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FORUM

THE VIEWS OF JUSTICE REHNQUIST CONCERNING THE PROPER ROLE OF THE STATES IN NATIONAL LABOR RELATIONS POLICY

Bruce Comly French*

I. INTRODUCTION

The opinions of Justice William H. Rehnquist reflect a clear trend in favor of state sovereignty within the federal system. His opinions, as well as those in which he has joined, tend to advocate restriction of federal court jurisdiction in matters affecting states,[1] while others breathe life into the view that the tenth and eleventh amendments to the Constitution enhance state powers.[2] Consequently, those opinions

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1. *See* Rizzo v. Goode, 423 U.S. 362, 379 (1976) ("Where an injunction against a criminal proceeding is sought under 42 U.S.C. § 1983, 'the principles of equity, comity, and federalism' must nonetheless restrain a federal court."); Doran v. Salem Inn, Inc., 422 U.S. 92 (1975) (by implication) (where state criminal proceedings are pending, it is an abuse of federal district court discretion to issue preliminary injunctive relief since state courts are fully competent to decide constitutional issues in such cases); Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("A suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); Hagans v. Lavine, 415 U.S. 528, 554 (1974) (Rehnquist, J., dissenting) (jurisdiction over supremacy clause claim may not be grounded as an pendent claim upon an insubstantial equal protection claim under 28 U.S.C. § 1343 which served as a ruse to federal question jurisdiction under 28 U.S.C. § 1331 where the claim did not exceed $10,000).

2. *See* National League of Cities v. Usery, 426 U.S. 833, 852-55 (1976) (Congress may not exercise its commerce power "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made). The court ultimately held that the 1974 amendments to the Fair Labor Standards Act extending minimum wage and maximum hour provisions to public employees of the states and their political subdivisions violated the tenth amendment. *See* Fry v. United States, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting) (dissenting from opinion holding that a Presidential Executive Order which

which analyze competing state and federal statutes are often result-oriented in favor of the state.[3]

The relative extent of state power when faced with directly conflicting or potentially clashing congressional enactments is one measure of this emerging view of the balance between federal and state interests. The analysis of the conflict is occasioned by the supremacy clause's injunction that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . ."[4]

The supremacy clause thus sets the stage for the judicial doctrine of preemption, which requires state enactments directly conflicting with enactments of the Congress in the same field to be rejected.[5] The nub of the controversy, of course, is whether the conflict is total; whether Congress intended the federal law to fully occupy the field and thus preempt the state or local enactment; or whether there is a way in which to harmonize the statutes.[6]

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imposed limitations on salaries paid state employees, was not violative of the tenth amendment); Edelman v. Jordan, 415 U.S. 651 (1974). *See also* Lind, *Justice Rehnquist: First Amendment Speech in the Labor Context*, 8 HASTINGS CONST. L.Q. 93, 94-96 (1980); Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

3. For cases that exemplify the type of result-oriented opinions which Rehnquist authors, see notes 1-2 *supra*.

4. U.S. CONST. art. IV, cl. 2.

5. Professor Tribe has asserted the premption problem as follows

> The question whether federal law "preempts" state action, largely one of statutory construction, cannot be reduced to general formulas. In evaluating patterns of statutory interaction, the Supreme Court has declared generally that whether challenged state action has been pre-empted on whether or not it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Since congressional purposes can be either substantive or jurisdictional, a state action may be struck down as an invalid interference with the federal design either because it conflicts with the actual operation of a federal program, or because, whatever its substantive impact, it intrudes upon a field that Congress has validly reserved to the federal sphere.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24 (1978). Preemption matters in conflicting state and federal relations are most pronounced in labor law matters. *See* note 9 *infra* and accompanying text.

For an analysis of related preemption problems between the federal authority concerning Native Americans and the state, (opinions joined by Justice Rehnquist during his tenure on the Court) see Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 696 (1979) (dissenting opinion); United States v. John, 437 U.S. 635 (1978); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

6. Professor Tribe identifies essentially three preemption issues. First, are those in which the state power conflicts with the power Congress *has* exercised in that field. Second, are those conflicts between state power and that which Congress *might* have exercised, so-called "dormant" congressional power. Finally, Congress may legislatively reserve to the federal government the power to act in a certain area. Therefore, any exercise of state power within this legislative vacuum is held invalid regardless of how consistent the state statute is with the federal scheme. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23 (1978). For an excellent example of harmoniz-

The substantive law of labor and management relations is often the most explosive example of the doctrine of preemption. Under the Labor Management Relations Act,[7] state criminal and tort laws often collide with the rights afforded[8] or denied.[9]

Labor law opinions authored and joined by Justice Rehnquist offer an opportunity for analyzing his view of the proper balance between state law interests and the national policies favoring collective bargaining.[10] Similarly, a quick "once over lightly" review of the Justice's authored opinions concerning preemption matters in maritime and environmental regulation and state property laws will be presented to show the consistency of his opinions regarding state and federal law conflicts.[11]

This article will examine the various opinions of Justice Rehnquist by first examining the narrow construction given to federal statutes on labor matters.[12] As will be seen, this is an apparent attempt to ensure state authority and jurisdiction in those matters. The most important decisions in this area are those construing the "affecting commerce" clause of the National Labor Relations Act as well as the appropriate reach of the National Labor Relations Board's jurisdiction. Second, the preemption doctrine will be examined in the context of the continued validity of state criminal and tort laws in those matters affecting

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ing the intent of two federal statutes and their impact on labor law, see New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) (plurality opinion).

7. Labor-Management Relations Act, 1947, 29 U.S.C. §§ 141-187 (1976).

8. Section 157 of the Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id. § 157.

9. *See id.* § 158.

