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## State Regulation of Peaceful Self-Help Conduct Is Pre-Empted by National Labor Policy - Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission

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**STATE REGULATION OF PEACEFUL SELF-HELP  
CONDUCT IS PRE-EMPTED BY NATIONAL LABOR  
POLICY—LODGE 76, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS v. WISCONSIN  
EMPLOYMENT RELATIONS COMMISSION**

Case law has established both general areas of federal pre-emption over labor disputes<sup>1</sup> and specific conduct<sup>2</sup> regulable by the state. But where federal regulation ends and state regulation begins still is not completely clear.<sup>3</sup> In fact, further adding to the uncertainty, there is an area of labor conduct which neither the National Labor Relations Board nor the states can regulate. In *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*,<sup>4</sup> the Supreme Court found a specific example of this protected labor activity. Concurrently, the Court delineated a general area of labor conduct free from any regulation. The majority held that a refusal to work overtime, which was an activity neither protected nor prohibited by the National Labor Relations Act,<sup>5</sup> nevertheless was unregulable by the state.<sup>6</sup> The Court stated that the refusal to work over-

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1. See notes 14 & 16 and accompanying text *infra*.

2. See notes 17-22 and accompanying text *infra*.

3. The United States Supreme Court has stated that

[T]he national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

*Garner v. Teamsters' Local Union 776*, 346 U.S. 485, 488 (1953).

4. 96 S. Ct. 2548 (1976).

5. For purposes of this Note, the pertinent federal labor acts are the National Labor Relations Act, 29 U.S.C. §151-169 (1970), as amended by the Labor-Management Relations Act of 1947 (Taft-Hartley), 29 U.S.C. §§141-44, 151-67, 171-88 (1970), and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), 29 U.S.C. §401-707 (1970). [Hereinafter, these acts are referred to as the "NLRA" or "the Act."].

"Protected" and "prohibited" in this Note relate to the rights of labor and management under sections seven and eight of the National Labor Relations Act. Section seven of the NLRA, 29 U.S.C. §157 (1970), guarantees the rights of employees to organize and form unions and to engage in collective bargaining. These rights are "protected" against interference. Section eight, 29 U.S.C. §158 (1970), describes various activities on the part of labor and management which are deemed to be unfair labor practices for the purposes of the federal acts. These activities are "prohibited" as against labor and management.

6. The Supreme Court specifically overruled its previous decision in *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949), commonly referred to and hereinafter cited as *Briggs-Stratton*. In the *Briggs-Stratton* case, the Court permitted state restriction of conduct that was neither protected nor prohibited by the federal labor laws. The Court

time was in a class of peaceful self-help conduct that generally was unregulable by either state or federal instrumentalities.

In *Machinists*, union members at a Wisconsin machine tool plant refused to work overtime in order to put pressure on the employer during collective bargaining negotiations.<sup>7</sup> The employer filed unfair labor practice charges against the union with the NLRB and the Wisconsin Employment Relations Commission.<sup>8</sup> The complaint was dismissed by the NLRB, which found no conduct prohibited by the National Labor Relations Act.<sup>9</sup> However, the Wisconsin Employment Relations Commission found the refusal to work overtime violated the state labor statute and issued a cease-and-desist order. The Wisconsin Supreme Court,

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found that the conduct, which consisted of repeated calls for employee meetings during working hours, was coercive, and allowed state jurisdiction in the absence of a clearly manifested congressional intent to the contrary. *Id.* at 253. The *Briggs-Stratton* Court premised its holding on the statement that, since the conduct was not subject to the Act, "[t]his conduct is either governable by the state or it is entirely ungoverned." *Id.* at 254. The *Machinists* Court acknowledged that in *Briggs-Stratton* the Court neglected to ascertain whether the conduct should be left unregulated to the free play of economic forces. 96 S. Ct. at 2553.

