on union agents,[32] to apply antitrust laws to union jurisdictional disputes,[33] to require strike votes,[34] to limit public utility strikes,[35] to award damages against a union for

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25. *Garmon*, 359 U.S. at 246. "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." Bethlehem Steel Co. v. New York Bd., 330 U.S. 767, 771 (1947). "Congressional purpose is of course 'the ultimate touchstone' of preemption analysis . . . ." Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 290 (1986). "We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, 346 U.S. at 488.

26. *See generally*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

27. *Id.*

28. For broad surveys of the course of labor law preemption doctrine *see generally*, F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 37–57 (2d ed. 1986); J. GETMAN & B. POGREBIN, LABOR RELATIONS - THE BASIC PROCESSES, LAW AND PRACTICE 333–61 (1988); R. GORMAN, BASIC TEXT ON LABOR LAW - UNIONIZATION AND COLLECTIVE BARGAINING 766–86 (1976); C. MORRIS, THE DEVELOPING LABOR LAW 1504–98 (2d ed. 1983). Concerning the juridical forging and vitality of *Garmon* principles, Justice Harlan stated as follows:

> [A]lthough largely of judicial making, the labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress. 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.

Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 302 (1971).

29. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). *See* Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 75 U.S. 96 (1963) (picketing to obtain union security agreement violative of valid state right-to-work law preempted); Hattiesburg Bldg. & Trades Council v. Broome, 377 U.S. 126 (1964) (injunction against peaceful secondary picketing preempted); Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965) (injunction against peaceful secondary picketing preempted). *See also* NLRB v. Nash-Finch Co., 404 U.S. 138 (1971) (federal court may enjoin state court order regulating preempted conduct).

30. Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963). *See* Local No. 207, Int'l Ass'n of Bridge Workers Union v. Perko, 373 U.S. 701 (1963) (tort claim against union for causing discharge preempted).

31. Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). *See also* Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616 (1975).

32. Hill v. Florida, 325 U.S. 538 (1945).

33. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

34. UAW v. O'Brien, 339 U.S. 454 (1950).

35. Amalgamated Ass'n of Street Employees, Div. 998 v. Wisconsin Bd., 340 U.S. 383 (1951).

wrongful application of a union security agreement,[36] to regulate or prohibit strikes deemed contrary to the public interest,[37] to deny unemployment compensation to persons filing NLRB charges,[38] to decide representation questions,[39] to remedy unfair labor practices,[40] and to entertain a supervisor's tort suit against a union for wrongful inducement of discharge.[41]

State jurisdiction and remedies have been permitted in a variety of situations generally involving areas deemed of serious local concern and/or of only peripheral concern to the NLRA or federal labor policy, even though aspects of the challenged conduct were arguably subject to the Act.[42] State authority was upheld by the Court, for example, in cases involving trespass laws applied to peaceful picketing,[43] intentional infliction of emotional distress,[44] picketing of foreign flag vessels,[45] malicious libel,[46] violence,[47] wrongful expulsion from union membership,[48] mass

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36. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). *See* Beasley v. Food Fair, 416 U.S. 653 (1974) (supervisor's damage suit against employer under state right-to-work law).

37. Amalgamated Ass'n of Street Employees, Div. 1287 v. Missouri, 374 U.S. 74 (1963).

38. Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967). *See* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (unmeritorious retaliatory lawsuit against employees).

39. Bethlehem Steel Co. v. New York Bd., 330 U.S. 767 (1947); LaCrosse Tel. Corp. v. Wisconsin Bd., 336 U.S. 18 (1949).

40. Plankinton Packing Co. v. Wisconsin Bd., 338 U.S. 953 (1950).

41. Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669 (1983).

42. *See generally*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44, 247 (1959). In *Garmon*, Justice Frankfurter rationalized nonpreemption of certain controversies arguably subject to the NLRA:

> [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. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Id. at 243–44. *See generally*, B. MELTZER & S. HENDERSON, *supra* note 4, at 731–32:

> Further complications arose from the Court's conviction that some state interests were so strong or traditional, and the competing federal interest so "peripheral," that Congress did not "intend" to foreclose state jurisdiction. It followed that state jurisdiction was preserved and could be exercised even though the NLRB had not previously decided whether the conduct in question was protected, prohibited, or ungoverned by the federal law. Such exercises of state jurisdiction plainly involved the risk that a state would restrict "protected" activity, or would devise remedies overlapping with, duplicating, or supplementing federal remedies—consequences that the general body of preemption doctrine was designed to avoid. But under the balance struck between state and federal interests in these exceptional classes of cases, such risks became acceptable.

Id.

43. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (employer could not invoke and union could not be forced to invoke NLRB jurisdiction).

44. Farmer v. United Bhd. of Carpenters, Local 25, 426 U.S. 903 (1977).

45. American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974); Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974); Incres S.S. Co. v. International Maritime Workers Union, 372 U.S. 24 (1963).

46. Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966). *See also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). *See generally*, Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 VA. L. REV. 1 (1967).

47. UAW v. Russell, 356 U.S. 634 (1958). *See* Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). *See also* Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

48. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

picketing,[49] concerted action seeking a union security agreement violative of state right-to-work law,[50] picketing seeking representation of clearly excluded supervisors,[51] and establishment of minimum standards for funding and vesting of terminated pension plans.[52] The Court has said that "[i]n such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act . . . and the risk that the State will sanction conduct that the Act protects."[53]

Further, explained *Garmon*, even if it is determined by the NLRB that the conduct is neither protected nor prohibited by the Act, the question remains whether or not the states may regulate the conduct, for Congress left some conduct either entirely uncontrolled and/or immune from state regulation.[54] The federal regulatory scheme leaves some activities and practices to be controlled by the free play of economic forces.[55] This second line of preemption analysis, so-called *Machinists* preemption,[56] focuses the inquiry upon whether Congress intended to leave the conduct unregulated. The Court has said that this "second pre-emption doctrine . . . proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, . . . conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes . . . ."[57] State authority was thus precluded where the Court found Congress intended the areas left unregulated, such as cases involving certain peaceful secondary activity,[58] and intermittent work stoppages.[59]

Another line of preemption analysis involves section 301 of the NLRA.[60] In *Textile Workers Union v. Lincoln Mills*,[61] the Court held that section 301 not only confers federal jurisdiction over unions but also puts sanctions behind collective bargaining agreements to make them enforceable. The Court held that the substantive law to apply in section 301 suits was federal law to be fashioned through judicial inventiveness from existing national labor law and policy.[62] Compatible state law might be absorbed as part of this new federal law, but state law could no longer

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49. Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Bd., 315 U.S. 740 (1942).

50. Local No. 438, Constr. Laborers Union v. Curry, 371 U.S. 542 (1963).

51. Hanna Mining Co. v. District 2, MEBA, 382 U.S. 181 (1965). *Cf.* MEBA v. Interlake S.S. Co., 370 U.S. 173 (1962) (picketing preempted where coverage of supervisors' union under Act uncertain).

