Recent Developments in Federal Labor Law Preemption

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Fitting the ever-growing bodies of regulatory law into a federal system in which the sum of regulatory power is shared between the national government and the states raises perennial problems of conflict and accommodation. Often both governments have concurrent jurisdiction unless Congress preempts the field. In the latter event, state law and often the jurisdiction of state tribunals are ousted by virtue of the supremacy clause.[1] Whether Congress has preempted the field is a matter of legislative intent. Since Congress more often than not fails to express its will directly, the problem with which the courts must wrestle quickly becomes one of statutory interpretation.

In the field of industrial relations there has been more than thirty years of fighting over the boundary lines defining the realm of exclusive federal control. The enactment of the Taft-Hartley "Slave Labor" Act in 1947[2] conferred several unexpected bonanzas upon those who expostulated that they would thereby be enslaved.[3] The chief benefit was immunity from state law limiting strikes, boycotts, and picketing. By prohibiting some forms of strike, boycott, and picketing as union unfair labor practices,[4] Congress laid the foundation for the argument that the federal prohibitions are exclusive. This argument provided an avenue of escape from the much more restrictive state statutes and court decisions. The Supreme Court took the cases as they came, but by 1959 the Justices were able to enunciate a formula that has become known as the *Garmon* rule.[5] The *Garmon* rule asserts that the states as well as the federal courts must yield exclusive jurisdiction to the National Labor Relations Board (NLRB) whenever the conduct that the state seeks to regulate is in an area subject to NLRB jurisdiction and is also either (1) prohibited or arguably prohibited by section 8 of the National Labor Relations Act (NLRA or the Act) or (2) protected or arguably protected by section 7 of the Act. A number of

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1. U.S. CONST. art. VI, § 2.

2. Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-169 (1976)).

3. For example, labor unions have benefited much more than employers from § 301, 29 U.S.C. § 185 (1976), which not only confers jurisdiction upon the United States district courts to entertain actions for violation of a collective bargaining agreement, but also has been interpreted to authorize the federal courts to build a body of substantive law.

4. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1976).

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

narrow exceptions to the *Garmon* rule later were developed for particular situations.[6]

A second and supplementary formula appears to advance the proposition that a state may not forbid or award damages for conduct in a labor dispute, even though the conduct is plainly neither prohibited nor protected by national law, if the application of state law would upset the balance of power between labor and management established by the NLRA. In *Teamsters Union v. Morton*[7] a local union, engaged in a labor dispute with a concern that hired out trucks and drivers for use in highway construction, requested the firm's customers to stop renting its products. There was neither threat nor other coercion by the union. When one customer agreed, the rental firm brought an action for damages, alleging violation of Ohio's secondary boycott law. The trial court granted judgment for the plaintiff, but the United States Supreme Court reversed because Congress had chosen not to forbid voluntary assistance to a union engaged in a labor dispute.

> This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters Union*, 346 U.S. 485, 500.[8]

Subsequently, *Machinists v. Wisconsin Employment Relations Commission*[9] held that a state may not deal with a concerted refusal to work overtime, not because a union's refusal to work overtime is at least arguably protected or prohibited by the national law, but rather because it is an economic weapon that Congress has neither protected nor prohibited, thus implying that it should be left to the free, unregulated interplay of the relative economic strength of management and union.

These two formulae, taken together, seemed to cover almost all of the

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6. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (breach of the duty of fair representation); Smith v. Evening News Ass'n, 371 U.S. 195 (1962) (judicial relief for breach of a contract that also constituted an unfair labor practice); International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (injunction against violence); United Constr. Workers v. Laburnum Constr. Co., 347 U.S. 656 (1954) (damages for violence in a labor dispute).

7. 377 U.S. 252 (1964).

8. *Id.* at 259-60.

9. 427 U.S. 132 (1976).

preemption problems in the law of strikes and picketing. Certain issues, however, remained unresolved—including the question whether a state has power to enjoin or punish, as a continuing trespass, picketing on private property. The Supreme Court faced this question in 1978 and edged toward a decision in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters.*[10] The ruling, for reasons elaborated upon below, gives only a very narrow, partial answer to this specific but vexing problem, but at least for a time the *Sears* opinion seemed to represent a major effort by Justice Stevens to expand state power, first, by confining the law of preemption to the *Garmon* rule and, second, by adding new exceptions.

The potential importance of *Sears* was diminished, however, when the Court ruled in *New York Telephone Co. v. New York State Department of Labor,*[11] that NLRA policy does not bar a state from paying unemployment compensation to strikers even though the payments and concomitant charges against the employer's rating are likely to have substantial effects upon the relative bargaining power of management and union. The opinion of the Court, which was once again delivered by Justice Stevens, seems to adopt an approach, discussed in further detail below, that Stevens expressly had disavowed in the *Machinists* case.

A third recent development in federal labor law preemption bears upon the question, discussed later in this Article, whether a collective bargaining agreement between management and labor on a statutory subject of collective bargaining in accordance with the NLRA immunizes the employer's violation of a state law regulating the same term or condition of employment.

I. Preemption in the Law of Strikes and Picketing

A. *The* Sears *Case*

The automobile, the private parking lot, the retail mall or shopping center, and the industrial park gradually have increased the importance of the law of trespass in union organization and labor disputes. In an organizing campaign, union organizers who are not employees find distribution of leaflets and personal contacts with employees as they leave their automobiles in the employer's parking lot vastly more effective than patrolling and leafleting as the employees drive by on the public highway. Similarly, in a labor dispute involving a suburban retail store set apart with its own parking facilities, picketing near the entrance doors is more effective than patrolling the public ways bounding the premises. The problem is most acute in relation to privately owned shopping centers and retail malls since, in those cases, neither union organizers nor pickets can reach either the employees or the customers of a single store without going

10. 436 U.S. 180 (1978).
11. 440 U.S. 519 (1979).

upon private property over the objection of the shopping center's owner and operator, which has leased space to several stores.

For a time, the United States Supreme Court flirted with treating privately owned shopping centers as if they were public streets or parks for the purposes of the first and fourteenth amendments,[12] but that avenue was closed to the unions by the decision in *Hudgens v. NLRB.*[13] As a result, union organizers and pickets are considered to be trespassers except as they can show that NLRA sections 7 and 8(a)(1) give them a statutory privilege to enter upon the private property in order to implement fully their rights to organize and to engage in concerted activities for the purposes of collective bargaining and other mutual aid and protection.