7. A bargaining impasse occurred in *Machinists* when the employer announced he would impose a 40 hour work week with overtime pay applicable after eight hours per day and 40 hours per week. The union sought to retain a 37 1/2 hour week and seven and one-half hour day, with overtime provisions applicable after that time. Workers simply left after their shifts and refused to volunteer for or accept overtime or Saturday work. Refusal to work overtime previously had been held to be unprotected activity. *See, e.g.,* John S. Swift Co. v. NLRB, 277 F.2d 641, 646 (7th Cir. 1960); NLRB v. Kohler, 220 F.2d 3, 9-10 (7th Cir. 1955); C.G. Conn. Ltd. v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939). *See also* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 96 S. Ct. 2548, 2561 n.1 (1976) (Stevens, J., dissenting). *But see* Dow Chem. Co., 152 NLRB 1150 (1965).

8. The employer claimed that the refusal to work overtime violated section 8(b)(3) of the NLRA, 29 U.S.C. §158(b)(3) (1970), which makes it an unfair labor practice for a union to "refuse to bargain collectively with an employer." The Wisconsin charge, filed several days after the NLRB complaint, claimed a violation of §111.06(2)(h) of the Wisconsin statutes, making it an unfair labor practice for an employee "[t]o take unauthorized possession of the property of an employer or to engage in any concerted effort to interfere with production. . . ." WIS. STAT. §111.06(2)(h) (1973). The union activity in *Machinists* at no time involved violence or threats of violence.

9. In refusing to file a formal complaint, the NLRB's Regional Director said the conduct "does not appear to be in violation of the Act" and therefore was not conduct cognizable by the NLRB under *NLRB v. Insurance Agents, Int'l Union*, 361 U.S. 477 (1960). *Machinists*, 96 S.Ct. 2548, 2560 (1976). The Board's dismissal also said in part:

Dismissal by this agency does not necessarily preclude the Charging Party from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said act.

*Machinists*, 67 Wis.2d 13, 15, 226 N.W.2d 203, 204 (1975). The Wisconsin Supreme Court took the Regional Director's statement into account in allowing state jurisdiction.

on appeal, held that no national labor policy prevented the Commission's action.<sup>10</sup>

The United States Supreme Court reversed.<sup>11</sup> The Court indicated that Congress, in enacting the national labor acts, intended that some activities be available as bargaining tools to labor and management. The Court said that a refusal to work overtime was within such a class of economic conduct and therefore was unregulable by either the state or the NLRB.<sup>12</sup> This Note will analyze the Court's effort to define this area of unrestricted activity. The *Machinists* decision will be examined in light of the Court's attempt to draw guidance from its own pre-emption decisions.

### FEDERAL PRE-EMPTION AND SPECIFIC STATE POWERS

The national labor laws clearly force state acts to yield when there is a conflict.<sup>13</sup> Under the doctrine of federal pre-emption the states are ousted from jurisdiction because Congress sought to have the federal government and its designated agencies comprehensively "occupy the field."<sup>14</sup>

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10. *Machinists*, 67 Wis.2d 13, 226 N.W.2d 203 (1975).

11. 96 S. Ct. 2548 (1976).

12. *Id.* at 2557, citing *NLRB v. Insurance Agents, Int'l Union*, 361 U.S. 477, 497-500 (1960). In a concurring opinion, Justice Powell, joined by the Chief Justice, agreed that the state law should be pre-empted. However, he added that he understood the Court's decision not to preclude state enforcement of "neutral" statutes. Those laws are not directed towards the parties' bargaining relations, but have only an incidental effect on bargaining strength. 96 S. Ct. at 2560-61.

13. The National Labor Relations Act is the primary law regulating the field of labor relations. Under the Commerce Clause, U.S. CONST. art. I, §8, and the Supremacy Clause, U.S. CONST. art. VI, Congress has derived the authority to legislate in the labor relations area and to have those enactments supercede similar state statutes. The constitutionality of the Act was upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The NLRB, as constituted, has jurisdiction over all matters which "affect commerce." 29 U.S.C. §151 (1970), defined at 29 U.S.C. §152(7) (1970). That jurisdiction has been broadly defined. See, e.g., *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1953); *Howell Chevrolet Co. v. NLRB*, 346 U.S. 482 (1953); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). If state action conflicts with Board jurisdiction, the states must yield. See, e.g., *Hill v. Florida*, 325 U.S. 538 (1957); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

14. In defining pre-emption, Justice Harlan, in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971), stated

The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.