52. Malone v. White Motor Corp., 435 U.S. 497 (1978).

53. Belknap, Inc. v. Hale, 463 U.S. 491, 498–99 (1983).

54. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

55. *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Comm'n, 427 U.S. 132 (1976); Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964); Garner v. Teamsters Union, 346 U.S. 485 (1953). *See also* New York Tel. Co. v. New York Dep't of Labor, 440 U.S. 519 (1979).

56. *See supra* note 55.

57. *Belknap*, 463 U.S. at 499.

58. Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964).

59. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Comm'n, 427 U.S. 132 (1976).

60. The preemptive effect of § 301 involves considerations related to but distinct from those raised by preemption under §§ 7 or 8 or NLRB primary jurisdiction. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 n.6 (1985).

61. 353 U.S. 448 (1957).

62. *Id. See generally*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957).

remain an independent source of private rights. Federal and not state law and interpretation would govern.[63]

Analyzing the preemptive effect of section 301 in *Local 174, Teamsters v. Lucas Flour Co.*,[64] the Court stated that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute, . . . [that] . . . issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy, . . . [and that] . . . in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."[65] State rules purporting to define the meaning or scope of labor contract terms in contract suits were therefore preempted.[66] The Supreme Court has also made clear that while state or federal court jurisdiction under section 301 is not preempted simply because the conduct is also an unfair labor practice,[67] the applicable federal law or standard nevertheless controls.[68] Further, a new and evolving question concerns the extent to which section 301 may have a preemptive effect over noncontractual state rights dependent upon or intertwined with the labor contract.[69]

IV. Current Problems

A. *The* Garmon *Strand*

1. *Union Interference With Supervisor's Employment*

In *Local 926, International Union of Operating Engineers v. Jones*,[70] the Court held that a state court action brought by a supervisor for interference by a union with his contractual relationship with his employer was preempted by the NLRA.[71] The supervisor's action was predicated upon his belief that the union persuaded his employer to discharge him because he had worked some years earlier for a nonunion

63. Section 301(a) of the Taft-Hartley Act provided that suits for violation of labor-management contracts could be brought in federal courts. 29 U.S.C. § 185(a) (1982). Section 301(b) provided that unions could sue or be sued as entities in federal court. *Id.* at § 185(b). On its face § 301(a) appeared merely to be jurisdictional, while § 301(b) appeared simply to provide a procedural remedy lacking at common law. Were § 301(a) deemed jurisdictional but not also substantive, the enforceability of labor contracts would be left to the vagaries of state law. "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

64. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

65. *Id.* at 103–04.

66. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

67. Arnold v. Carpenters Dist. Council, 417 U.S. 12 (1974) (jurisdictional dispute strike); Vaca v. Sipes, 386 U.S. 171 (1967) (duty of fair representation); Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (representation questions); Smith v. Evening News Ass'n, 371 U.S. 195 (1962) (discrimination based on union activity). *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

68. Vaca v. Sipes, 386 U.S. 171 (1967); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

69. *E.g.*, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

70. 460 U.S. 669 (1983).

71. *Id.* Justice White delivered the Court's opinion, joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun and Stevens. Justice Rehnquist filed a dissenting opinion, joined by Justices Powell and O'Connor.

employer. The supervisor's section 8(b)(1)(A) and (B) unfair labor practice charges were dismissed by the NLRB Regional Director on the grounds that there was insufficient evidence that the union had caused the discharge, that there was a lack of evidence indicating the union had restrained or coerced the employer in the selection of its representative for bargaining purposes, and because the discharge was based upon the employer's changes in supervisory structure. The state court complaint claimed that the union had interfered with the contract between the supervisor and his employer, and that the union representative had maliciously coerced the employer into breaching the employment contract.

The Supreme Court found that the union's conduct was arguably prohibited by both sections 8(b)(1)(A) and (B).[72] The Court rejected the theory that dismissal of the complaint by the Regional Director for insufficient evidence of a violation satisfied federal law interests and cleared the way for a state cause of action. The Court found that the complainant had not adequately submitted his dispute to the Board, noting that he did not exhaust his administrative remedies by an appeal to the General Counsel. Since the issue was arguably within NLRB jurisdiction, *Garmon* principles and concern for uniform adjudication and enforcement of national labor policy required the issue be left to the NLRB.

> [T]he *Garmon* pre-emption doctrine not only mandates the substantive pre-emption by the federal labor law in the areas to which it applies, but also protects the exclusive jurisdiction of the Board over matters arguably within the reach of the Act. Even if Jones had satisfied ordinary primary-jurisdiction requirements, which he did not, he would not have taken adequate account of the decision of Congress to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act's purview. Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve *uniform* as well as *effective* enforcement of the national labor policy.[73]

The Court noted that the federal and state claims were the same in a fundamental respect, in that both turned on the issue of union causation of the discharge.[74] The Regional Director found that the union was not responsible, that the same issue would have been presented to the Board (which had jurisdiction) had a complaint issued, and that the issue was one that would recurringly be at the core of section 8(b)(1)(B) cases. Since Jones sought to relitigate that same question in the state courts "[t]he risk of interference with the Board's jurisdiction [was] thus obvious and substantial."[75]

Accordingly, the Court found that the supervisor's damage action for interference with contractual relationships was not merely of peripheral concern to federal labor

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72. The Court found the case substantially controlled by Local No. 207, Int'l Ass'n of Bridge Workers Union v. Perko, 373 U.S. 701 (1963), in which the Court found a supervisor's common-law tort action for interference with a contract of employment preempted because the conduct was arguably subject to §§ 7 and 8.

73. *Jones*, 460 U.S. at 680–81.

74. The Court found Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978), distinguishable since the state trespass claim there focused upon the location of the picketing whereas the unfair labor practice charges would have focused upon the objective.

75. *Jones*, 460 U.S. at 683.

policy, and also that the claim was not so deeply rooted in local law that the state's interest overrode interference with the federal labor law. The Court also noted that because employees have a protected right to exert noncoercive influence on the choice of low-level supervisors, the supervisor's complaint, had it come before the Board, would arguably have been rejected because the union's conduct was protected activity.

2. *Union Misrepresentation of Supervisor's Statutory Protection*

In *International Longshoremen's Association v. Davis*,[76] the Court held that *Garmon* preemption is a nonwaivable foreclosure of a state court's adjudicatory jurisdiction.[77] The Court held further that a discharged supervisor's state court suit against a union for fraud and misrepresentation[78] was not preempted since no showing was made that the supervisor was arguably an employee protected by the NLRA.[79] The arguably protected or prohibited precondition for *Garmon* protection requires evidence sufficient to reasonably support an NLRB interpretation of statutory coverage. "[A] party asserting pre-emption must make an affirmative showing that the activity is arguably subject to the Act. . . ."[80] Here the union made no factual or legal showing, and an independent search of the record failed to make even a colorable claim that the supervisor was arguably an employee.[81]

3. *Disqualification of Racketeers from Union Office*

In *Brown v. Hotel & Restaurant Employees International Union Local 54*,[82] the Court held that New Jersey's disqualification of racketeers from union office in the casino gambling industry was not preempted by section 7.[83] The Court rejected the

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76. 476 U.S. 380 (1986).