In time, the NLRB may define the extent of this privilege with respect to the several categories of organizers and pickets. Conceivably, there will be distinct rules for shopping centers and for the property of a single establishment, for organizational leafleting and for picketing, and for picketing at the primary site of a labor dispute and for secondary appeals to retail buyers of products manufactured by an employer that is the real target of the union's concerted activities. All this will take time. Meanwhile, the important question is whether state courts may entertain an application for an injunction against the alleged trespass, or whether, because of federal preemption, they are ousted of jurisdiction. Occasionally, a similar question is raised by arrest and prosecution of pickets for criminal trespass.

The *Sears* case involved picketing upon the property of a single retail establishment. Sears' store was in a large block surrounded by its own parking lot, which was bounded in turn by public sidewalks. The Carpenters Union, protesting Sear's use of a contractor who employed non-union carpenters, set up pickets in the Sear's parking lot and near the store's doors. Sears obtained a temporary injunction against the picketing in the California Superior Court, but the Supreme Court of California set the injunction aside on the ground that the picketing was not only "arguably prohibited" as recognition picketing forbidden by NLRA section 8(b)(c), but also "arguably protected" by sections 7 and 8(a)(1), which arguably confer a right to enter upon the employer's property under circumstances in which there is no other method of appealing to employees and the public.[14] By a 6-3 vote, the United States Supreme Court reversed upon the ground that neither the "arguably prohibited" nor the "arguably protected" branch of the *Garmon* rule called for preemption in the *Sears* case.[15]

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12. Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

13. 424 U.S. 507 (1976).

14. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 17 Cal. 3d 893, 553 P.2d. 603, 132 Cal. Rptr. 443 (1977), *rev'd*, 436 U.S. 180 (1978).

15. 436 U.S. 180 (1978).

1. *"arguably prohibited"*

A showing that the conduct of which the plaintiff complains in the state court is arguably prohibited by the NLRA is never enough to establish conclusively that the NLRB has exclusive jurisdiction. Common sense repels so broad a claim of exclusivity. No one would suggest that, because it is an unfair labor practice for an employer to beat-up union organizers and run them out of town, the state is deprived of power to prosecute the employer, or the organizers have no private right to recover damages under state law. Supreme Court decisions also sustain the power of state courts to award compensation for losses inflicted by mass picketing or other violence in a labor dispute,[16] and even to enjoin such misconduct,[17] despite a showing that the same activities are prohibited by NLRA section 8(b)(1).

In earlier articles, I have suggested that preemption should extend to, but should also be confined to, those cases in which the relief sought under state law is based upon a judgment that focuses upon the interests of employers, unions, employees, and the general public in employee self-organization, collective bargaining, or a labor-management dispute:

> Congress obviously had its own views concerning the special rights and duties to be imposed upon employers, unions, and employees because of their relation to employee self-organization and free collective bargaining. Where further particularization would be appropriate, it delegated the function to a specially constituted administrative agency. But it is equally plain that Congress developed this special framework for self-organization and collective bargaining within a larger context of state law creating rights of property, bodily security, and personality, preserving public order, and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute. Neither the laws themselves nor any particular application involves weighing the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes. The likelihood that the collateral impact of such laws upon management or labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated. It is only where the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes that the likelihood that is application to persons under NLRB jurisdiction will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise.[18]

State laws dealing with trespass upon privately owned property have general application utterly independent of any appraisal of the special

16. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

17. International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

18. Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56 (1972); *see also* Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

interests of employers, labor unions, and employees in union organization or collective bargaining. Under this approach, therefore, the California state courts had jurisdiction to deal with the picketing of Sears unless the pickets were exercising or arguably exercising a federal right granted by NLRA sections 7 and 8(a)(1).

Although the decisions of the United States Supreme Court seem to me to be entirely consistent with this approach, the Court's opinions expressly have repudiated the approach on several occasions.[19] Speaking for the Court in *Sears*, Mr. Justice Stevens again rejected the distinction:

> The critical inquiry therefore is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the State court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board.[20]

Less than a year later, Justice Stevens would treat as decisive against preemption the fact that the challenged state statute "is a law of general applicability."[21] In *Sears*, however, Justice Stevens found that the "arguably prohibited" branch of the *Garmon* rule was inapplicable because the controversy presented to the California court was not the same as the controversy that Sears might have presented to the Labor Board. Before the Labor Board, subtle questions concerning the Carpenters' purposes and the interpretation of sections 8(b)(4)(D) and 8(b)(7)(C) of the NLRA would have been presented. Before the state court, however, the proof would relate to the location of the pickets and the ownership or possession of the property on which the picketing occurred.

Justice Stevens' formulation of the exceptions to the arguably-prohibited branch of the *Garmon* rule drew heavily upon the reasoning in

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19. *See, e.g.*, Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290, 300 (1977); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 479-80 (1955).

20. 436 U.S. at 197. A cautionary footnote to the passage from which the sentence in the text is quoted suggests that Justice Stevens was inclined to agree, even at the time of *Sears*, that certain state laws of general applicability might not be vulnerable under a *Morton-Machinists* analysis, even though their application to a labor controversy would affect the balance of power between management and union.

The analysis might be improved by clarifying definitions and by adopting more consistent useage. The Court's opinions prior to the *N. Y. Telephone* case cite state antitrust laws as examples of "laws of general applicability." Obviously their application is, and should be, preempted in the case of a labor controversy between persons subject to NLRB jurisdiction. Teamsters Union v. Oliver, 358 U.S. 282 (1959); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955). But antitrust laws are not always written in such general terms that their application to labor controversies depends, as in other situations, upon a particularized judicial appraisal of the interests of labor, management, individual employees, and the public that Congress sought to balance in the NLRA. *See* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1357-58 (1972). This, not the application of the shorthand phrase "law of general applicability," should be the critical inquiry in determining which state laws are preempted.

The term "law of general applicability" may be an inept phrase for abbreviating the underlying principle, but I can devise no better way of avoiding tedious repetition of the entire proposition whenever it is necessary to refer to it.

21. *See* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 533 (1979), which is discussed in the text accompanying notes 55-70 *infra*.