10. Other opinions not discussed in this article which provide a perspective of Justice Rehnquist's view concerning labor law doctrine include NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (church schools not within the jurisdiction of the NLRB); Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974) (successorship bargaining obligations); NLRB v. Boeing Co., 412 U.S. 67 (1973) (fines of union members for crossing a picket line); NLRB v. Burns Security Services, 406 U.S. 272, 296 (1972) (Rehnquist, J., concurring in part and dissenting in part) (successorship doctrine). For other helpful articles concerning labor law preemption, see note 23 *infra*. *See also* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

11. See text accompanying notes 122-133 *infra*.

12. See notes 16 through 44 *infra* and accompanying text.

national labor relations.[13] Here, those cases falling within the traditional preemption analysis will be examined. Though Justice Rehnquist has authored no opinions in this area, he did join in the *New York Telephone*[14] opinion, an exceedingly pro-labor opinion which supports his notion of fundamental state sovereignty within the federal system. Finally, the concept of preemption and federal-state relations in other fields will be examined.[15] The decisions in this area are important in that they demonstrate Justice Rehnquist's consistency with his labor law opinions.

II. Narrow Construction of Federal Statutes to Ensure State Authority and Jurisdiction in Labor Matters

In expounding the underlying philosophical underpinnings of Justice Rehnquist's views, commentators have emphasized that in resolving conflicts between state and federal authority, he usually concludes that the state authority should be exercised.[16] This has meant that he is often in the minority in Supreme Court opinions, but his opinions have shown remarkable consistency in explicating this principle. It is not surprising, then, when reading federal statutes from this viewpoint, that an interpretation is advanced which narrows the reach of federal authority to one which allows full play to state court jurisdiction and the effectuating of state laws.

In his first two major labor relations opinions, Justice Rehnquist narrowly construed a definition within the National Labor Relations Act (NLRA) to find no jurisdiction in the NLRB. Resulting from this threshold determination, the Court then concluded there was no bar to the issuance of state court injunctions to control picketing under neutral state statutes. Both cases, *Windward Shipping (London) Ltd. v. American Radio Association*[17] and *American Radio Association v. Mobile Steamship Association*,[18] turned upon the meaning of the phrase "affecting commerce"[19] within sections 2(6) and (7) of the Act.[20] In 6-3

13. See notes 45 through 121 *infra* and accompanying text.
14. 440 U.S. 519 (1979) (plurality opinion).
15. See notes 122 through 133 *infra* and accompanying text.
16. *See, e.g.*, Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 294 (1976).
17. 415 U.S. 104 (1974).
18. 419 U.S. 215 (1974).
19. 415 U.S. at 105.
20. In this regard, the Labor Management Relations Act provides in pertinent part:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Terri-

and 5-4 decisions, Justice Rehnquist delivered the opinions of the Court which found no jurisdiction in the NLRB under the Act.

In *Windward Shipping*, suit was initiated by the managing agents of two Liberian flag ships in a Texas state court to enjoin picketing by American maritime unions. The ships in question were operated by foreign nationals in foreign unions, and called upon foreign ports.[21] While the picketing was peaceful, an injunction was sought under a Texas tort statute when representatives of other unions declined to cross the picket lines. The state trial court determined that the NLRB had at least arguable jurisdiction over originally protected union activity.[22] As a result, under the Supreme Court's holding in *San Diego Building Trades Council v. Garmon*,[23] state court jurisdiction was preempted, and the NLRB's authority was exclusive.

The Court traced a series of earlier decisions which emphasized the primary application of the Labor-Management Relations Act[24] to "*American* workingmen and for their employers"[25] and not to foreign nationals. Justice Rehnquist reasoned that the unique nature and tradition of maritime employment precluded its inclusion within the phrase "affecting commerce," and that a special cue from the Congress to disturb this conclusion would be required. The dissenters posed the political reaction that seamen are entitled to attempt to save their jobs from foreign economic competition. A statutory reaction was also posed that, because the case arguably falls under the *Garmon* rule, jurisdiction is properly vested in the NLRB in the first instance.[26]

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tory of the United States and any State or other Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

29 U.S.C. §§ 152(6) & (7).

21. 415 U.S. at 106.

22. *Id.* at 108.

23. 359 U.S. 236, 245 (1959): If the NLRB decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the states are ousted of all jurisdiction. For a thorough analysis of the *Garmon* rule, see notes 45-101 *infra* and accompanying text. *See also* Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

24. 29 U.S.C. §§ 141-187 (1976).

25. 415 U.S. at 110 (emphasis in the original) (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 144 (1957).

26. The threat of foreign economic competition was conceded. 415 U.S. at 122 (Brennan, Douglas, and Marshall JJ., dissenting).

In *American Radio Association v. Mobile Steamship Association*,[27] Alabama state courts issued a temporary injunction against picketing substantially similar to that complained of in *Windward Shipping*. In this instance, the injunction was sought by stevedores and shippers, rather than by the owners and agents. Petitioners here claimed that the activity complained of was the converse of the facts in the related case and arguably prohibited by section 8(b)(4)(B) of the NLRA.[28] Again, the Court declined to assert exclusive NLRB jurisdiction, removing the potential for state court jurisdiction because it concluded that the "affecting commerce" issue (a threshold determination for jurisdictional purposes) was adversely resolved in *Windward Shipping*. The dissenters, more numerous here than in *Windward Shipping*, pressed the argument of the existence of an unlawful secondary boycott which was properly the subject of exclusive review by the NLRB. This conclusion on the merits would have been reasonable had the jurisdictional decision been resolved in a contrary fashion.[29]

While the decision in *Windward Shipping* presents a closer question whether the federal labor relations laws are applicable than in *American Radio Association*, the latter decision was able to serve Justice Rehnquist's general opinion that the preclusion of state court jurisdiction is not to be lightly inferred. The definitional interpretation of "affecting commerce" strains the common and ordinary understanding of the phrase, but the outcome does effectively limit exclusive federal authority in these picketing cases. The niggardly analysis of the breadth of the NLRA is to be contrasted with the expansive brush which has painted a broad field to benefit the exercise of state jurisdiction.[30] A more principled approach to the result-oriented conclusion of these two decisions would be to find NLRB jurisdiction under the plain meaning of the statute, but to carve out an exception to the exclusive

27. 419 U.S. 215 (1974).