77. *Id.* Justice White delivered the opinion of the Court on this part, joined by Chief Justice Burger and Justices Brennan, Marshall and Blackmun. Justice Rehnquist filed an opinion dissenting from this part but concurring in the judgment, joined by Justices Powell, Stevens, and O'Connor. *Garmon* focuses upon the danger of state interference with NLRB exclusive jurisdiction, said the Court, so that "[i]f there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *Id.* at 391. The peripheral concern and local interests exceptions merely define the scope of *Garmon* preemption; they do not redefine its jurisdictional nature. Accordingly, the union did not waive its preemption claim by failing to assert it until its motion for judgment notwithstanding the verdict.

78. *Id.* at 380. The supervisor alleged that contrary to the union's protective assurances he was discharged for his organizational activities for a supervisory unit.

79. *Id.* Justice White delivered the opinion of the Court on this part, joined by all Members except Justice Blackmun who dissented from this part and the judgment.

80. *Id.* at 399. Neither conclusory assertions of preemption, nor lack of final NLRB determination of the status of the conduct, meet the burden of establishing an arguable case. The burden is affirmatively evidentiary.

81. *Id.* at 398. Indeed, the record revealed that an NLRB Regional Director declined to issue a complaint concerning the discharge of a co-supervisor, having found the individual was a statutory supervisor under section 2(11), and no evidence otherwise linked the discharge to protected activity. The Court noted that determinations of supervisory status depend upon actual duties.

In dissent, Justice Blackmun argued that the inherently fact-specific and difficult nature of supervisory determinations, and the need for uniformity of interpretation, require preemption until the supervisory status of the individuals in question is definitively settled by the NLRB. By evaluating the sufficiency of the evidence the court will usurp the NLRB function. In Justice Blackmun's view, the "new standard" (*Id.* at 408 n.6) represented an indirect continuation of Justice White's alleged long-standing effort to eliminate the arguably protected branch of *Garmon* preemption doctrine. *Id.* at 406 n.3.

82. 468 U.S. 491 (1984).

83. *Id.* Justice O'Connor delivered the opinion of the Court, joined by Chief Justice Burger and Justices Blackmun

contention that the state disqualification conflicted with the section 7 right to choose a bargaining representative.[84] In the Court's view, subsequent Landrum-Griffin Act[85] disqualification of certain convicted felons from union office[86] clearly showed that Congress did not consider the section 7 right of officer selection absolute.[87] Further, that Act expressly disclaimed preemption of state regulation of union officer responsibility.[88] Moreover, congressional approval of an interstate compact between New York and New Jersey to combat waterfront labor union corruption reflected the compatibility of section 7 and certain state disqualification.[89] Accordingly, the Court found no actual conflict and thus no preemption.[90]

4. *Contract Debarment of NLRA Violators*

In *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*,[91] the Court held that a Wisconsin statute debarring certain repeat NLRA violators from doing business with the state[92] was preempted by the NLRA.[93] Because the debarment statute served clearly as a supplemental sanction for enforcement of the NLRA, it conflicted with the integrated and comprehensive system of regulation administered by the NLRB.[94] "[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."[95]

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and Rehnquist. Justice White filed a dissenting opinion, joined by Jusices Powell and Stevens. Justices Brennan and Marshall did not participate.

84. *Id.* Since actual federal conflict with consequent state-federal substantive conflict, and not arguable NLRB primary jurisdiction, was asserted, the balancing test used for the local interests exception to *Garmon* preemption doctrine was deemed inapplicable. The presumption of preemption applicable to the NLRB primary jurisdiction rationale admits a balancing of state interests because "appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters." *Id.* at 503. "If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." *Id.* Where such actual state-federal substantive conflict exists preemption follows without balancing for federal law is paramount.

85. The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401–531 (1982).

86. 29 U.S.C. § 504(a) (1982).

87. *Brown*, 468 U.S. at 504. Thus, Hill v. Florida, 325 U.S. 538 (1945), was therefore deemed inapposite.

88. 29 U.S.C. § 603(a) (1982) (repealed 1982). *See* De Veau v. Braisted, 363 U.S. 144, 157 (1960).

89. *See De Veau*, 363 U.S. at 158.

90. The Court emphasized that its conclusion did not implicate the § 7 right to select a union but only the subsidiary right to select union officials. Nor did the Court reach the validity of the sanctions imposed to effect removal of disqualified officials—dues collection and pension and welfare fund administration prohibitions.

91. 475 U.S. 282 (1986).

92. *Id.* at 283–84 n.1. The statute prohibited state purchases from persons or firms found by court-enforced NLRB orders to have violated the NLRA in three separate cases within five years. Similar state contract disqualification statutes had been passed by Connecticut, Maryland, Michigan, and Ohio.

93. *Id.* at 282. Justice Blackmun delivered the opinion for a unanimous Court.

94. *Id.* The Court noted that while some controversy exists over the scope of NLRA preemption, the general rule articulated in *Garmon* was reasonably settled "that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* at 286.

95. *Id.* The Court observed that whether the statute was predicated upon the state's spending or police powers, the unacceptable potential for conflict existed. As stated in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 292 (1971), "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."

While some state spending policies touching peripheral NLRA concerns, fundamental local interests, or areas intentionally left by Congress to the states might be permissible, Wisconsin's debarment statute entailed none of these situations. The Court stated that:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement restraints 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.[96]

5. *Employer's Retaliatory Lawsuit*

In *Bill Johnson's Restaurants, Inc. v. NLRB*,[97] the Court held that the NLRB could not enjoin an employer's prosecution of a state court action for libel and other torts, against employees who had engaged in organizational activity and picketing and filed NLRB charges,[98] absent both retaliatory motive and lack of reasonable basis.[99] While an employer's lawsuit undoubtedly can be a powerful instrument of coercion or retaliation against protected section 7 rights, "weighty countervailing considerations,"[100] such as the first amendment right of access to the courts[101] and compelling state interests in providing civil remedies for "deeply rooted"[102] local interests, militate against enjoining a well-founded but retaliatory lawsuit.[103] Since baseless litigation triggers neither first amendment nor state interest considerations, however, "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA."[104]

In making the reasonable basis inquiry, the Court said that first amendment and state interest concerns require that the Board not intrude upon a litigant's right to have

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96. Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282, 291 (1986).

97. 461 U.S. 731 (1983). *See generally*, Wilson, *Retaliatory Lawsuits, the NLRA, and the First Amendment: A Proposed Accommodation of Competing Interests*, 38 VAND. L. REV. 1235 (1985).