Farmer v. United Brotherhood of Carpenters.[22] The plaintiff Farmer was administrator of the estate of Richard Hill, who had been a carpenter and an official of the local carpenters union. After an internal union row, according to Hill, the local began to discriminate against him in job referrals and then to subject him to a campaign of personal abuse and harassment in addition to continued discrimination. Hill brought suit in the Superior Court of California. Three counts of the amended complaint focused upon interference with employment opportunities and alleged violations of a collective bargaining agreement, while one count alleged the intentional infliction of emotional distress resulting in bodily injury. The Superior Court allowed the latter count to go to the jury upon instructions that Hill was required to prove, by a preponderance of the evidence, that he suffered some "highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry."[23] The jury returned a verdict against the union of $7500 actual damages and $175,000 punitive damages. On appeal, the California courts reversed the judgment and ordered dismissal.[24]

The United States Supreme Court unaminously reversed, holding that the NLRA does not deprive state courts of jurisdiction to entertain actions for the intentional infliction of severe emotional distress. The opinion began with a strong reaffirmation of both branches of the *Garmon* rule, but then acknowledged numerous exceptions. In an effort to rationalize the exceptions, the Court—relying on precedents allowing state courts to hear cases alleging defamation or violence—suggested that three factors were always present:

(1) the underlying conduct that forms the basis of the state action is not protected or arguably protected by the NLRA;
(2) there is "an overriding state interest" that is "deeply rooted in local feeling and responsibility"; and
(3) there is little risk that the state cause of action will interfere with the effective administration of national labor policy.

The Court implied that three additional factors should be considered in applying the third requirement: First, whether the elements of the state cause of action are different from those that would support an unfair labor practice charge; second, whether different remedies are available in the state court; and third, whether the state court action can be adjudicated without regard to the merits of the underlying labor dispute. In the *Farmer* case, Justice Powell concluded that the state action for intentional infliction of severe emotional distress satisfied all the requirements, and that the state court therefore had jurisdiction. Although, superficially, the

22. 430 U.S. 290 (1977).
23. *Id.* at 294.
24. 49 Cal. App. 3d 614, 122 Cal. Rptr. 722 (1975), *vacated*, 430 U.S. 290 (1977).

decision reads as a victory for the individual employee, I am relatively certain that the employee and his attorney regarded the Supreme Court's action as a major setback, if not a total defeat. Even though both the plaintiff and the Court thought, and the Court held, that dismissal of the complaint by the California appellate courts was improper, the Court refused to reinstate the jury's verdict for the plaintiff. The opinion gives two reasons: First, the evidence supporting the verdict had focused less on a campaign of harassment, public ridicule, and verbal abuse than on hostile discrimination in refusing to dispatch the plaintiff to any but the least desirable jobs; and second, the jury was not instructed that something more than the emotional distress resulting from the threat or actuality of abuse of the union's power to make or withhold job referrals must be proved before it could find for the plaintiff. Indeed, a footnote instructs trial courts to "be sensitive to the need to minimize the jury's exposure to evidence of employment discrimination,"[25] and also to give instructions that the fact of such discrimination should not enter into the determination of liability or damages.

In my judgment, the approach formulated in *Farmer* and applied in *Sears* carries federal preemption to undesirable lengths in the area of controversies between individual workers and a labor union. In contrast with its approach to labor-management relations, Congress has never developed a comprehensive federal plan for regulation of relations between a union and its members. Federal laws supplement state rights and remedies only interstitially. The problems resulting from union job control under a closed or union shop agreement straddle both fields. On the one hand, the membership clause in a union security agreement may be an organizing tool, compelling employees to become union members, enriching the union treasury, and securing the union's status as exclusive bargaining representative. On the other hand, when the union is strong and its status secure, the chief consequence of union job control is to enhance the effectiveness of sanctions for a union member's breach of union discipline by depriving the individual of his job if he is expelled from the union. Even in the former situation, in which the union is in the initial stages of organization, controversies essentially between the individual and the union present scant danger of any substantial interference with broad national labor policy, unless one believes that the policy embraces protecting labor unions against heavy liability to individual members. And in the latter situation, in which the union has become securely established, there is no danger at all. Yet, in both situations, the effect of the *Farmer* decision is to require the individual union member to split between two forums—the state court and the NLRB—a claim that could be tried more fairly in one.

It is more difficult to predict the effect of the *Farmer-Sears* approach

25. 430 U.S. at 305 n.13.

within the area of labor-management relations. Justice Stevens wrote in *Sears* that in applying the "arguably prohibited" branch of the *Garmon* rule "[t]he critical inquiry . . . is . . . whether the controversy presented to the State court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board."[26]

But the Justice obviously did not intend us to read him literally. Earlier decisions make it plain that there may be no preemption even though the controversy presented to the state court is identical to the controversy that might have been presented to the Labor Board.[27] A complaint praying for a state court injunction against a labor union's mass picketing, for example, alleges the very same facts as an NLRB charge alleging violation of section 8(b)(1), yet the state court may grant both preventive and compensatory relief.[28] One cannot reasonably suppose that the Court meant any more than that there is no preemption under the "arguably prohibited" branch of the *Garmon* rule if the state controversy is not "identical with" the controversy that might have been submitted to the Labor Board.

Even this interpretation of *Sears* suggests a conscious or unconscious rewriting of decisional precepts in ways that imply a significant narrowing of the area of exclusive federal jurisdiction. The more widely the applicable state substantive law differs from the federal law, the greater will be the differences in the proof required to make a case for judicial relief. When this is true, the argument against preemption under the *Farmer-Sears* formula will also be the stronger. The logical consequence is that the wider a state's departure from the national balance of the interests in union organization and collective bargaining, the greater freedom the state will have to upset the national policy.

This logic will not disturb those who reject the *Machinists* rationale and view the *Garmon* rule and its exceptions as an all-sufficient measure of the extent of federal premption.[29] The Justice Stevens who was speaking for the Court in *Sears* apparently belonged to this school. He had dissented in *Machinists*,[30] and in *Sears* he impliedly rejected *Machinists*, referring to the two aspects of the *Garmon* rule as "*the* general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of State regulation of activity touching upon labor-management relations."[31] He also explained the "arguably prohibited" branch of the

26. 436 U.S. at 197.

27. *See* International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

28. *See* International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); United Constr. Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954).

29. The most complete exposition of this view is the opinion written by Justice Harlan for the Court in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971).

30. 427 U.S. at 156-69.

31. 436 U.S. at 187 (emphasis added).

Garmon rule exclusively in terms of the risk that two tribunals with concurrent jurisdiction might follow divergent procedures, make inconsistent findings, and grant different remedies. Neither the risks nor the resulting damage to federal policy would be inconsiderable, but the harm seems small in comparison to the harm that would result from allowing a state to enforce a substantively different labor-management relations law. The latter danger seemingly did not worry Justice Stevens. In support of his narrow rationale, he quoted a portion of Justice Jackson's opinion for the Court in *Garner v. Teamsters Union*,[32] in which the Court first held that a state had no jurisdiction to enjoin conduct prohibited by the NLRA because:

> 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. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. 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.[33]

Justice Stevens did not quote the portion of Justice Jackson's opinion explaining the danger to national policy if the states were allowed to apply divergent substantive law:

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.[34]

It was this portion of the *Garner* opinion upon which the Court relied to find preemption in the *Machinists* case, over Justice Stevens' dissent.[35]

There is further reason to think that the *Sears* opinion sought to undermine both the last quoted passage from *Garner* and the *Machinists* decision. One spontaneously rejects any suggestion that a state may never grant remedies for trespassory picketing because the omission of any federal prohibition implies that the conduct is to be left free of regulation. If the common sense reaction is correct, as I believe it to be, one ought to be able to give a reason that fits into a coherent body of principle. My reason

32. 346 U.S. 485 (1953).