*Id.* at 285. Under the doctrine of pre-emption, state legislation may be prevented when a

Specific provisions of the National Labor Relations Act, notably sections 7 and 8,<sup>15</sup> make certain conduct subject solely to the jurisdiction of the NLRB.<sup>16</sup> However, the Supreme Court has specified areas in which states are left with residual police powers to regulate conduct affecting the health, safety, and welfare of the populace.<sup>17</sup> For example, the states generally have retained the power to halt or prevent violence which accompanies a labor dispute, provided that the state action is directed only to that violence or intimidation.<sup>18</sup> The police power also

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federal act already comprehensively regulates the field. State law must defer to the competence of the NLRB when the conduct falls under the provisions of the NLRA. In the NLRA statement of policy, 29 U.S.C. §151 (1970), the purpose of the Act was to safeguard the economy of the country by the application of one federal law to labor relations disputes. Whether or not that pre-emption exists largely depends on the Court's interpretation of congressional intent.

15. See note 5 *supra*. The pre-emption doctrine recognizes that any activity arguably subject to sections seven or eight of the Act is prevented from state interference. Further, the pre-emption doctrine acknowledges that it is not for the states or the federal courts to determine whether an activity is covered by the provisions of sections seven or eight. The Supreme Court expressed this concept of pre-emption in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), in which the Court stated:

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

[I]n the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

359 U.S. at 245-46.

16. The NLRB, under the reasoning of the *Garmon* decision, has primary jurisdiction over cases arguably subject to the NLRA. Once the Board has determined that conduct is subject to its jurisdiction, other governmental units are pre-empted. This primary jurisdiction notion of pre-emption allows the NLRB to take jurisdiction over most labor disputes. For a discussion of primary jurisdiction, see generally *Come, Federal Pre-emption in Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435 (1970); Hays, *State Courts and Federal Pre-emption*, 23 Mo. L. Rev. 373 (1958); Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I*, 59 COLUM. L. REV. 1 (1959).

17. This residue of state powers is derived from the state's "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." *Allen Bradley, Local 111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942); See also *Garner v. Teamsters, Local Union 776*, 346 U.S. 485, 488 (1953).

18. See, e.g., *UAW v. Russell*, 356 U.S. 634 (1958) (union's malicious interference with employee's lawful occupation); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (evidence that abuse, insults, and epithets involved with picketing likely to produce violence); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (union agent's threats and intimidation directed towards contractor).

extends to enforcement of tort actions<sup>19</sup> and some breach of contract actions between labor and management.<sup>20</sup> In addition, the *San Diego Building Trades Council v. Garmon*<sup>21</sup> decision indicated that the states could act when the conduct was insubstantial and local in character or when application of neutral state law would have only a peripheral impact on labor relations.<sup>22</sup>

### UNREGULABLE SELF-HELP CONDUCT

The Supreme Court also has recognized that some conduct cannot be regulated by either the state or federal agencies.<sup>23</sup> In *Machinists*, the crucial inquiry was whether Congress intended not to regulate certain conduct, leaving it to be controlled by "the free play of economic forces."<sup>24</sup> The *Machinists* Court reasoned that refusal to work overtime was within a category of permissible economic weapons that Congress

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19. See, e.g., *Farmer v. United Brotherhood of Carpenters, Local 25*, 45 U.S.L.W. 4263 (March 7, 1977) (intentional infliction of emotional distress); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel).

20. See, e.g., *William Arnold Co. v. Carpenter's Dist. Council*, 417 U.S. 12 (1974) (breach of "no strike" clause in collective bargaining agreement); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (failure to comply with grievance arbitration procedure in agreement).