98. Following her discharge, a senior employee and others picketed the employer with signs claiming the employer was unfair, and distributed leaflets accusing management of engaging in sexual advances towards female employees and maintaining a filthy women's restroom. The employer filed a state court action alleging mass picketing, blocking of ingress and egress, creating a threat of public safety, and libel. Unfair labor practice complaints based on the discharge and lawsuit were consolidated for hearing. Based upon the record, including credibility resolutions, the ALJ, affirmed by the Board, concluded that the obstruction charges were unfounded, that the libel count was baseless because the leaflet statements were true, and that the suit was therefore retaliatory and violative of §§ 8(a)(1) and (4). The Board's position, according to the Court, was that retaliatory motive, not lack of merit, to the employer's suit was the *only* essential element. *Bill Johnson's Restaurants*, 461 U.S. at 733–34.

99. Justice White delivered the opinion for a unanimous Court. Justice Brennan filed a concurring opinion. *Id.* at 733, 750.

100. *Id.* at 741.

101. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Id.* at 741.

102. *Id.*

103. "[A]lthough it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749.

104. *Id.* at 744.

factual disputes resolved by jury and legal questions by the state judiciary.[105] Accordingly, if the Board's reasonable basis inquiry reveals that genuine material, factual, or legal issues exist, the Board must await state court adjudication of the merits of the state suit.[106]

B. *The* Machinists *Strand*

1. *Damage Actions by Displaced Strike Replacements*

In *Belknap, Inc. v. Hale*,[107] the Court held that a state court misrepresentation and breach-of-contract action against the employer by displaced strike replacements was not preempted.[108] During an economic strike, arguably converted to an unfair labor practice strike, the employer hired strike replacements as "regular full time permanent replacement[s]"[109] and thereafter reassured them that they would continue as "permanent replacement employees" when the strike ended.[110] Pursuant to a strike settlement with the union, the employer agreed to reinstate the strikers and laid off the replacements.[111] The displaced replacements sued in state court for misrepresentation and breach-of-contract, seeking compensatory and punitive damages. The Court found that neither the *Machinists* nor *Garmon* preemption doctrines preempted the suit.

The Court rejected the argument, predicated upon *Machinists*, that the state action was an impermissible regulation of and burden upon the employer's right to hire permanent replacements. While federal law may license free use of economic weapons by the parties against each other, the Court said that it does not authorize the employer or union to injure innocent third parties in disregard of normal rules of law governing those relationships. While federal law may also favor settlement of labor disputes, this does not relieve an employer from liability for repeated assurances of permanent employment or otherwise actionable misrepresentations to obtain such replacements. The rights and interests of the replacements may not be so ignored.

Paramount federal law may well permit an employer to terminate permanent replacements if a strike settlement or unfair labor practice strike determination occurs, and thereby render an offer of permanent employment necessarily conditional

105. *Id.* at 748. The Court found that the ALJ erred in weighing the evidence and making credibility judgments. The inquiry should have been confined to whether the factual issues were genuine and material, *i.e.*, genuine issues whether the leaflet statements were knowingly false. *Id.*

106. State judgment for the employer entitles the employer to prevail before the Board, "for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 747. An adverse state judgment, withdrawal, or other showing of lack of merit, entitles the Board to proceed to consider unmeritoriousness in determining retaliatory motive and to reimburse wrongfully sued employees for attorney's fees and other expenses.

107. 463 U.S. 491 (1983).

108. Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Rehnquist, Stevens and O'Connor. Justice Blackmun filed a concurring opinion. Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Powell. *Id.* at 493, 513, 523.

109. *Id.* at 495.

110. *Id.*

111. In light of the strike settlement, the NLRB Regional Director agreed to withdrawal and dismissal of unfair labor practice charges and complaints against both parties, including an alleged §§ 8(a)(1) and (5) unilateral wage increase. *Id.* at 496.

and nonpermanent to some degree. These qualifications do not destroy the substantially permanent nature of the replacement arrangement, however, nor permit the employer to deceive replacements concerning such inherent or implied conditions. The Court stated:

> An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike.[112]

By making its offer to replacements conditional, the employer may avoid conflicting obligations to strikers and replacements, and thereby limit its risk of liability to displaced replacements. Since the employer can protect itself against liability, there is no adverse impact on settlement potential.[113]

Nor did *Garmon* doctrine preempt the action, for the state court and NLRB controversies were not identical.[114] The questions of whether the employer's unilateral wage increase created an unfair labor practice strike, and rendered the offers of permanent employment unfair labor practices, concerned rights of strikers. The question of misrepresentation concerned misrepresentations to replacements. The misrepresentation action was thus "of no more than peripheral concern to the Board and federal law [whereas] . . . Kentucky surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm."[115] The Court found that the state's interests clearly outweighed any potential interference with the Board's function.[116] Similarly, the state damage action for breach of contract did not intrude upon NLRB jurisdiction or federal law interests in ensuring striker reinstatement under the NLRA. In short, NLRB-NLRA and state interests were discrete concerns.

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112. *Id.* at 503. Absent a strike settlement or unfair labor practice determination necessitating displacement, the promise of permanency has great significance to the replacements. That promise constitutes a legitimate justification to refuse reinstatement for economic strikers under NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967). The Court noted further:

> That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional. As the Board recognizes . . . although respondents were hired on a permanent basis, they were subject to discharge in the event of a business slowdown. Had Belknap not settled and no unfair labor practices been filed, surely it would have been free to retain respondents and obligated to do so by the terms of its promises to them. The result should be the same if Belknap had promised to retain them if it did not settle with the union and if it were not ordered to reinstate strikers.

Belknap, 463 U.S. at 504, n.8.

113. Any dilemma created by unconditional commitments to replacements, noted the Court, is therefore of the employer's own making. *See* W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) (employer bound by conflicting obligations assumed under EEOC conciliation agreement and labor contract).

114. In the Court's view, Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978), emphasized that a critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board. Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983).

115. *Id.* at 511.

116. The Court noted that the strikers could not obtain reinstatement or other relief through the state misrepresentation action, and the replacements could obtain no damages or other relief before the NLRB. *Id.* at 512.

2. *Minimum Employment Standards and Benefits*

In *Metropolitan Life Insurance Co. v. Massachusetts*,[117] the Court held that state-mandated minimum mental health benefit laws[118] were not preempted by the NLRA.[119] Applying a *Machinists* preemption analysis, the Court found that while mandated-benefit laws have an impact upon mandatory subjects of collective bargaining under the NLRA, Congress did not intend to preclude the states from establishing minimum employment standards.[120] "To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety."[121]

The NLRA was concerned with inequality of bargaining power and depressed wage rates, said the Court, and compatible state protective labor legislation raises no conflict. Such minimum standards impact equally on union and nonunion employees, neither encourage nor discourage collective bargaining processes, have little effect upon self-organization, and focus upon individual, not collective, interests.[122] Viewed against the myriad of state laws that had established minimum labor standards prior to enactment of the NLRA, "[f]ederal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act."[123] Accordingly, "[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act."[124]

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117. 471 U.S. 724 (1985).

118. The state law required any general health insurance policy providing hospital and surgical coverage, or benefit plan with such coverage, to furnish minimum mental health coverage. *Id.* at 727.

119. Justice Blackmun delivered the opinion for a unanimous Court. Justice Powell did not participate. *Id.* at 727, 758. The Court also held that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (1982), did not preempt such laws. *Id.* at 733.