33. 346 U.S. at 490-91, *quoted* in *Sears*, 436 U.S. at 192-93.

34. 346 U.S. at 499-500.

35. 427 U.S. at 144.

is that a state trespass law is a law of general application. At the time of *Sears*, Justice Stevens would have rejected this reason. The only other rationale that I can formulate is that states are free to regulate activities neither plainly protected nor prohibited by the NLRA.

Perhaps these speculations strain too hard to find implications in the words and reasoning of one segment of the Court's opinion in a single case. Yet serious consequences follow from analyzing preemption exclusively in terms akin to primary jurisdiction instead of focusing upon the need to protect the balance of power struck by national policy in the field of union organization and labor management relations. The first approach assumes that federal law is a collection of particular rights and duties rather than a complete and comprehensive policy. It thus implies that there is room for the intrusion of state labor relations policies regulating conduct that is left plainly unregulated by federal law. The second approach posits the opposite characterization and consequences. The Justices can hardly have been unmindful of the differences, even though the choice of rationale was probably immaterial to the outcome of the *Sears* case. Furthermore, the same disposition to narrow the area from which state law is excluded runs through the portion of the *Sears* opinion dealing with the claim that the "arguably protected" branch of the *Garmon* rule barred the California state court from exercising jurisdiction.

2. *"arguably protected"*

Labor cases aside, when a federal right is asserted as a defense in state litigation, the state court normally interprets the federal law as best it can at all stages of the litigation, subject to ultimate review by the Supreme Court of the United States.[36] If this course were followed in a case like *Sears*, the state court of first instance would have to decide whether the picketing should be enjoined as a continuing trespass or tolerated as the exercise of a privilege of entry actually given by the NLRA. The NLRA precedents gave and still give little guidance. If the state court decided the NLRA issue against the privilege and were "right," justice would be done. If the state court decided "wrong," the decision would deprive the union of a privilege granted by federal law unless—and, in any event, until—the decision was reversed on appeal.

The labor preemption cases followed a different course, at least in part because the United States Supreme Court wished to guard against the danger of delay or denial of a federal privilege. The *Garmon* rule directs state courts to keep out whenever it is even "arguable" that the concerted activities are protected by federal law. The risks of interference with federal rights were considerable when the rule was formulated. Many state courts had been notably hostile to union activities and inhospitable to federal policies concerning union organization and collective bargaining, even

36. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

though certain union activity, such as peaceful picketing, approaches the status of a preferred first amendment liberty. In some labor disputes, even temporary interference with what is in truth a privilege granted by federal law may have critical importance.

A second justification for the "arguably protected" branch of the *Garmon* rule is the need for NLRB expertise in resolving whether the conduct that the employer seeks to enjoin is an NLRA-protected concerted activity. The Supreme Court decisions increasingly speak of the deference that is to be given NLRB interpretations.[37] The balance to be struck between an employer's proprietary and managerial interests on one hand, and the employees' or unions' interests in union organization and concerted activities, on the other, has always been a question peculiarly suited for informed agency discretion.[38] The NLRB may appear as amicus curiae in the Supreme Court of the United States, but it would be impracticable to file regularly in the highest state courts and impossible to take part at the crucial phase in all courts of first instance. Furthermore, the NLRB as amicus can neither express the judgments nor be given the deference resulting from a finding upon a trial record.

While these are weighty considerations, the "arguably protected" branch of the *Garmon* rule also carries risks of unfairness to those injured by picketing that is forbidden by a state law of general application. Not every arguably protected activity is in truth protected. In a case in which the activities are arguably protected but in truth unprotected, the *Garmon* rule denies the employer a remedy to which it is entitled unless—and, in any event, until—it finds some way of securing an NLRB determination. If a prompt method of reaching the NLRB is available, little harm is done. If no method is available, as seemed to be the situation with respect to the allegedly trespassory picketing in *Garmon*, the employer is denied a day in court and thus shut off from the hope of obtaining a remedy for what may well be a substantive wrong. In effect the law would be asserting that "the legal system requires NLRB participation in order to be sure of doing justice. Since that assurance cannot be obtained, the law may not try to do justice at all." Deeming this assertion to be unjust, some judges and commentators have argued that state courts should be allowed to decide the NLRA question to the best of their ability, as in non-labor cases.[39]

Although there is still no way for an employer to obtain directly a ruling upon whether the conduct of pickets is a protected concerted activity, the NLRB asserted in its amicus brief in the *Sears* case that a demand that the pickets leave the property "would constitute a sufficient

37. *See, e.g.*, NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507 (1977); NLRB v. Magnavox Co., 415 U.S. 322 (1974).

38. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

39. *See, e.g.*, Taggart v. Weinacker's, Inc., 397 U.S. 223, 227 (1970) (Burger, C. J., Stewart & White, JJ., concurring); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1297, 1359-63 (1972).

interference with rights arguably protected by section 7 to warrant the General Counsel, had a charge been filed by the Union, in issuing a Section 8(a)(1) complaint."[40] Sears had made such a demand and the Carpenters' union could have filed the unfair labor practice charge. The Court concluded that the demand by Sears, which it described as "critical to our holding,"[41] gave the union "a fair opportunity to present the protection issue to the Labor Board" and "meaningful protection against the risk of error in a state tribunal."[42] For this reason, and because it supposed that there was slight chance that the NLRB would find trespassory picketing to be protected under the NLRA, the Court ruled that the "arguably protected" character of the union's conduct did not deprive the California courts of jurisdiction.[43]

It is hard to imagine a narrower decision. One narrowing factor is the weight that Justice Stevens gave to what he deemed the low degree of probability that the union's claim to protection would prevail. Surely, the union's chance of prevailing would have been higher if the picketing had been outside the entrances to a store in a shopping center.[44] Does this mean that state jurisdiction may be preempted in the shopping center case? I suppose not, but the opinion leaves the possibility open.