21. 359 U.S. 236 (1959).

22. *Id.* at 243-44. However, the Court has set aside broad state statutes which have an impact on labor relations. See, e.g., *McCrary v. Aladdin Radio Co.*, 355 U.S. 8 (1957); *Teamsters, Local 327 v. Kerrigan Iron Works*, 353 U.S. 968 (1957).

The states also have been granted jurisdiction over labor matters by specific congressional enactment. For example, under section 14(b) of the NLRA, 29 U.S.C. §164(b) (1970), states can restrict union security agreements by applying substantive laws which are commonly referred to as right-to-work laws. See, e.g., *Retail Clerks, Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963). Under section 14(c) of the Act, 29 U.S.C. §164(c) (1970), the Board may decline jurisdiction over cases concerning labor disputes not substantially affecting commerce. Under section 14(c)(2), 29 U.S.C. §164(c)(2) (1970), the states can assert jurisdiction over these cases which the Board declines generally for failure to meet its jurisdictional standards. These standards are expressed in general terms of dollar volume by industry. See, e.g., *Acme Paper Box Co.*, 201 NLRB 32 (1973) (retail concerns with annual business over \$500,000); *Trico Disposal Service, Inc.*, 191 NLRB 17 (1971) (national defense). Other congressional grants of power to states include cession agreements under section 10(a) of the NLRA, 29 U.S.C. §160(a) (1970), and certain actions allowing damage awards for unfair labor practices under section 303 of the Act, 29 U.S.C. §187 (1970).

23. The Supreme Court, in *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 254, (1949) acknowledged that some conduct was entirely unregulated. The Court reiterated this view in *Garner v. Teamsters Local 776*, 347 U.S. 485, 488 (1953). The dictum of *Garner* indicated that these unregulated activities were as important to labor balance as those activities specifically protected under the NLRA. *Id.* at 500.

24. 96 S.Ct. at 2553, citing *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

intended to be free of governmental interference.<sup>25</sup> The majority found that neither the states nor the NLRB should be able to upset the balance of bargaining strength between labor and management which Congress created. That balance was evidenced by the congressional enactments which protected some conduct, prohibited other conduct, and left other conduct to the free play of economic forces. The Court concluded that state regulation of this unrestricted conduct would conflict with the congressional intent. In reaching its decision, the Supreme Court relied heavily on its previous reasoning in *NLRB v. Insurance Agents International Union*<sup>26</sup> and *Local 20, Teamsters v. Morton*.<sup>27</sup>

In *Insurance Agents*, the Supreme Court found that concerted harassing tactics by employees were not contrary to the union's duty to bargain in good faith.<sup>28</sup> Therefore, the NLRB was prevented by the Court from

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25. This activity, intended to be left unregulated, is generally in the nature of self-help or partial strike conduct which is employed by both labor and management to persuade each to agree to contract terms. This class of activity includes general slowdowns, Phelps Dodge Copper Prod. Corp., 101 NLRB 360 (1952), Elk Lumber Co., 91 NLRB 333 (1950); attacks on the employer's product, *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953); concerted rejections of optional though requested assignments, *Memphis Moldings, Inc.*, 164 NLRB 524 (1967); refusal to cross picket lines at a customer's premises, *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), *enforced*, 325 F.2d 1011 (D.C. Cir. 1963); and certain disloyalty measures, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). In attempting to ascertain the federal role over such activities, the policy is that Congress did not consider such conduct as neutral, but rather as conduct "to be assimilated to the large residual area in which the regime of free collective bargaining or economic warfare is thought to be in the course of regulatory wisdom." Lesnick, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 480 (1972). Because Congress intended that this conduct be available to bargaining parties, it is often seen as "protected" by the Act. Professor Cox has suggested that this unrestricted self-help conduct be called "permitted," because it is protected against governmental, but not employer, interference. Cox, *Labor Law Pre-emption Revisited*, 85 HARV. L. REV. 1338, 1346 (1972). For a discussion of the "protected" status of partial strike activity as a result of *Machinists* see Getman, *The Protected Status of Partial Strikes After Lodge 76: A Comment*, 29 STAN. L. REV. 205 (1977).