120. The origins of *Machinists* preemption doctrine were summarized as follows in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749 (1985):

> The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act . . . . Such action falls outside the reach of *Garmon* pre-emption.

See also, New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 529–31 (1979) (plurality opinion).

121. *Metropolitan Life Ins. Co.*, 471 U.S. at 756. The Court noted that the states traditionally have possessed broad authority under their police powers to regulate the employment relationship, *e.g.*, child labor, minimum and other wages, occupational health and safety, unemployment and workers compensation, holidays, and poll or jury duty. *Id.* The Court also noted the settled applicability of federal minimal labor standards to the unionized sector. *Id.* at 757. *See, e.g.*, Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737, 739 (1981) (wages). *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (equal employment).

122. No NLRA purpose would be served by facilitating collective bargaining exemption from state labor standards. The Court commented that "[i]t would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." *Metropolitan Life Ins. Co.*, 471 U.S. at 756.

123. *Id.*

124. *Id.* at 757. *See* Malone v. White Motor Corp., 435 U.S. 497 (1978) (state minimum funding and vesting levels for employee pension plans not preempted).

3. *Requirement of Plant Closing Severance Pay*

In *Fort Halifax Packing Co. v. Coyne*,[125] the Court held that a Maine statute requiring employers upon plant closing to make a one-time severance payment to employees[126] not contractually entitled to severance pay was not preempted by the NLRA.[127] Applying a *Machinists* preemption analysis, the Court found the statute a valid and unexceptional exercise of traditional state police powers over health and safety (*i.e.*, establishment of minimum labor standards) that did not impermissibly intrude upon the federal enclave of free collective bargaining.[128] The NLRA does not preempt all state regulatory power over subjects of bargaining.[129] Nonintrusiveness was enhanced by the statutory exception for negotiated severance. Since *Metropolitan Life Insurance Co. v. Massachusetts*[130] upheld a state statute mandating minimum mental health benefits that permitted no collective bargaining, "surely one that permits such bargaining cannot be preempted."[131]

4. *City Franchise Conditioned on Strike Settlement*

In *Golden State Transit Corp. v. City of Los Angeles*,[132] the Court held that the city's conditioned renewal of a taxicab franchise upon a strike settlement and subsequent refusal to renew the franchise because of strike continuation[133] was preempted by the NLRA.[134] Under *Machinists* preemption doctrine, Congress intentionally prohibited some forms of economic pressure and left others unregulated; states may not impose additional restrictions upon permissible economic tactics such as the right to strike or the right to withstand the strike.[135] The NLRA essentially leaves the bargaining process to the parties, and imposes no time limits on bargaining

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125. 482 U.S. 1 (1987).

126. The statute obligated employers with over 100 employees to provide one week's pay per year of service upon plant closing or relocation beyond 100 miles, unless the employee accepted employment at the new location, was covered by an express contract providing for severance pay, or had less than three years seniority. *Id.* at 4.

127. *Id.* at 6. Justice Brennan delivered the opinion of the Court, joined by Justices Marshall, Blackmun, Powell, and Stevens. *Id.* at 3. The Court also held that the statute was not preempted by ERISA. *Id.* at 23. Justice White filed a dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.*

128. *Garmon* analysis was inapplicable, noted the Court, for the statute did not purport to regulate any conduct subject to NLRB regulation. *Id.* at 11–12.

129. The Court stated that:

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations.

Id. at 21.

130. 471 U.S. 724 (1985).

131. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987).

132. 475 U.S. 608 (1986).

133. During pendency of the employer's taxicab franchise renewal application, the employer's drivers struck over labor contract negotiations. The city conditioned franchise renewal upon settlement of the labor dispute prior to franchise expiration the following week, and, failing dispute resolution, the franchise expired. *Id.* at 610–11.

134. Justice Blackmun delivered the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, White, Marshall, Powell, Stevens and O'Connor. *Id.* at 609. Justice Rehnquist filed a dissenting opinion. *Id.* at 620.

135. Having found that the city directly interfered with a central NLRA concern, the bargaining process, the Court did not consider whether the peripheral concern exception to *Garmon* analysis applies to *Machinists* analysis. The employer relied upon *Machinists*, not *Garmon*. *Id.* at 617–19.

negotiations or the economic struggle. "The parties' resort to economic pressure was a legitimate part of their collective-bargaining process . . . [b]ut the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help."[136]

5. *Unemployment Compensation Disqualification for Financing Strike*

In *Baker v. General Motors Corp.*,[137] the Court held that state disqualification from unemployment compensation for employees who financed a strike by other than regular union dues, the strike causing their unemployment,[138] was not preempted by the NLRA.[139] Under the Social Security Act of 1935, Congress left to the states the policy choice of paying or denying unemployment compensation to strikers.[140] The distinction between voluntary and involuntary unemployment was the congressionally intended key to eligibility. While financing a strike may entail associational and bargaining rights protected by section 7 of the NLRA against employer retaliation, the voluntary nature of resultant unemployment justifies state determination of the compensation question.[141] Emphasizing the significance of voluntary and involuntary unemployment under the Social Security Act, the Court stated that:

> [A]n employee's decision to participate in a strike, either directly or by financing it, is not only an obvious example of causing one's own unemployment—it is one that furthers the federal policy of free collective bargaining regardless of whether or not a State provides compensation for employees who are furloughed as a result of the labor dispute.[142]

C. *The* Lucas Flour *Strand*

1. *Bad Faith Handling of Insurance Claim*

In *Allis-Chalmers Corp. v. Lueck*,[143] the Court held that an employee's state tort action against an employer and insurer for bad faith handling of a claim under a

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136. *Id.* at 615. "Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations." *Id.* at 619. That the city purported to exercise a traditional municipal function of regulating transportation, not labor, did not legitimize the city's impermissible intrusion into the substantive aspects of the bargaining process and consequent disruption of the balance of power designed by Congress.

137. 478 U.S. 621 (1986).

138. The disqualified employees had paid emergency dues to augment the union's general strike insurance fund during national negotiations, and were subsequently unemployed by a temporary curtailment of operations because of local union strikes at other plants. As construed by the Michigan Supreme Court, the financing disqualification required a meaningful connection between the financing and the strikes, so that essentially only strikers were disqualified. Relying on the purpose, amount, and timing of the emergency dues, the court found the requisite causal connection in that the dues actually supported the strikes, the strikes were foreseeable when the dues were collected, and the resultant unemployment was foreseeable. By such direct involvement in the labor dispute the employees were voluntarily unemployed. *Id.* at 623–28.

139. Justice Stevens delivered the opinion of the Court, joined by Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor. Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Blackmun. *Id.* at 622, 638.

140. *See* New York Tel. Co. v. New York Dep't of Labor, 440 U.S. 519 (1979).

141. Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967), was deemed distinguishable since the impermissible compensation disqualification of an employee discharged for filing an NLRB charge involved involuntary unemployment. *Id.* at 636–37.