More important, the opinion skillfully narrows the holding to a situation likely never again to recur. The employer must make a demand upon the pickets before it can maintain an injunctive action in state court. At the same time, *Sears* tells us that the state court has jurisdiction unless and until the picketing union files a charge with the NLRB General Counsel alleging that the employer has violated section 8(a)(1). This leaves open several critical questions. Must an existing temporary injunction be vacated when the union files its charge? Suppose that the union files its charge before the state court hearing on the motion for a temporary injunction. Is the charge alone sufficient to oust the jurisdiction of the state court? Finally, since the NLRB will not decide the case for many months—even longer if the union stalls, as unions have often done with charges filed to block an election—does the state court have jurisdiction in the interim, with the duty of ruling on federal question as best it can? Or does the charge protect the union by denying the employer a day in court until after the NLRB renders its decision?[45]

The opinion of the Supreme Court is as inscrutable upon these questions as the silence of the Sphinx. Although Justice Stevens char-

40. Brief for NLRB as Amicus Curiae at 18 *quoted in* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. at 209.

41. 436 U.S. at 207 n.44.

42. *Id.* at 207.

43. *Id.* at 208.

44. Scott Hudgens, 230 N.L.R.B. 414 (1977).

45. The problem is perhaps more complex if the pickets are arrested for trespass immediately upon refusing to leave the premises at the owner-employer's request. *See, e.g.*, State v. Dargon, 165 N. J. Super. 500, 398 A.2d 891 (1978).

acterized the union's opportunity to institute an NLRB proceeding as a method by which the union might protect itself against risk of error in the state court,[46] he was careful to avoid saying whether he meant error along the way or error at the end of the road. The silence appears to have been necessary to attract the concurrence of six Justices in the opinion of the Court. Justice Blackmun, in a concurring opinion, stated that the logic of the Court's opinion dictated the corollary that the mere institution of NLRB proceedings would be enough to block action by the state court pending a decision by the NLRB.[47] Justice Powell, also concurring, declared that commencement of NLRB proceedings should not be enough, and that he would not have joined in the Court's opinion if it were susceptible to Justice Blackmun's reading.[48]

The *Sears* opinion has three other puzzling aspects. One is Justice Stevens' surmise that the union will file a section 8(a)(1) charge only if it expects to win before the Board.[49] This surmise is plausible only if the justice is assuming that no ground is gained by merely filing the charge. If the union's case is weak but the charge ousts the state court of jurisdiction, the union's best tactic obviously is to file the charge and stall.

Second, the observation that the NLRB likely will find very little trespassory picketing to be protected by the NLRA seems to prejudge a question whose complexity escaped the Court's attention.[50] In the case of a single store or factory with entrances and exits directly off a public way, *NLRB v. Babcock & Wilcox*[51] may support the generalization that the NLRB will not extend protection to the picketing, although one would have supposed that a parking lot open to any member of the public who wishes to buy or even to inspect retail merchandise was fundamentally different from a lot open only to the employees of a single employer. By comparison, if the store of an employer engaged in a labor dispute is in a shopping center or its plant is in an industrial park, the precedents from the Board and lower courts support the claim of privilege when the pickets are employees of the picketed establishment.[52] In the case of a shopping center, decisions ultimately may turn upon whether the pickets are employees, paid organizers, or volunteers, and upon the role of the operator of the picketed establishment in the labor dispute. One would also suppose that

46. 436 U.S. at 207.

47. *Id.* at 208-12 (Blackmun, J., concurring).

48. *Id.* at 212-14 (Powell, J., concurring). The concurrence of Justice Powell, who joined in the majority opinion by Justice Stevens, was limited to a response to the issues raised by Justice Blackmun's concurring opinion. *See* text accompanying note 48 *supra*. In Reece Shirley & Ron's, Inc. v. Retail Store Employees Union, Local 782, 255 Kan. 470, 476, 592 P.2d 433, 437 (1979), the Supreme Court of Kansas declared that a state court would lose the power to take jurisdiction "if . . . the board takes jurisdiction."

49. 436 U.S. at 206, 207.

50. *Id.* at 206.

51. 351 U.S. 105 (1956).

52. Holland Rantos Co., 234 N.L.R.B. 726, *enforced*, 583 F.2d 100 (3d Cir. 1978); Scott Hudgens, 230 N.L.R.B. 414 (1977).

trespassory picketing was much more often important in industrial parks and shopping centers than at individual sites with individual entrances from a public way. While the observation that trespassory picketing is likely to be unprotected seems too guarded for so difficult a problem, I cannot tell whether it applies to all categories of trespassory picketing or only to the situation at Sears.

Third, obscurity hangs over the novel suggestion that a state court is to appraise the degree of probability that the union will prevail before the NLRB in deciding whether the court has jurisdiction. If the human mind could measure with mathematical precision the risk of misunderstanding the law, and if all human minds were alike, the degree of risk of depriving the defendant of a federal right would be an appropriate factor in the calculus by which preemption *vel non* was decided. But if all human minds were alike, state courts always would reach the same conclusion as that reached by the NLRB and the federal reviewing courts. The *Garmon* rule would scarcely be necessary. In formulating the *Garmon* rule, Justice Frankfurter, who analyzed the problem in terms of primary jurisdiction, took account of the differences among judges and established a wide prophylactic zone—"arguably protected"—from which all but the NLRB are excluded. The *Sears* opinion narrows this zone by making the probability of a union's success before the NLRB a relevant consideration under some circumstances. By introducing this additional variable factor, the opinion lessens the predictability of preemption law.[53]

The importance of the invitation to interpret *Sears* as narrowing the zone of federal preemption depends upon a question discussed above—namely, whether the *Garmon* rule is the complete test of preemption. If so, any narrowing is important; if not, then the narrowing of the *Garmon* rule probably has only marginal significance because the application of state laws focused upon union organization, collective bargaining, or labor disputes would be barred under the principle associated with *Garner, Morton*, and *Machinists*.

B. New York Telephone Co. v. New York Department of Labor

Less than a year after the *Sears* decision, the Court came to grips with the question whether a state may provide unemployment compensation to strikers in an industry subject to NLRB jurisdiction.[54] A New York statute provides for the payment of unemployment benefits to workers, after an eight week waiting period, when their employment is terminated by a strike.[55] The benefits are financed primarily by employer contributions. Each employer's contributions are affected by the claims of his employees

53. In Commonwealth v. Nofke, ——— Mass. ———, 379 N.E.2d 1086 (1978), the Massachusettes Supreme Judicial Court made such an appraisal in upholding the trespass conviction of a union organizer who entered a hospital parking lot.

54. New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979).

55. N.Y. Lab. Law §§ 590(7), 592(1) (McKinney 1977 & Supp. 1978-1979).

against the state fund. New York Telephone Company, whose employees had received benefits during a protracted strike, sought a declaratory judgment that the New York statute mandating the payment of benefits to strikers at their employer's expense is inconsistent with national labor policy and therefore invalid under the supremacy clause. The United States Supreme Court rejected the argument by a 6-3 vote. There was no opinion of the Court; the six Justices in the majority required three opinions to explain their divergent views.