26. 361 U.S. 477 (1960).

27. 377 U.S. 252 (1964).

28. The employer in *Insurance Agents* charged the union members with a violation of section 8(b)(3) of the Act, 29 U.S.C. §158(b)(3) (1970), which is a refusal to bargain collectively by the union. The NLRB found a violation, and considered the union's continued participation in negotiations to be less than seriously pursued while the harassment continued. 119 NLRB 768, 771 (1957). The Supreme Court overturned the NLRB's findings. The justices found

[A]t the present stage of our national labor relations policy, the two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms—exist side by side.

361 U.S. at 489.

attempting to interfere with the economic pressure tactics. The self-help actions included refusal to solicit new business, refusal to comply with company business procedures, periodically reporting late for work, sit-ins, distribution of literature, and leaving in groups at noon.<sup>29</sup> The Supreme Court stated that these self-help tools were intended to be available to labor and management in bargaining for contract terms.<sup>30</sup> It reasoned that NLRB regulation could result in too much government influence over the substantive terms of collective bargaining agreements. The Court concluded that the national labor policy was not premised on the basis that the government should control the results of negotiations.<sup>31</sup>

In *Local 20, Teamsters v. Morton*,<sup>32</sup> the Supreme Court pre-empted application of state law to peaceful secondary boycott activity. A union violated section 303 of the NLRA<sup>33</sup> by encouraging employees of a customer to force their management to cease doing business with the struck employer.<sup>34</sup> Compensatory damages for business losses were awarded to the employer for this violation of section 303. The union also violated Ohio state law by encouraging the management of a second customer to cease doing business with the struck employer.<sup>35</sup> Punitive damages

29. 361 U.S. at 480-81.

30. In allowing the self-help actions, the Court quoted from *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), which held that a state anti-trust statute could not be applied to negate the terms of a collective bargaining agreement setting wage rates. The *Insurance Agents* court accepted the *Oliver* notion that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." 361 U.S. at 488, citing *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. at 295.

31. 361 U.S. at 490. The *Insurance Agents* Court expressed a concern that,

if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the terms on which the parties contract.

*Id.* Self-help weapons aid in making parties agree to bargaining terms. If states control the conduct, the parties cannot force contract settlements. Thus, the government may be forced to enter the negotiations to persuade the parties to agree to terms. For this reason, the *Agents* Court prevented the NLRB from asserting its authority to try to distinguish among economic weapons or to equalize disparities of bargaining power. *Id.* at 490. Fear of NLRB interference had previously been expressed by Congress. See S. REP. No. 105, 80th Cong., 1st Sess. 19 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 408 (1974).

32. 377 U.S. 252 (1964).

33. Section 303 of the Act, 29 U.S.C. §187 (1970), provides for damages against unions engaged in certain unfair labor practices.

34. 29 U.S.C. §187(a) (1970).

35. This conduct violated Ohio common law, which the Court said prohibits "making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer." *Local 20, Teamsters v. Morton*, 377 U.S. 252, 255 (1964). The



were assessed against the union. The Supreme Court found that section 303, which leaves a union free to peacefully persuade the management of a customer to boycott the struck employer, might be frustrated by the state's prohibition of the same activity.<sup>36</sup> Because Congress had "occupied the field" by comprehensively regulating secondary boycotts, the Court reasoned that congressional failure to prohibit the conduct indicated an intent that it be permissible self-help action.<sup>37</sup> Therefore, the damage award in *Morton* was confined to the specifically limited provisions of section 303.

The *Machinists* Court used the findings in *Insurance Agents* and *Morton* as justification for holding the refusal to work overtime to be unregulable. In *Insurance Agents*, the Court was concerned that the NLRB might become too closely involved in the collective bargaining sphere.<sup>38</sup> The Court in *Machinists*, fearing a similar influence by the Wisconsin agency, pre-empted the state jurisdiction.<sup>39</sup> While the majority in *Machinists* claims merely to have applied the principle of

peaceful approach to a customer's management did not violate any provisions of the federal Act.