142. *Baker*, 478 U.S. at 638. The Court specifically disclaimed consideration of a disqualification based on payment of regular union dues. *Id.*

143. 471 U.S. 202 (1985).

nonoccupational disability insurance plan incorporated in a collective bargaining agreement[144] was preempted by federal labor contract law under section 301.[145] The Wisconsin Supreme Court viewed the tort claim as independent of any breach of contract claim, since the Wisconsin tort of bad faith handling of an insurance claim was predicated not upon an express contract provision, but rather on the implied covenant of good faith and fair dealing found in every contract. The Wisconsin court assumed that the labor contract covered only the payment but not the manner of payment of insurance benefits. The United States Supreme Court rejected that analysis and assumption, and found that the bad faith claim was "rooted in contract."[146]

Since the labor contract incorporated a special grievance-arbitration procedure covering "any insurance-related issues that may arise,"[147] the Court said that federal, not state law required that an arbitrator decide whether the employer breached any implied contract provision concerning timely payment of benefits.[148] The difference between, or extent of, any implied or express duties "depends upon the terms of the agreement between the parties, [and] both are tightly bound with questions of contract interpretation that must be left to federal law."[149]

Because the state tort law did not confer "nonnegotiable state-law rights . . . independent of any right established by contract [but rather was] inextricably intertwined with consideration of the terms of the labor contract,"[150] the state law was preempted by section 301. Section 301 preemption was further necessitated to preserve the centrality and effectiveness of arbitration and to preclude bypassing the arbitrator. Exhaustion of the grievance-arbitration procedure would have been a condition precedent to a section 301 contract claim. The court stated that "[p]erhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the

144. The employee claimed that his disability payments were arbitrarily interrupted and that he was subjected to excessive medical examinations. *Id.* at 205.

145. Justice Blackmun delivered the opinion for a unanimous Court. Justice Powell did not participate. *Id.* at 203, 221.

146. *Id.* at 220. The preemptive effect of § 301 extends to questions concerning contract meaning and consequences of breach whether a state action is characterized as contract or tort. "Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Id.* at 211.

147. *Id.* at 204.

148. "The assumption that the labor contract creates no implied rights is not one that state law may make." *Id.* at 215.

149. *Id.* at 216. The Court stated further that "[b]ecause the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218.

150. *Id.* at 213. Distinguishing preemption based upon actual federal protection from that based upon NLRB primary jurisdiction, the Court noted as follows:

> So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the commerce clause, has provided that federal law must prevail.

Id. at 214 n.9.

grievance procedures established in the bargaining agreement."[151] Preemption is required to preserve the parties' federal right to make a neutral arbitrator their contract interpreter.[152]

The Court emphasized that not every state action related to a labor contract is preempted by section 301, and that "[t]he full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."[153] Where resolution of the state claim is "substantially dependent upon the terms of . . . a labor contract,"[154] however, the claim must be brought under section 301 or dismissed as preempted.

2. *Negligent Union Failure to Provide Safe Workplace*

In *International Brotherhood of Electrical Workers v. Hechler*,[155] the Court held that an injured employee's state court negligence action against a union, predicated upon an alleged duty of care arising from the labor contract's safety and working requirement provisions,[156] was preempted by section 301 of the NLRA.[157] Ascertainment of tort liability turned upon the existence, nature, and scope of any implied duty of care imposed upon the union by the contract. Tort liability was therefore inextricably intertwined with consideration of the contract terms, and was thus not sufficiently independent of the contract to withstand the preemptive force of section 301.[158] Since questions of contract interpretation underlay the negligence determination, "[t]he need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action."[159]

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151. *Id.* at 219.

152. The Court stated that:

> 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. Claims involving vacation or overtime pay . . . —in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . . as well as eviscerate a central tenet of federal labor-contract law under § 301, that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 219–20.

153. *Id.* at 220.

154. *Id.*

155. 481 U.S. 851 (1987).

156. *Id.* at 859–62. The gravamen of the complaint was that the union breached a duty of care to provide the employee a safe workplace, which duty arose from contracts between the employer and union to which the employee was a third-party beneficiary. The complaint alleged the union was negligent in allowing the employee to be assigned to a dangerous job beyond her capacities. *Id.* at 853.

157. Justice Blackmun delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Powell, O'Connor and Scalia. Justice Stevens filed an opinion concurring in the preemption determination. *Id.* at 852, 865.

158. The parties disagreed whether the action should be characterized as a duty of fair representation or independent § 301 claim, and the Court remanded for consideration of the applicable statute of limitations. *Id.* at 864–65. Justice Stevens viewed the matter as a clearly time-barred fair representation claim, and dissented from the remand. *Id.* at 865.

159. *Id.* at 862.

3. *Wrongful Discharge Action Upon Individual Contract*

In *Caterpillar, Inc. v. Williams*,[160] the Court held that terminated employees' state court breach of contract action, based upon individual employment contracts made while the employees worked in non-bargaining unit managerial and other salaried positions,[161] was not preempted by section 301 and therefore not removable to federal court.[162] Since the claims were neither founded directly or indirectly on the labor contract, nor substantially dependent on analysis or interpretation of the labor contract, nor concerned with the relationship between the individual and labor contracts, section 301 was not preemptive.[163] The fact that the employees may have returned to the bargaining unit and also possessed substantial rights under the labor contract did not preclude their choice to pursue independent claims based on the individual employment contracts.[164] "[A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement."[165]

4. *Retaliatory Discharge Under Workers' Compensation Laws*

In *Lingle v. Norge Division of Magic Chef, Inc.*,[166] the Court held that a state court tort action for retaliatory discharge for asserting rights under workers' compensation laws,[167] by an employee covered by just cause provisions of a labor contract,[168] was not preempted by section 301.[169] Since the purely factual questions of conduct and motivation in the state action neither entailed court interpretation of the labor contract terms nor turned upon the meaning thereof, the state-law remedy

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160. 482 U.S. 386 (1987).

161. The employees, transferred out of the bargaining unit for periods ranging from three to fifteen years and thereafter returned, alleged that when the plant closed they were laid off contrary to oral and written assurances, made while serving as managers or weekly salaried employees, of definite and lasting employment at some company facility. *Id.* at 388–91.

162. Justice Brennan delivered the opinion for a unanimous Court. *Id.* at 388.

163. The Court noted that "[s]ection 301 says nothing about the content or validity of individual employment contracts." *Id.* at 394. Nor did J. I. Case Co. v. NLRB, 321 U.S. 332 (1944), hold that all individual employment contracts or state claims based thereon are inevitably superseded, subsumed or eliminated by a collective bargaining agreement covering the employee. *Id.* at 395–96.

164. The Court noted that neither § 301 nor any other federal law preempts all employment-related matters concerning unionized employees or tangentially involving a labor contract. "Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by § 301." *Id.* at 397 n.10. Since the individual claims were outside the labor contract's grievance-arbitration process, national labor policy favoring arbitration was not implicated.