All the opinions, including the dissent, seem to accept the premise that a state law may be unconstitutional even though the *Garmon* rule does not condemn it. Drawing upon *Garner, Morton* and *Machinists*, Justice Powell's dissenting opinion, joined by the Chief Justice and Justice Stewart, is the most explicit:

> The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the State were to declare picketing free for purposes or by methods which the federal Act prohibits."[56]

Justice Blackmun, speaking for himself and Justice Marshall, embraced the *Morton-Machinists* rule.[57] Justice Brennan, author of the *Machinists* opinion, agreed.[58] Justice Stevens, joined by Justice White and Rehnquist, also took *Morton* and *Machinists* as a predicate, even though the shadow of his earlier skepticism led him to set the decisions apart from the "main body of labor pre-emption law."[59] In sum, for the first time all the Justices embraced the basic proposition that the NLRA strikes a balance of power in matters of union organization and collective bargaining which a state may not disturb.

The next step in the analysis of the *New York Telephone* case was to examine the limits of this basic protection. We may presume that all the Justices agreed that generality must yield to specific evidence of congressional intent to allow the states freedom to make their own decisions on a particular question. Justices Blackmun, Brennan, and Marshall found such evidence in congressional debates on the Social Security Act of 1935, the Taft-Hartley Act of 1947 and a proposed 1969 amendment to the Social Security Act.[60] The dissenting Justices found the evidence totally unpersuasive.[61] The opinion written by Justice Stevens is somewhat more equivocal. It examines the legislative history to see

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56. 440 U.S. at 554, (Powell, J., dissenting), *quoting* Garner v. Teamsters, 346 U.S. 485, 500 (1953).

57. *Id.* at 547-49.

58. *Id.* at 546-47.

59. *Id.* at 530.

60. *Id.* at 549, approving Part III of the plurality opinion, which appears *id.* at 540-45.

61. *Id.* at 560-67.

whether there is affirmative evidence of an intent to preempt and observes that, since Congress knew of the possible impact of unemployment compensation on the bargaining process, "omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize or to prohibit, such payments."[62] But in the very next sentence, the Stevens opinion retreats to the guarded conclusion that "the congressional silence in 1935 was not evidence of an intent to pre-empt the States' power to make this policy choice."[63] Thus, only three of nine Justices were persuaded that the legislative history shows an affirmative congressional intent not to preempt.

Earlier I suggested that the proposition that Congress has impliedly barred the states from disturbing the balance of power struck by the NLRA does not extend so far as to exclude state laws of general application, that is, laws that do not rest upon legislative, administrative, or judicial evaluation of the several interests of employers, labor unions, employees, and the public in union organization, collective bargaining, or a labor dispute. Justice Stevens, who seemed to go out of his way to disapprove this suggestion in *Sears*, accepted the greater part of it in *New York Telephone*, saying

> the [New York] statute is a law of general applicability. Although that is not a sufficient reason to exempt it from preemption, . . . our cases have consistently recognized that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity.[64]

The overtones of the Stevens opinion suggest, without saying, that, when a state law of general application is at issue, the burden of proving congressional intent to preempt rests upon the party seeking to escape state law, while in the instance of a state law directed specifically at concerted activity, the party seeking application of the state law must adduce specific evidence of an intent not to preempt. This is the only reasoning left to support the conclusion reached by Justice Stevens once he rejects the argument that the legislative history supplies specific evidence of an intent to preempt the application of laws calling for payment of unemployment compensation to workers engaged in a labor dispute.

Only three Justices took this approach. Justice Brennan observed that he was not completely at ease with the distinctions made by Justice Stevens in setting limits upon the *Morton-Machinists* principles.[65] Justice Blackmun, speaking for himself and Justice Marshall, viewed Justice Stevens' distinction as a departure "from the principles of *Machinists*" when applied "to a case where a State alters the balance struck by Congress

62. *Id.* at 544.
63. *Id.*
64. *Id.* at 533.
65. *Id.* at 546-47.

by conferring a benefit on a broadly defined class of citizens rather than by regulating more explicitly the conduct of parties to a labor-management dispute."[66] Justice Powell, speaking for the three dissenting Justices, disputed the conclusion that the challenged statute was a law of general applicability and also declared:

> Even if the challenged portion of the New York statute could be viewed as part of a law of general applicability, this generality of the law would have little or nothing to do with whether it is preempted by the NLRA. A state law with purposes and applications beyond the area of industrial relations may nonetheless impinge upon congressional policy when it is applied to the collective-bargaining relationship.[67]

The disagreement over whether the provision of the New York statute making strikers eligible for unemployment compensation is a "law of general applicability" is a useful reminder that neither formulae nor even precise definitions can take the place of judgment in rendering judicial decisions. The New York unemployment compensation law, taken as a whole, appears to rest on general concerns roughly similar to those supporting the payment of public welfare.[68] Looking to the debates in state legislatures upon whether strikers should be eligible for unemployment compensation, one finds attention focused upon the effect of payment of the benefits on collective bargaining and labor-management disputes. Perhaps the wisest approach is to keep the importance of the distinction between labor-management laws and laws of general application in mind, but to avoid rigid classification in close cases. In a borderline case one would then hae only a slight disposition to infer an intent to preempt from the character of the legislation, and one would be quick to accept indications of congressional intent to allow states to decide for themselves.

I suspect that the six Justices who made up the majority in *New York Telephone* came closer to sharing this approach than the opinions indicate, and that the differences in the opinions are more of emphasis than of principle. The congressional debates leave little doubt about the unwillingness of Congress to render an explicit national decision upon the eligibility of strikers for unemployment benefits. A Senator or Representative could share that reluctance, yet still logically suppose that the policy of the NLRA applies so strongly as to imply a national decision to bar a state from providing compensation. To attribute such a nicely balanced state of mind to Congress seems implausible, however, when the state law lies in a general field somewhat removed from labor-management relations.[69] The *New York Telephone* case therefore should be viewed

66. *Id.* at 549-50.

67. *Id.* at 557-58.

68. In such cases the courts of appeals held that there was no federal preemption. *See, e.g.*, Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir. 1977).

69. It is entirely plausible to attribute the above state of mind to a congressman who is trying to avoid taking a public position, but I question the relevance of this hypothesis when a court is attempting to accomodate several pieces of legislation in the same area.

chiefly as a particular controversy that turns primarily upon one's characterization of the specific provision of the unemployment compensation law and upon the conclusions drawn from unsuccessful legislative attempts to enact a national rule.