28. *Id.* at 220. This provision prohibits *inter alia*:

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing;

29. 29 U.S.C. § 158(b)(4)(B). 419 U.S. at 236-244 (Stewart, Douglas, Brennan, and Marshall, JJ., dissenting).

30. See notes 45-133 *infra* and accompanying text.

jurisdiction of the Board similar to that found in the cases below.[31]

Justice Rehnquist, dissenting in *Eastex, Inc. v. NLRB*[32] and joined by the Chief Justice, held that the NLRB's remedial order constituted an actionable trespass under Texas state law not authorized by the NLRA. At issue in this complicated factual case in which six members of the Court joined the majority, was whether a union newsletter could be distributed over an employer's objection during nonworking hours in nonworking areas of the employer's premises. The majority of the Court emphasized those portions of the union newsletter which the employer had conceded were legitimate union expression.[33] Furthermore, the Court found that the private property issues did not outweigh the union's "mutual aid or protection" rights[34] because the union representatives were already lawfully on the premises. Thus, the majority concluded that the basic issues related to economics and labor relations and not to property rights.[35] Justice Rehnquist, in dissent, focused upon technical common law property law distinctions. He concluded that the limited exceptions to the employer's fundamental right in his private property did not justify the opening up of the premises for the political advocacy questions presented.[36]

In *Eastex*, Rehnquist quarreled with the majority's and the Board's treatment of the owner's property rights. He would maintain the state property law rights unless the primacy of the total repudiation of state law is shown by a clear indication of Congressional intent. Finding no such intention here, he would maintain those traditional state property rights to the owner.

The existence of some protected activity having been conceded in *Eastex*, the Justice was confronted with a complicated judicial and administrative balancing act. The outline of his scheme suggests that those matters directly within the competence of the NLRB were properly resolvable in that forum, but that more effort must be made to give the state substantive law its due.[37] State substantive law is here again

31. *Compare* 415 U.S. at 109-15 *with* the holding at 115. The Court undertook the recommended analysis but rendered a definitional holding.
32. 437 U.S. 556, 579 (1978) (Rehnquist, J., and Burger, C.J., dissenting).
33. *Id.* at 561.
34. *Id.* at 564. For the text of the statutory language, see note 8 *supra*.
35. 437 U.S. at 573.
36. *Id.* at 580 (Rehnquist, J., and Burger, C.J., dissenting). The narrow displacement of state property law to accommodate the legitimate distribution of union materials must be honored. Central Hardware Co. v. NLRB, 407 U.S. 539, 544-45 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113-14 (1956); Republic Aviation Corp. v. NLRB, 324 U.S 793, 805 (1945).
37. 437 U.S. at 580.

honored by creating a conflicting maze of procedural hurdles through which litigants must negotiate before a final conclusion is reached in their judicial journey.

Contrasting with these three result-oriented opinions, is one which benefits a uniform federal administrative practice over the individual and his pursuit of state law remedies. While Justice Rehnquist is a strong supporter of the administrative state[38] and often votes with government in litigation against the individual, *Andrews v. Louisville and Nashville Railroad*[39] suggests another paramount jurisprudential concept of Justice Rehnquist — the limitation upon the federal judicial forum.[40] In writing for the Court in a 7-1 opinion, Justice Rehnquist reviewed the legislative history of various enactments affecting the right of railway workers to bring suit for wrongful discharge. Petitioner Andrews had filed a suit in the Georgia state court complaining of a "wrongful discharge" following an automobile accident unrelated to his railway employment. The company removed the case to federal court, and then had the case successfully dismissed on the grounds of failure to exhaust the administrative remedies by appearing before the National Railroad Adjustment Board. The Court's opinion focused upon the exclusive nature of the bargaining agreement and its appropriate interpretation by the Board, even though Andrews had no interest in returning to his employment with the railroad.[41] In short, said the Court, the nature of any employer obligations to Andrews were based upon the contract and not a Georgia state law.

In dissent, Justice Douglas characterized the problem in a totally different light, focusing upon the Georgia law, and the remedies sought by Andrews, which did not include reinstatement and back pay which might be awarded by the Railroad Board.[42] Douglas concluded that the petitioner had no interest in further association with the railroad, nor with the union under the collective bargaining agreement. Because any statutory or common law remedy would have no impact upon the continued operations of the railroad and its relations with the unions

38. "A consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference . . . by the Court." NLRB v. Boeing Co., 412 U.S. 67, 75 (1973). *See* United States v. Enmons, 410 U.S. 396, 413 (1973) (Douglas, Rehnquist, Powell, J.J., and Burger, C.J., dissenting, (strong federal public policy of strict enforcement of the Hobbs Act should be honored).

39. 406 U.S. 320 (1972).

40. See note 1 *supra*.

41. 406 U.S. at 324.

42. *Id.* at 327 (Douglas, J., dissenting).

under the collective bargaining agreement, no national policy would be served by forcing Andrews to go before the Board.[43] Thus, Andrews should have been allowed his option of a judicial forum in the first instance.