165. *Id.* at 396. The removal analysis focused upon whether the employees' claim arose under federal law, and potential employer defenses, based on *Machinists* or *Garmon* preemption or on interpretation of the labor contract, did not transform the action into a federal claim. That the claims might ultimately prove preempted or otherwise barred by federal law did not make them removable. *Id.* at 398–99.

166. 108 S. Ct. 1877 (1988) *on remand*, 823 F.2d 422 (7th Cir. 1988).

167. Illinois recognized the tort of retaliatory discharge for filing a workers' compensation claim, and provided for compensatory and punitive damages. *Id.* at 1881. The employer discharged the employee for allegedly filing a false claim. *Id.* at 1879.

168. The employee also filed a grievance under the labor contract and ultimately prevailed before an arbitrator who ordered reinstatement and backpay. *Id.* at 1879.

169. *Id.* at 1883. Justice Stevens delivered the opinion for a unanimous Court. *Id.* at 1878.

was independent of the labor contract.[170] The Court stated that "the sense of 'independent' that matters for § 301 preemption purposes [is that] resolution of the state-law claim does not require construing the collective-bargaining agreement."[171]

While the state-law and arbitrator-contract actions might implicate the same factual analyses, such parallelism does not make the state-law analysis dependent on the contractual analysis. For section 301 preemption purposes, the state claim is independent if it can be resolved without interpreting the labor contract.[172] Given the requisite independence, the state and arbitral determinations need not comport.

V. REFLECTIONS

Upon conception of this essay my thought was that labor preemption doctrine was in subtle transition toward decentralization and nonpreemption. Several cases in the late 1970s suggested increased tolerance of and deference toward state regulation,[173] and concomitant erosion of traditional preemption doctrine.[174] Careful reading, analysis, and reflection of the cases of the last decade call my perception into question. As Holmes reminds, "I hardly think it advisable to shape general theory from the exception. . . ."[175]

At the same time, however, I also disagree with the Chief Justice's concern, related at the outset of the essay, over a burgeoning labor preemption doctrine. In my view, the decisions reflect the same sensitive analysis of conflicting state-federal interests that has traditionally marked labor, if not all, preemption adjudication.[176]

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170. "[I]nterpretation of collective-bargaining agreements remains firmly in the arbitral realm . . . ." *Id.* at 1884.

171. *Id.* at 1882. *Lucas Flour*, *Allis-Chalmers*, and *Hechler* were distinguishable, since relevant principles of state law necessitated construction of the labor contract.

172. The Court observed that:

> [W]hile there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, [*i.e.*, *Garmon* or *Machinists* preemption] § 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.

Id. at 1883.

173. *See* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) (payment of unemployment compensation to strikers); Sears, Roebuck & Co. v. San Diego Carpenters, 436 U.S. 180 (1978) (trespass law applied to peaceful picketing arguably protected and prohibited); Malone v. White Motor Corp., 435 U.S. 497 (1978) (regulation of negotiated pension plan).

174. *See generally* A. COX, D. BOK & R. GORMAN, *supra* note 4 ("retreat from a broad preemption philosophy"); J. GETMAN & B. POGREBIN, *supra* note 28, at 345 ("The area of trespass represents the first sign of judicial retreat from an absolutist approach to preemption issues where protected activity is concerned."); W. OBERER, K. HANSLOWE, J. ANDERSEN & T. HEINSZ, CASES AND MATERIALS ON LABOR LAW—COLLECTIVE BARGAINING IN A FREE SOCIETY 371 (1986) ("the seeming (*and* confusing) erosion of the doctrine"); C. SUMMERS, H. WELLINGTON & A. HYDE, CASES AND MATERIALS ON LABOR LAW 1068 (2d ed. 1982) ("How much is left of the 'arguably prohibited' category?"); Modjeska, *The Supreme Court and the Diversification of National Labor Policy*, 12 U.C. DAVIS L. REV. 37, 37, 58 (1979) ("In three decisions . . . [*Sears*, *Malone*, *New York Tel.*] the Court opened the administration of national labor relations policy to the states. . . . [The] decisions suggest a trend toward decentralization and diversification.").

175. O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 176 (1920).

176. One is reminded of the words of *Garmon*'s author, Justice Frankfurter, written over forty years ago in Hill v. Florida, 325 U.S. 538, 552 (1945) (dissenting opinion), which offer an apt description of the Court's approach to labor preemption over the last decade:

> A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves no doubt that State action has not been set aside on mere generalities

Despite episodic shadings of language and emphasis, the essence of traditional preemption analysis—real conflict—appears extant, if not vibrant. Thus, under traditional *Garmon* principles used in *Jones*, litigation by the discharged supervisor in state court of the identical union-causation issue subject to NLRB jurisdiction raised substantial risk of conflict with that NLRB jurisdiction. The traditional considerations of uniformity and effective enforcement of national labor policy that underlie NLRB primary jurisdiction or exclusivity thus prevailed absent overriding state interests. Similarly, in *Gould*, Wisconsin's attempt to rewrite the NLRA through its recidivist debarment statute was not only in patent conflict with the NLRA remedial scheme but also unsupported by legitimate state needs.

Conversely, by underscoring the touchstone of real and not imaginary conflict, *Davis* required at least a colorable claim of NLRB exclusivity before divestment of state court adjudicatory jurisdiction over the discharged supervisor's fraud suit against the union. *Brown* permitted state racketeering regulation that was not in actual conflict with the NLRA and implicitly approved by Congress. *Belknap* upheld the displaced strike replacements' misrepresentation and breach-of-contract action where the state and federal controversies were not identical, the misrepresentation action had no NLRB concern, and the state's interests were substantial. And *Bill Johnson*'s tolerance of well-founded but retaliatory lawsuits reemphasized the Court's solicitude for "deeply rooted" local interests.

Under traditional *Machinists* principles, the Court in *Belknap* upheld the displaced strike replacements' damage action since federal solicitude for unregulated disputes did not necessitate tolerance of innocent third-party injury. Similarly, the Court's acceptance of minimum mental-health benefits in *Metropolitan Life* and severance pay in *Fort Halifax* reveal that it is too late in the decisional day to strike down state protective labor legislation merely because of an impact upon collective bargaining. Contrasting the nonpreemption of *General Motors'* unemployment compensation disqualification of strikers who finance the strike with the preemption of *Golden State*'s taxicab franchise conditioned on strike settlement emphasizes the classic focus upon congressional intention and real conflict. Voluntary strike participation furthers free collective bargaining while burdensome restrictions on permissible economic tactics do not.

The evolving *Lucas Flour* strand continues traditional analytic focus upon real conflict. In *Allis-Chalmers*, preemption was required of a tort action for bad faith handling of an insurance claim "rooted" in the labor contract to avoid conflict with federal labor law generally and the primary jurisdiction of the arbitrator particularly.

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about Congress having "occupied the field," or on the basis of loose talk instead of demonstrations about "conflict" between State and federal action. We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

Constitutional exercises of state authority were not to be displaced "cavalierly, on the basis of loose inference and dogmatic assertion," continued Justice Frankfurter, but were to be "examined with painstaking care . . . in order to ascertain whether, in their practical operation, they ran counter to the scheme as conceived by Congress and impinged upon its administration." *Id.* at 554.