The broader implications for federal law preemption are two. First, the notion that the *Garmon* formula and its exceptions embody the whole law of labor preemption has been abandoned. All nine Justices accepted the view that the NLRA provisions protecting some conduct, prohibiting other conduct, and leaving still other conduct neither protected nor prohibited establish an accommodation of the interests of employers, employees, labor unions, and the public in union organization and collective bargaining which, in the absence of other evidence, impliedly excludes any state law based upon a different legislative or judicial determination as to where the balance should be struck. Second, perhaps a majority of the Court is willing to imply from the existence of this congressional accommodation an intent to bar the application of state laws that significantly or substantially disturb the balance reached by Congress, even though the state laws rest upon broader considerations. I say "perhaps" because the views expressed in the dissenting opinion upon this point strike one as somewhat inconsistent with the normal attitudes of the Chief Justice and Justice Powell. The Chief Justice usually is strongly disposed to uphold exercises of state power against claims of federal jurisdiction. Justice Powell leans less far in that direction, and although the results of *New York Telephone* and *Machinists* are entirely consistent, the language of his *New York Telephone* opinion seems wholly inconsistent with his earlier, separate statement in *Machinists*, in which Justice Powell stated:

> I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing in the context of a labor dispute, "neutral" state statutes or rules of decision: state laws that are not directed towards altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength.[70]

The Chief Justice joined Justice Powell in both statements. Apparently, their result-oriented belief that a business should be protected against a state-imposed duty to contribute to the support of men and women on strike against the management was stronger then their normal principled preference for state rights.

The final lesson of the *New York Telephone* case, in my view, is that judgments about the intent of Congress with respect to the exclusion or toleration of state law require a sense of separable areas of discourse. New York Telephone argued with much logic that the state law altered the balance of economic bargaining power between management and labor by helping to finance strikes. The fundamental weakness in this argument was

70. 427 U.S. at 156. Co law is wholly "neutral" if it requires one party to desist from tactics that the party considers to be useful in a labor dispute.

that Congress, in enacting the National Labor Relations Act and the Labor Management Relations Act (LMRA),[71] was not concerned with everything affecting labor-management relations or the balance of power in collective bargaining. In writing those laws Congress was concerned only with the rules rather directly defining rights, privileges, and duties in the negotiation and administration of collective bargaining agreements, and the use of economic weapons or other forms of self-help in contests over unionization or the terms of a collective bargaining agreement. Welfare, social security, and unemployment compensation all have substantial effects upon such contests because, like many other laws, they may affect the relative bargaining power of the parties to the contest. But their effects are indirect. They belong in a different sphere. They were part of the context of the NLRA and the LMRA, not part of their subject matter. The verbal logic helpful in defining the extent of federal preemption in one sphere should not be carried over into the other. Although this is not the reasoning of any of the opinions by a Justice in the *New York Telephone* majority, I suspect that some such judgment influenced them all.

II. State Regulation of the Terms of Collective Bargaining Agreements

A similar approach seems appropriate in judging the validity of a state law uniformly regulating wages, hours, or some other term or condition of employment in one or more industries without regard to whether the employees have selected collective bargaining representatives. In *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*,[72] it appeared that the employer and the union had negotiated a comprehensive disability plan which provided that the normal disability benefits would not be paid during a pregnancy-related leave of absence. The omission did not violate the then existing federal laws against sex discrimination in employment, as interpreted in *General Electric Co. v. Gilbert*.[73] The Massachusetts Commission, refusing to follow that decision, held that the omission violated Massachusetts law. The employer replied that "the extent of disability benefits, which was a mandatory subject of bargaining, is to be left under federal labor law to the free regulation of the parties."[74] The Supreme Judicial Court of Massachusetts rejected the argument upon two grounds: (1) the discrimination "touches

71. 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1970)).

72. ——— Mass. ———, 375 N.E.2d 1192 (1978). *Accord*: Brown Co. v. Dep't of Indus., Labor and Human Relations, 476 F. Supp. 209 (W.D. Wis. 1979), *relying on* Malone v. White Motor Corp., 435 U.S. 497 (1978), which is discussed later in this Article. In other cases the argument for preemption was usually pitched upon the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974), but was equally unsuccessful. *See* Bucyrus Erie Co. v. Department of Indus., Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979).

73. 429 U.S. 125 (1976).

74. ——— Mass. ———, 375 N.E.2d at 1202.

interests so deeply rooted in local feeling and responsibility" that State law might continue to govern despite the NLRA and (2) discrimination is only a "peripheral concern" of the NLRA.[75]

Neither reason seems adequate. Putting matters of union security to one side, all substantive terms and conditions of employment are equally "peripheral" to NLRA policy. Nor is there any basis for saying that the local interest in preventing employment discrimination is greater or more "deeply-rooted" than the local interest in regulating many other substantive terms and conditions of employment.

One can readily imagine other situations raising the question of a state's power to impose statutory regulation of a term or condition of employment inconsistent with the provisions of a collective bargaining agreement. Massachusetts anticipated the federal government's prohibition against aged-based discrimination in employment.[76] Suppose that a collective bargaining agreement had provided for mandatory retirement at an age below that specified in the state statute. Would the collective bargaining agreement have been a defense to the charge of violation of state law? Similarly, suppose that a collective agreement gives an employee who is a minor a right to bid for and receive a particular job in which the employment of minors is forbidden by state law. Does the state law or the contract control? What about a state ceiling upon wage increases?

Free from direct precedent, I would have supposed that the NLRA leaves the states free to regulate employment conditions, provided that the state legislation does not discriminate against collective bargaining. The NLRA is primarily concerned with a *method* of establishing terms and conditions of employment; it protects and even encourages substituting negotiations between the employer and the employees as a group, backed by freedom to resort to economic weapons, in place of the older methods of unilateral dictation or individual bargaining. There is not the slightest reason to suppose that Congress intended to allow unions and employers, acting jointly, to establish employment conditions that a state forbids employers to establish unilaterally or by individual bargain. Serious interference with the substitution of one method for another would not result from allowing a state to outlaw substantive conditions of employment that the state regards as undesirable without regard to the method by which they are established. Preemption is required only if state law limits the terms that may be included in collective agreements while leaving employers free to establish the same conditions unilaterally or by negotiation with individuals. To put the point a little differently, reasoning about Congress' intent to the exclusion or toleration of state laws regulating substantive terms and conditions of employment seems to me to require that the areas of discourse be observed, as I suggested in discussing

75. *Id.*

76. 1937 Mass. Acts, ch. 367, § 2.

unemployment insurance and the rights of individual members against the union.