Ironically, it is Justice Rehnquist who emphasizes the desirability of a single administrative forum for grievances which historically were optionally available before the Board or a trial court. The argument of exclusive jurisdiction within the federal agency does not appear to be as well developed as in the *Garmon* deferral cases discussed below, but an alternative policy objective of minimizing the burden of lawsuits must surely have driven the Justice to close out this avenue of redress.[44]

III. Classical Preemption Doctrine

The essence of the conflict between federal and state authority often flowers in a labor controversy. For here, one is presented with a longstanding national policy favoring the organization of workers into unions in order to promote industrial peace and stability[45] contending with the state's interest in deciding its local employment disputes. While specific exceptions to the exclusive jurisdiction of the NLRB have long existed, the general judicial statement of the NLRB's exclusive jurisdiction was set forth in the seminal opinion of *Garmon*[46] in 1959. The touchstone of the policy is:

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

43. *Id.* at 330 (Douglas, J., dissenting).
44. See note 1 *supra*.
45. 29 U.S.C. § 151 (1976) provides:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occuring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce, or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

Id.

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

to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[47]

The general approach of Justice Rehnquist in classical preemption cases is hinted at in his dissenting opinion in *Eastex*.[48] Not having written an opinion expressly on the question of preemption by the NLRA, Justice Rehnquist's views must be gleaned from his joining in the opinions in *Central Hardware Co. v. NLRB*,[49] *Hudgens v. NLRB*,[50] *Old Dominion Branch No. 496 v. Austin*,[51] *Farmer v. United Brotherhood of Carpenters*,[52] *Sears, Roebuck & Co. v. Carpenters*,[53] and *New York Telephone Co. v. New York Department of Labor*.[54] The positions adopted by Justice Rehnquist in the cases noted above can be roughly described as follows.

First amendment picketing rights should not be broadly construed and, in the context of labor relations, the appropriate standard for evaluation is the statutory one, the NLRA, and not the first amendment.[55] This view undercuts the preemption argument to the extent that the NRLB is the appropriate forum to generally resolve such matters, but it

47. *Id.* at 244-45.

48. *See* 437 U.S. at 579-83 (1978). In this case involving employees' distribution of union literature on the employer's premises, the Court held that the right to distribute the literature was protected by § 7 of the NLRA and preempted the employer's private property rights. *Id.* at 572-76. In his dissent, Justice Rehnquist argued that the literature was primarily political, rather than concerned with union organization or bargaining. Since it did not pertain to union activities, Mr. Rehnquist found the literature excluded from § 7 protection and argued that the employer's right to control activity on his private property should prevail over employees' attempts to distribute political literature. *Id.* at 579-83.

49. 407 U.S. 539 (1972). (case remanded for reconsideration of employer's property rights vis à vis union's use of employer's parking lot for union literature distribution after determining whether the union had other means readily available to reach employees).

50. 424 U.S. 507 (1976). (remanded to NLRB to be determined on NLRA basis alone and *not* on first amendment considerations).

51. 418 U.S. 264 (1974).

52. 430 U.S. 290 (1977). (unanimous holding that NLRA would not preempt state court jurisdiction over tort action arising out of internal union relations not directly related to employment discrimination).

53. 436 U.S. 180 (1978). The Court held that where the controversy presented to a state court was not the same as a controversy that would have been presented to the NLRB, the state court action would not be preempted since no danger of overlapping jurisdiction, prohibited by the *Garmon* rule, existed. Further, state court jurisdiction in these circumstances would not be preempted where a party who could have raised an NLRA issue failed to do so.

54. 440 U.S. 519 (1979). (enactments of NLRA and Social Security Act were not intended to preempt states' power to pay unemployment compensation to strikers).

55. See notes 43 & 44 *supra*. *Cf.* Carey v. Brown, 447 U.S. 455, 472 (1980) (Rehnquist and Blackmun, J.J., and Burger, C.J., dissenting) (would uphold carefully drawn Illinois statute concerning residential picketing) and Jones v. North Carolina Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (upholding state prison regulations as rational and not conflicting with first amendment).

enhances the role of state substantive law in non-labor-relations picketing cases by permitting a state supreme court to adopt a *state* constitutional law analysis of the state's first amendment analogue which differs from the federal interpretation.[56]

Furthermore, state substantive law should prevail in cases of tort standards[57] and state welfare benefits,[58] absent a clear signal from Congress that state adjudication of these matters would disrupt the federally created balance between labor and management in labor bargaining. In circumstances where a matter was arguably covered by the *Garmon* rule,[59] preemption would not be ordered where the matters properly susceptible to state court resolution[60] would not affect the national policies of the NLRA. The *Garmon* rule seems amenable to shading in either direction, due to what might have been an error in legal strategy by counsel for the labor organization in failing to make any complaint to the Labor Board in *Sears*.[61]

A. *Picketing by Labor—Resolution under the NLRA and not the First Amendment*

Justice Rehnquist joined the opinion of the Court in both *Central Hardware*[62] and *Hudgens*.[63] Both of these cases involved labor representatives' picketing on private property which was objected to by the owners involved. In *Central Hardware*, the retail clerks' union held an organizational campaign of non-employee union members on one of Central's parking lots.[64] The company's uniform and neutrally applied no-solicitation rule was applied against the union, after Central had received complaints from some of its employees concerning union harassment.[65] The question clearly framed was whether the Court's earlier decision in *Logan Valley*[66] or in *Babcock & Wilcox*[67] served as the basis

56. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-88 (1980); Note, Robins v. PruneYard Shopping Center: *Federalism and State Protection of Free Speech*, 10 GOLDEN GATE U.L. REV. 805 (1980).
57. Farmers v. United Bhd. of Carpenters, 430 U.S. 290 (1977).
58. New York Tel. Co. v. New York Dep't of Labor, 440 U.S. 519 (1979).
59. See note 23 *supra*.
60. *E.g.*, Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978). (unauthorized trespass).
61. 436 U.S. at 202-07.
62. 407 U.S. 539 (1972).
63. 424 U.S. 507 (1976).
64. 407 U.S. at 540-41.
65. *Id.* at 541.
66. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *overruled sub silentio*, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
67. NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).

for assessment of the enforceability of the state trespass statute. *Logan Valley* focused upon first amendment rights in characterizing the shopping mall as "the community business block,"[68] while *Babcock & Wilcox* focused on a statutory standard, the NLRA, to balance management's property rights with labor organizers' rights.[69]

The analysis of *Babcock & Wilcox* is narrowly drawn to the limited access given organizers in prescribed non-working areas of the employer's premise for the limited duration of the organizational campaign.[70] This, the Court concluded, was a fair balancing between the respective organizing and property rights of labor and management.[71] The dispute in *Central Hardware* was remanded to the NLRB for consideration in light of the NLRA principles of *Babcock & Wilcox*, rather than the constitutional principles of *Logan Valley*. Ironically though, as the dissenters noted, it was conceptually possible to find the NLRA rights to be broader than the first amendment in the context of an organizational campaign, and thus a more severe restriction on property rights might be compelled.[72]

As a sequel in *Central Hardware*, the Court considered *Hudgens*,[73] clarifying its earlier opinion and its relation to picketing by union members in furtherance of a strike, rather than in organizational campaign trespassing as in *Central Hardware*.[74] In *Hudgens*, the union pickets were employees of a warehouse of a shoe store company having a retail outlet in a shopping center.[75] The owner of the shopping center indicated that he would have them arrested for violating his no-solicitation rule. The pickets contended that their presence was in furtherance of a strike against the shoe company which was protected activity.[76] After canvassing the applicable cases, the Court remanded the matter to the NLRB to clarify its confusing reliance upon *Logan Valley*.[77] The proper test was to assess "conflicts between section 7 rights and private property rights, 'and . . . seek a proper accommodation between the two.' ".[78]

68. 391 U.S. at 319.
69. 351 U.S. at 113-14.
70. 407 U.S. at 545.
71. *Id.*
72. *Id.* at 548 (Marshall, Douglas, and Brennan, JJ., dissenting).
73. 424 U.S. 507 (1976).
74. 407 U.S. 539 (1972).
75. 424 U.S. 507, 590 (1976).
76. *Id.* at 490.
77. *Id.* at 523.
78. *Id.* at 521.

Having adopted the statutory rather than the constitutional standard, Justice Rehnquist was required to defer to the NLRB in the context of labor and management relations. In non-labor law areas, his own coup de grace was delivered in *PruneYard Shopping Center v. Robins*[79] in which the state court interpretation of state constitutional speech and picketing rights was allowed to be more expansive of the federal standard that was articulated in *Lloyd v. Tanner*.[80] This harmonization of rights in this sensitive constitutional area allows for the development of alternative standards in different states and is the logical step in an effort to make states full partners in a federal system. *Sears, Roebuck & Co. v. Carpenters*[81] is the most interesting case concerning preemption in which Justice Rehnquist joined the majority. Even the statement of the question suggests the answer that should prevail under *Garmon*, but an exception emerged which Justice Rehnquist was readily able to endorse:

> The question in this case is whether the National Labor Relations Act, as amended, deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against *picketing which is arguably—but not definitely—prohibited or protected by federal law.*[82]

Under the traditional statement of the *Garmon* rule, it is clear that this question would be an appropriate one for resolution by the NLRB. In *Sears*, representatives of the carpenters union engaged in peaceful picketing in a Sears parking lot in Chula Vista, California. The state court issued a temporary restraining order directing that the carpenters leave Sears' property.[83]

The state court of appeals relied upon the final clause of the *Garmon* rule, "the potential danger of state interference with national policy,"[84] as the leg that allowed it to sustain the injunction, even though it appeared to fall within the ambit of the rule.[85] The court noted that the

79. 447 U.S. 74 (1980). See, Note, New York Telephone v. New York State Department of Labor: *Limiting the Doctrine of Implied Labor Law; Preemption*, 46 BROOKLYN L. REV. 297 (1980); and Note, *State Unemployment Benefits to Strikers and the Preemption Doctrine*, 11 U. TOL. L. REV. 143 (1979).

80. 407 U.S. 551 (1972). In a 5-4 decision, the *Lloyd* court held that mere size and general invitation of the public for business purposes were not sufficient to change the private character of a large shopping center where there was no accompanying assumption or exercise of municipal functions or power. *Id.* at 569-70.

81. 436 U.S. 180 (1978).

82. *Id.* at 182 (footnotes omitted, emphasis supplied).

83. *Id.* at 182-83.

84. 359 U.S. 236, 245 (1959).

85. 436 U.S. at 183.

injunction was narrowly drawn to " 'location of the controversy as opposed to the purpose of the acts . . . and did not deny the Union effective communication with all persons going to Sears.' "[86] The state supreme court reversed, holding that the conduct was arguably protected or prohibited under *Garmon* and thus subject to the exclusive jurisdiction of the NLRB.[87] In analyzing the allegedly prohibited union conduct (recognitional picketing rules under section 8(b)(7)(C))[88] or the allegedly protected conduct (securing compliance by Sears with standards under section 7),[89] the Court assessed the actions which might have been taken before the NLRB. Regarding the section 8 violation, the Court concluded that the location of the pickets was irrelevant to the outcome (and thus the state court order did not constitute interference with the national policy)[90] and concerning the section 7 protections, a fuller federal protection is afforded.[91] The prohibited conduct branch focuses upon the impact of the state court jurisdiction over a common nucleus of facts relevant to state law and the risk of interference with the regulatory jurisdiction of the NLRB.[92] In this case, the nature of the section 8 unfair labor practice charge would have dealt with the picketing in general, and not as a result of its location.[93] Thus, even if the federal board held that an unfair labor practice had been committed it would not interfere with the locational aspects of the state trial court order.[94] Thus, preemption over the nar-

86. *Id.* at n.5.
87. 436 U.S. at 184.
88. 29 U.S.C. § 158(b)(7)(C) provides:

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the courts of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

Id.