Similarly, the negligence action against the union for failure to provide a safe workplace in *Hechler* was preempted since the claim was inextricably intertwined with labor contract terms. Conversely, no real conflict existed, and preemption was not required, over the wrongful discharge action based upon an individual contract in *Caterpillar*, since the claim was based upon rights independent of the labor contract. Nor was preemption required in *Lingle*, for the workers' compensation retaliatory discharge claim did not depend upon construction of the labor contract and was thus independent of it.

I submit that the labor milieu, not preemption analysis, is in transition. The limitations, if not failures, of collective bargaining,[177] declining unionism,[178] the individual and civil rights explosion,[179] erosion of the employment-at-will doctrine,[180] and the concomitant and resultant proliferation of state (legislative and judicial) protective labor and employment law,[181] underlie the myriad preemption

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177. Collective bargaining has obviously had extensive qualitative radiations. For example, 1988 median earnings for full-time union members were $480 weekly, for nonunion members $356. 1 Lab. Rel. Rep. (BNA) 130:144 (February 6, 1989). Quantitatively, however, collective bargaining has not achieved its "vital national purpose." (Phelps-Dodge Corp. v. NLRB, 313 U.S. 177, 182 (1941)). Union membership comprises only 16.8 percent of the workforce. 1 Lab. Rel. Rep. (BNA) 130:143 (February 6, 1989). Private sector membership was higher in several industries, *i.e.*, transportation and public utilities, 33 percent; manufacturing, 22 percent; construction, 21 percent; and mining, 19 percent. *Id.* at 144. Professor Weiler makes the following observation: "Contemporary American labor law more resembles and elegant tombstone for a dying institution. While administrators, judges, lawyers, and scholars busy themselves with sophisticated jurisprudential refinements of the legal framework for collective bargaining, the fraction of the work force actually engaged in collective bargaining is steadily declining. . . . No feature of contemporary labor-management relations in the United States is more significant that the diminishing reach of collective bargaining." Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769, 1771 (1983).

178. Labor's ostensible decline is attributed to various factors including a changing workforce, evolution of a service and distribution economy, domestic and global competition, management antiunionism, union apathy and organizational ineptness, NLRB and other governmental bias, and a resurgent spirit of individualism. *See generally* Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633; Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); Modjeska, *Reflections on the House of Labor*, 41 VAND. L. REV. 1013 (1988); Raskin, *Organized Labor—A Movement in Search of a Mission: Implications for Employers and Unions*, 3 THE LABOR LAWYER 41 (1987).

179. *See* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW v–vi (2d ed. 1988):

> Recent statistics illustrate the magnitude of the employment discrimination litigation explosion in recent years. During the fiscal year ending June 30, 1987, 20,128 civil rights actions were commenced in the federal district courts, of which 8,986 were employment cases. During that same period, 3,926 civil rights cases arose in the federal courts of appeals from the district courts, 1,393 of which were employment cases. Further, as of June 30, 1987, 2,764 governmental civil rights cases were pending in the federal district courts, of which 1,759 were employment cases. Also as of that date, 23,352 private civil rights cases were pending in the federal district courts, of which 10,500 were employment cases. Further, during fiscal 1987, the Equal Employment Opportunity Commission (EEOC) received 65,844 charges of unlawful employment practices. An additional 49,692 charges were received by the 81 state and local fair employment practice agencies pursuant to worksharing agreements whereby these agencies process charges for the EEOC, for a total of 115,536 charges during fiscal 1987.

Id. Professor Getman and Attorney Pogrebin have observed that "[t]he interests in individual rights sparked by the Civil Rights Acts and the struggle of minorities and women to enter the workplace may have shifted the focus in labor-management law from collective rights to individual rights." J. GETMAN & B. POGREBIN, *supra* note 28, at 358.

180. *See generally* A. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE (1987); W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES (1985); L. LARSON, UNJUST DISMISSAL (1988); H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE (2d ed. 1987).

181. Professor Summers comments as follows on the failures and limitations of collective bargaining, and the concomitant expansion of legal regulation:

> Why collective bargaining has not been more widely extended is, for present purposes, unimportant. The significant fact is that collective bargaining does not regulate the labor market. Unions and collective agreements

cases coming before the Court. This is the tip of the iceberg beneath the preemption decisions of the last decade.

The work of the Court mirrors the life of the nation, and while it is all "very quiet there, . . . it is the quiet of a storm centre. . . ."[182] The Court is hardly oblivious to labor evolution, for, in Cardozo's words, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[183] Whatever the next stage in labor and employment evolution, however, fundamental notions of judicial restraint and separation of powers confine the Court to interpretation and application of present declarations of national labor policy, upon which the *Garmon*, *Machinists*, and *Lucas Flour* strands are predicated.

Selection of socioeconomic and legal systems to maximize employee protection are essentially legislative, not judicial, choices. The iceberg was glimpsed in *Lingle* when the Seventh Circuit favored preemption of workers' compensation retaliatory discharge claims because the converse result was detrimental to unionism.[184] The Supreme Court eschewed any such rationale. Whatever the merits of emerging wrongful discharge jurisprudence, it is not for the Court as a policy matter to prefer such recourse over NLRB, collective bargaining, and grievance-arbitration processes.

Concepts such as "arguably subject," "left unregulated," and "contract independent," are concededly imprecise.[185] So too is much of the language of the law. The genius and durability of *Garmon*,[186] *Machinists*, and *Lucas Flour* standards may be their very flexibility and consequent capacity for adaptation.

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do not guard employees from the potential deprivations and oppressions of employer economic power. The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party. The law, either through the courts or the legislatures, will become the guardian. Labor law is now in the midst of that changing of the guard. There is current recognition that if the majority of employees are to be protected, it must be by the law prescribing at least certain rights of employees and minimum terms and conditions of employment.

Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10–11 (1988).

182. O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 292 (1920).

183. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (21st printing 1971).

184. In a rather astonishing burst of political candor the court stated that:

Finally, we note that a conclusion that state retaliatory discharge claims are not preempted would be detrimental to unions. If a state statute or common law gave all workers protection from unjustified discharges, then one of the major recruiting points of union organizers—that unionization would protect the worker against arbitrary discharge—would disappear. The effect of such a state system would be to make the worker less dependent on the arbitration remedies created by the collective bargaining contract.

Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1047 (1987).

185. The very diversity of state regulation compels general rather than definitive preemption formulas. *See* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 290 (1971) ("inherent limitations on this Court's ability to state a workable rule that comports reasonably with apparent congressional objectives").

186. On balance, there appears to be continuing legitimacy to Norton Come's observation some years ago that, "[t]he *Garmon* doctrine has in practice provided a readily ascertainable and effective standard for effectuating Congress' objective of attaining a uniform national labor policy by centralizing administration of the Act in a specialized agency, the National Labor Relations Board." Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of* Garmon, 56 VA. L. REV. 1435, 1452 (1970).