The reasoning of the opinion in *Teamsters Union v. Oliver*[77] is totally opposed to this suggestion. Oliver was the owner and occasionally the operator of trucking equipment that he leased to another carrier. The Central States Agreement between the Teamsters and the carriers prescribed in careful detail the wages to be paid owner-drivers, their working conditions, and the separate rental to be paid for equipment. Oliver brought an action in the Ohio courts to enjoin the Teamsters and the carriers from implementing the contract on the ground that it violated the Ohio anti-trust law. The Ohio courts granted the injunction.[78] The United States Supreme Court reversed. The Court first decided that the clause in the Central States Agreement was a mandatory subject of collective bargaining under section 8(d) of the NLRA. It then posed the following question: "Whether Ohio's anti-trust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which the federal law directs them to begin."[79] The Court had little difficulty in concluding that Ohio law cannot be so applied. After describing the goal of federal labor policy expressed in the NLRA, the Court concluded: "we believe that there is no room in this scheme for the application here of this State policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions."[80]

The Court's language is manifestly inconsistent with the approach suggested above. An exception for employment discrimination must be interpolated in order to justify the *Massachusetts Electric* decision. On the other hand, the language is also manifestly broader than required to decide the only issue that was before the Court. The Ohio courts had held that Ohio's anti-trust law was violated because an association of employers and a labor union had agreed upon the compensation and rental for owner-operated trucking equipment. The state had formulated no policy with respect to those subjects, save that they should not be fixed by collective bargaining. It was, in short, the *method* to which the state objected. The NLRA prescribed a method that the state attempted to proscribe. Obviously, the state law had to yield, but there was no occasion to decide whether an employer and the representatives of its employees can by agreement override a state law fixing a substantive term or condition of employment for employers and employees without regard to how their relations are conducted.

The opinions in *Malone v. White Motor Co.*,[81] although far from

77. 358 U.S. 283 (1959).
78. 167 Ohio St. 299, 147 N.E.2d 856 (1958).
79. 358 U.S. at 295.
80. *Id.* at 296.
81. 435 U.S. 497 (1978).

dispositive, suggest that *Oliver* may not be the final word. In the 1960's, the United Automobile Workers and a subsidiary of White Motor Co. had agreed in collective bargaining upon a retirement and pension plan that only partially funded the promised pensions. The beneficiary's rights were nonetheless strictly limited to payments from the fund. The subsidiary corporation also reserved the absolute right to terminate its liability at any time. In 1968 and 1971, White Motor guaranteed certain payments at levels higher than the fund could support but still below the levels fixed in the plan. Early in 1974, Minnesota enacted legislation imposing upon employers who had established a pension plan a "pension funding charge" sufficient to ensure that employees with ten years seniority would obtain the level of benefits set by the plan, even though the plan was not fully funded and was terminated before the rights of the employees had vested.[82] Shortly after enactment of the statute, White terminated the plan. When the state sought to compel payment of the funding charge, White asked the United States District Court to enjoin collection upon the ground that the Minnesota statute "interferes with the right . . . to free collective bargaining under federal law and . . . vitiates collective bargaining agreements entered into under the authority of federal law."[83]

The district court rejected the claim of federal preemption,[84] but the Court of Appeals for the Eighth Circuit sustained it, partly upon the ground that since "states cannot control the economic weapons of the parties at the bargaining table, a *fortiori* they may not directly control the substantive terms of the contract which results from that bargaining,"[85] and partly on the ground that "a state cannot modify an otherwise valid and effective provision of a collective bargaining agreement."[86] The reasoning rather plainly implies that any collective bargaining agreement negotiated between an employer and representatives of employees subject to NLRB jurisdiction upon a statutory subject of bargaining prevails over an inconsistent state law.

Three of the seven Supreme Court Justices who participated in the decision followed the same reasoning, albeit in dissent. Justice Stewart was most explicit in asserting that the case was governed by "[t]he fundamental policy of the national labor laws to leave undisturbed 'the parties' solution of a problem which Congress required them to negotiate in good faith towards solving . . . ."[87] Justice Powell also relied upon "the national labor policy barring interference by the States with privately negotiated solutions to problems involving mandatory subjects of collective bargaining."[88] The Chief Justice concurred in both dissenting opinions.

82. MINN. STAT. § 181 B. 01 (1976).
83. 435 U.S. at 502.
84. 412 F. Supp. 599 (D. Minn. 1976).
85. 545 F.2d 599, 606 (1976).
86. *Id.*
87. 435 U.S. at 515-16.
88. *Id.* at 516.

A four-man majority, speaking through Justice White, disagreed. The bulk of the opinion is devoted to showing that section 10 of the federal Welfare and Pension Plans Disclosure Act[89] manifested a congressional intention to retain state regulation of welfare and pension plans. That question need not detain us. Since January 1, 1975, section 514 of the federal Employee Retirement Security Income Act of 1974[90] has ousted state regulation of employee pension plans. The remaining, challenging question is whether Justice White and his colleagues would agree with the dissenters that, in the absence of other specific intent, the national labor policy prevents a state from fixing by statute a term or condition of employment different from what is stipulated in a collective bargaining agreement. The White Motor opinion seems carefully non-committal:

> There is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining. If the [State] Pension Act is preempted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here and that a far more reliable intent . . . is to be found in § 10 of the Disclosure Act.[91]

Perhaps the question whether an employer and the representatives of its employees can override a state law fixing a substantive term or condition of employment for all covered establishments, regardless of whether the employees have organized, has little practical importance. The absence of litigation would so suggest. I am inclined to think, however, that if the question were to be litigated, *Teamsters Union v. Oliver* might well be cut back to the narrower rule that I have suggested. The majority opinion in *Malone v. White Motor Corp.* would lend substance to the argument if only because it carefully avoided espousing the views of the dissenters.

III. CONCLUSION

The divisions among the Justices in the *Sears, New York Telephone* and *Malone* cases suggest that praise and criticism of the decisions may be equally divided. All three decisions commend themselves to me. The opinions, however, do nothing to clarify the principles that govern federal preemption in labor law. One perceives little interest in logical consistency and less interest in building a coherent and continuing body of law. Perhaps this characteristic results from the increasing influence upon Court opinions of law clerks serving for single one-year terms and assigned to write an opinion justifying a vote already cast. Perhaps it reflects a predominance of Justices who are primarily pragmatists more concerned with the immediate outcome than with building a coherent body of law.

89. 72 Stat. 997 (1958), *repealed by*, Employee Retirement Income Security Act of 1974 § 111(a)(1), 88 Stat. 829, 832 (1974).

90. 88 Stat. 832 (1974) (codified at 29 U.S.C. § 1144 (1976)).

91. 435 U.S. at 504-05.