89. For text of section 7, see note 8 *supra*.
90. 436 U.S. at 186.
91. *Id.* at 199-208.
92. *Id.* at 196.
93. *Id.*
94. *Id.* at 198.

rowly drawn state court order is not warranted.[95]

"Considerations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited."[96] The Court concluded that the union was obliged to file an unfair labor practice charge with the NLRB because the company had no effective means of presenting the protected activity charge to the Board.[97] In what might be considered a poor display of lawyering, the union instead chose to indicate its willingness to comply with a state court order ("legal process") to evict it from the premises.[98] Of final significance was the Court's statement in dictum that, "Experience under the Act teaches that . . . situations where trespassing is protected are rare and that a trespass is far more likely to be unprotected than protected."[99] Thus, the state supreme court's decision was reversed and the authority of the trial court to enjoin the picketing on Sears' property was sustained. By joining with the Court in this opinion, Justice Rehnquist concurred with an opening wedge into an area directly controlled by *Garmon*. His opinion in *PruneYard* presages a reassertion of state power, with all of its diversity, in an area previously viewed as exclusively federal.

The various opinions of the Court[100] are instructive as an indication of the current balance between property rights and picketing and the federal and state constitutional interplay under the expanding doctrine of federalism. Justice Rehnquist, as the primary proponent of expanded state's rights, is carrying the day in this clash between the federal and state governments for hegemony. *PruneYard* is indeed a bellwether.

The aftermath of *Sears* has been a cautious exercise of state court jurisdiction.[101] Courts have been tempted to assess the strength of the protected activity under the two-prong analysis of *Sears*, which gave greater weight and strength to protected rather than prohibited activity. The outcome, however, is far from certain. A more balanced approach,

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95. *Id.*
96. 436 U.S. at 200.
97. *Id.* at 201 & n.33.
98. *Id.* at 202.
99. *Id.* at 205.
100. *Compare* the opinion of the Court, 447 U.S. 74 (1980), *with id.* at 89 (Marshall, J., concurring), *id.* at 95 (White, J., concurring in part and concurring in the judgment), *and id.* at 96 (Powell and White, JJ., concurring in part and in the judgment).
101. *See* Note - Labor Law - Federal Preemption - *The Aftermath of* Sears, 27 WAYNE L. REV. 313 (1980).

designed to effectuate federal collective bargaining policy, calls for deferral to the NLRB in peaceful picketing circumstances under *Garmon* and resort to state courts for injunctions to enjoin violence on the picket line. *Garmon's* line of "arguable" jurisdiction appears to be the best test under the national policy, but it is certainly one which strengthens the NLRB at the interface between state and federal jurisdiction. Justice Rehnquist would applaud *Sears* and further narrow *Garmon*.

B. *Furtherance of Policies of State Substantive Law Not Directly Affecting the Collective Bargaining Process*

In three cases affecting state law, two cases involving tort actions and one affecting unemployment compensation benefits to strikers, the views of Justice Rehnquist became known. The two tort cases involved litigation against unions for various activities. In *Farmer v. United Brotherhood of Carpenters*,[102] a unanimous Supreme Court held in an opinion by Justice Powell that the NLRB does not preempt an action in state court to recover damages for the intentional tort of emotional distress against union officials. Pendent federal claims concerning discrimination and breach of contract claims against the union were dismissed by the trial court to minimize potential state court interference with the NLRA and EEO rights.

In *Old Dominion Branch No. 496 v. Austin*,[103] Justice Rehnquist joined with two other dissenting Justices in finding that the NLRA did not preempt a state court action for defamation.[104] In *Austin*, nonunion members of a bargaining unit were depicted as "scabs" by a local union newsletter. In the nonunion members' suit against the union for defamation, the state trial and supreme courts sustained an award of damages in the amount of $145,000 for each of the litigants.[105] The United States Supreme Court determined that the Virginia courts had not given sufficient attention to the standard of first amendment freedoms mandated in labor disputes.[106] The "hard" language of the newsletter

102. 430 U.S. 290 (1977). *See* Lodge 76 v. Wisconsin Employment Comm'n, 427 U.S. 132, 156 (1976) (Stevens, Stewart, and Rehnquist, JJ., dissenting) (should allow state court to enjoin unlawful strike); Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel); UAW v. Russell, 356 U.S. 634 (1958); Youndahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (damage action for labor dispute violence).

103. 418 U.S. 264 (1974).

104. *Id.* at 291 (Powell and Rehnquist, JJ., and Burger, C.J., dissenting).

105. *Id.* at 269 & n.4.

106. *Id.* at 272.

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must be protected because of the robust nature of debate and hyperbole that is part of labor organization and union relations with its members. The dissenters, including Justice Rehnquist, concluded that the loose standard adopted by the majority ran roughshod over the reputation rights of the dissenting union members.[107] The solution of the dissent was to reverse and remand for a new trial with clearer jury standards that were more favorable to the litigant's ultimate ability to collect a judgment.[108]

New York Telephone Co. v. New York Department of Labor,[109] the most complex case to be considered by the Supreme Court in recent years, involved the relations of state law to federal labor relations policy. Here, announcing the judgment of the Court, Justice Stevens, joined by Justices Rehnquist and White, concluded that a New York state law which authorized the payment of unemployment compensation benefits to strikers did not require rejection under federal preemption doctrine.[110] All Justices concluded that this strike payment did benefit labor at the expense of management. The plurality, including Justice Rehnquist, concluded that Congress was aware of the potential problem of burdening management in a labor dispute, but that it gave no indication that the burden was impermissible as part of the collective bargaining system.[111] The Court opined that cases involving preemption of state laws specifically impacting upon labor relations (or laws of general application having an effect upon collective bargaining) were nonapplicable.[112] The dissenters, of course, viewed the national relations policy as preempting this "employee benefit" state law. They found no expression of legislative intent to suggest that Congress had even remotely considered the full ramifications of this local state law. Thus, preemption was appropriate in maintaining the balance in labor relations.[113]

The significance of *New York Telephone* is not only its favoring the emerging narrow reading of what is exclusively protected or prohibited under the NLRA,[114] but also its profound legal implications for federal and state relations analysis. As in *Sears*, which threaded a thin

107. *Id.* at 295 (Powell and Rehnquist, JJ., and Burger, C.J., dissenting).
108. *Id.* at 297.
109. 440 U.S. 519 (1979).
110. *Id.* at 527-42.
111. *Id.* at 530-31; *see id.* at 549-50 (Blackmun and Marshall, JJ., concurring in the judgment).
112. *Id.* at 532.
113. *Id.* at 551-67 (Powell and Stewart, JJ., and Burger, C.J., dissenting).
114. See notes 45-121 *supra* and accompanying text.

line through a minefield of arguable jurisdiction of the NLRB, *New York Telephone* firmly articulates the view that Congress must show preemption by specific direction, rather than through some ambiguous signals coming from various statutory provisions.[115] This view is even more pronounced in several environmental regulation cases in which Justice Rehnquist is ironically in dissent.[116]

If *New York Telephone* is followed, reliance upon a carefully reasoned and developed federal scheme in an area of clear federal authority in assessing whether a state statute should be preempted will be insufficient. As all litigating parties agreed, the New York State scheme burdened the NLRA's policy of labor and management collective bargaining. Nonetheless, with the scant legislative history of both the NLRA's enactment and the contemporaneous enactment of title IX of the Social Security Act,[117] the Court was unable to find that the Congress intended to eliminate the option of states to provide strikers unemployment compensation benefits. Likely, the matter was not considered in any depth, but it is clear, as the dissenters point out, that this decision moves to add a "state law burden" to the balanced national policy.[118] It is of considerable irony that the "state's rights" advocacy of Justice Rehnquist has benefitted labor in this instance. Woe be to labor in a decision emanating from a right to work state[119] or other less receptive jurisdictions.[120]

The sum of this view is consistent with that advanced by Justice Rehnquist in general federal and state opinions analyzed below.[121] By giving full effect to all or, in some cases, a large portion of a state law, Justice Rehnquist accomplishes an objective of aggrandizing state power. Similarly, in relations between the federal government and the

115. See note 121 *infra*.

116. See notes 122-133 *infra* and accompanying text.

117. 49 Stat. 639, as amended and recodified as the Federal Unemployment Tax Act, 26 U.S.C. § 3301-3311 (1976), 42 U.S.C. § 501, § 1101-1108 (1976). *Compare* 440 U.S. at 526-27 *with id.* at 561 (Powell and Stewart, JJ., and Burger, C.J., dissenting).

118. 440 U.S. at 560-67 (Powell and Stewart, JJ., and Burger, C.J., dissenting).

119. 29 U.S.C. § 164(b). Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407 (1976). (Justice Stewart's opinion in dissent concluding that a state right to work law applied should be contrasted to the majority in which Justice Rehnquist joined). *Id.* at 422 (Stewart and Rehnquist, JJ., dissenting).

120. *See* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215 (1974).

121. "Preemption, then, if it is to exist at all in this case, must exist because the operation of the state Act inexorably conflicts with the *purposes* underlying the Federal Act." Jones v. Rath Packing Co., 430 U.S. 519, 545 (1977) (Rehnquist and Stewart, JJ., dissenting) (emphasis in original); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973) (Rehnquist joining in majority opinion by Powell) (clear and manifest evidence of Congressional intent to preempt must be shown).

states, the Justice demands an unequivocal statement by the Congress that a particular regulatory or statutory scheme is intended to preempt all state activity in the subject matter area. *New York Telephone*, like *Sears* and *PruneYard*, shares and supports the objective of creating diversity within the federal system and enabling the states to develop in a manner consistent with a local tradition, rather than being melted into one undistinguishable state.

IV. Preemption and Federal-State Relations in Other Fields: A Consistency with Labor Law Opinions

Justice Rehnquist has consistently limited the reach of federal statutes. Two notable examples of environmental regulation conflicts include tanker pilotage and size regulation in Puget Sound and airplane noise ordinance controls in Burbank, California. In *Ray v. Atlantic Richfield Co.*,[122] Justice Rehnquist joined with Justice Marshall, concurring in part and dissenting in part, to find that a portion of the Washington state statute was preempted (a conclusion of the unanimous court), while arguing in dissent that the absolute size limitation upon vessels entering Puget Sound was not preempted by federal law or regulation. While believing that the Secretary of the Federal Department of Transportation had unexercised jurisdiction to preempt the related state statute, he found that the federal and state schemes could be harmonized. Similarly, in *City of Burbank v. Lockheed Air Terminal, Inc.*,[123] he concluded that an insufficient showing of implied federal preemption of all local regulation was presented. Thus, in both of these instances, in the absence of specific legislative language or a compelling legislative history to preempt related state statutes in an area of federal cognizance, he affords state law latitude to regulate in the interests of the general federal statute. These opinions represent a principled and consistent analysis of the preemption issue.

In two opinions involving air and water pollution programs administered by the federal Environmental Protection Agency,[124] both Justice Rehnquist and Justice Stewart found sufficient intent in the acts

122. 435 U.S. 151, 181 (1978) (Marshall, Brennan and Rehnquist, JJ., concurring in part and dissenting in part).

123. 411 U.S. 624, 640 (1973) (Rehnquist, Stewart, White, and Marshall, JJ., dissenting). *See id.* at 640-650 for an analysis of the preemption argument by the dissenters.

124. Hancock v. Train, 426 U.S. 167 (1976) (Stewart and Rehnquist, JJ., dissenting) and EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200 (1976) (Stewart and Rehnquist, JJ., dissenting). *See also* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (no federal preemption of Florida Oil Spill Prevention and Pollution Control Act).

of Congress to allow state governments to control the operation of federal facilities within those states through a permit system administered by them. In these two dissents, Justice Rehnquist differed with the majority which failed to find the requisite degree of clarity in the federal laws to express congressional intent to force federal instrumentalities to comply with state officials' implementation of federal-state plans.[125] Here, the result-oriented decision of strengthened state governments was well supported by a textual reading of the federal enactments.[126] The additional justification sought by the majority appeared to be unwarranted in light of the specific language of the statutes.

In *Arizona Public Service Co. v. Snead*[127] and *Douglas v. Seacoast Products, Inc.*,[128] Justice Rehnquist, in separate opinions, concurred in the Court's judgment but indicated that he would not tread as broadly as the majority opinion. Thus, again, he would preempt only state laws specifically drawn into conflict of question by the federal enactments. In a procedural decision, a limited reach of the federal rules was honored in *Granny Goose Foods, Inc. v. Teamsters Local 70*.[129] In *Hisquierdo v. Hisquierdo*,[130] Rehnquist joined with Stewart's dissent favoring the continued validity of and application of community property regimes in California. *Malone v. White Motor Corp.*[131] authorized collective bargaining over pension systems in accordance with state law. Justice Rehnquist joined with the majority in federal and state copyright relations cases[132] and with the dissent in a case of state taxation of

125. Hancock, *supra* note 124, at 189 (Stewart and Rehnquist, JJ., dissenting) (agreeing with the Fifth Circuit's reasoning in Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974); *see* EPA v. California *ex rel.* State Water Resources Control Bd., *supra* note 124, at 228 (Stewart and Rehnquist, JJ., dissenting) (agreeing substantially with the reasoning of the Ninth Circuit in this case, 511 F.2d 963 (9th Cir. 1975).

126. 33 U.S.C. §§ 1251-1376 (1976).

127. 441 U.S. 141, 151 (1979) (Rehnquist and White, JJ., concurring in the judgment).

128. 431 U.S. 265, 287 (1977) (Rehnquist and Powell, JJ., concurring in the judgment, concurring in part and dissenting in part).

129. 415 U.S. 423, 445 (1974) (Rehnquist, Stewart, and Powell, JJ., and Burger, C.J., concurring in the judgment) (would hold more narrowly than majority). For an interesting analysis of this opinion see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 334, n.192 (1976). *Cf.* General Atomic Company v. Felton, 434 U.S. 12, 19 (1977) (Rehnquist, J., dissenting) (order in issue only applies to future litigation and does not offend federal court orders).

130. 439 U.S. 572 (1979) (Stewart and Rehnquist, JJ., dissenting) (would hold that federal Railroad Retirement Act of 1974 contemplated continued application of California community property law, rather than majority treatment of the marital benefit provisions). *Cf.* Butner v. United States, 440 U.S. 78 (1979) (follow state laws concerning property rights of a bankrupts' assets).

131. 435 U.S. 497 (1978).

132. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973) (state protection of trade

the fruits of a federal instrumentality,[133] favoring the state.

These decisions give the greatest breadth to state laws and their interplay with federal enactments. Federal laws are construed narrowly to give full breadth to state laws, and where they are in partial or apparent conflict, Justice Rehnquist reaches for a result-oriented conclusion which favors harmonizing the statutes to the benefit of state authority, consistent with the general principles elucidated in his other labor law opinions.

V. Summary and Conclusions: Hypotheses

Justice William R. Rehnquist has a consistent judicial outlook which is reflected in his opinions concerning federal and state relations. In short, he looks for ways to sustain state exercises of power in the face of conflicting or clashing federal enactments so that the state laws may live. He attempts to avoid federal constitutional decisions which benefit the federal government, while striving to find federal statutory bases to support state constitutional or statutory activities.

Where there is conflict between his principle of conservative reading of federal constitutional protections, he will err on the side of expansive reading of state constitutional provisions initially propounded by a state supreme court. Decisions of federalism will be his hallmark to the expense of other principled decisions he may wish to endorse. In this manner, his jurisprudential philosophy is consistent with his political view, and carries out the objectives of the man who nominated him to the bench—Richard M. Nixon. As a "modern" states' rights activist, Justice Rehnquist will continue to exercise a profound influence on the Court in the decades ahead.

secrets does not violate federal law or require preemption); Goldstein v. California, 412 U.S. 546 (1973) (no total premption of state copyright laws).

133. *See* United States v. State Tax Comm'n, 412 U.S. 363, 381 (1973) (Douglas and Rehnquist, JJ., dissenting from remand to lower court to consider supremacy clause claim not previously addressed) (dissenters would have allowed the states to charge taxes upon liquor imported by the federal government for non-governmental functions over which the federal government has exlcusive jurisdiction.