36. The *Morton* majority stated:

[E]ven though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, "Congress occupied the field and closed it to state regulation. . . ." The basic question . . . is whether "in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law." . . . *The answer to that question ultimately depends upon whether the application of state law . . . would serve to frustrate the purpose of the federal legislation.*

377 U.S. at 258 (emphasis added). That frustration would be the state's regulation of an activity Congress meant to leave unregulated. The emphasis in *Morton* on the necessity of seeing whether state regulation would frustrate the Act by interfering with an area closed by Congress had been upheld by the Supreme Court prior to the *Machinists* decision. See, e.g., *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). For a discussion of *Morton*, see Ratner, *Damage Actions and the Impact of the Morton Case*, 18TH ANN. N.Y.U. CONF. ON LABOR 117 (1966).

37. The Court reasoned that Congress struck a balance in bargaining strength between labor and management, and that allowing the use of self-help was part of that balance. The justices then found that,

if the Ohio law of secondary boycott can be applied to proscribe the same type of conduct Congress focused upon but did not proscribe when it enacted §303, *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.*

377 U.S. at 259-60. (emphasis added).

38. See note 31 *supra*.

39. 96 S. Ct. at 2555.

*Insurance Agents* to the refusal to work overtime, the conclusions which they drew from that opinion seem overstated.

Justice Stevens' dissent in *Machinists* points out that *Insurance Agents* did not resolve the broad question whether self-help conduct was unregulable because of some legislative intent.<sup>40</sup> Rather, the *Insurance Agents* Court focused on a discussion of whether the union activity violated the duty to bargain in good faith under section 8(b)(3).<sup>41</sup> In addition, Justice Stevens limited the holding in *Insurance Agents* to the statement that the NLRB could not regulate the self-help conduct. He stated that the prohibition did not extend to the states. Justice Stevens reasoned in *Machinists* that simply because Congress denied the NLRB power to regulate the particular self-help conduct, this "hardly amounts to withdrawal of the same power from the States."<sup>42</sup> Following Justice Stevens' analysis, the Wisconsin Supreme Court correctly interpreted *Insurance Agents* as only precluding NLRB regulation of self-help tactics.<sup>43</sup> However, the response to this argument is that if the NLRB cannot assert jurisdiction to distinguish among various economic weapons, then the states, which have even less labor expertise, should also be precluded.<sup>44</sup> The NLRB is the expert agency designated by Congress to adjudicate labor disputes.<sup>45</sup>

The *Machinists* majority also may have overstated the Court's holding in *Morton*. In *Morton*, the Court found that Congress had intended section 303 to prohibit a specific form of self-help conduct while leaving

40. *Id.* at 2562, n.3.

41. See note 31 *supra*.

42. 96 S. Ct. at 2562, n.2.

43. Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 67 Wis.2d 13, 226 N.W.2d 203 (1975). The Wisconsin Supreme Court said *Insurance Agents* "merely holds that the NLRB had no power to regulate strike tactics and left regulation of strike tactics to the states." 67 Wis.2d at 18, 226 N.W.2d at 207.

44. The *Machinists* majority said the Court's prior decisions indicate a congressional intent that the activities were not to be regulable by the states any more than by the NLRB. 96 S.Ct. at 2557. The majority also found that the decisions "made it abundantly clear that state attempts to influence the terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB." *Id.* at 2559.

45. The Court noted in *Garner v. Teamsters, Local Union 776*, 346 U.S. 485 (1953), that in creating the national labor scheme Congress

did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . .

*Id.* at 490-91. The NLRB is empowered to apply the national labor act provisions, including the prevention of unfair labor practices by labor or management. 29 U.S.C. §160(a) (1970).

open other forms of such activity not specifically prohibited under that section.<sup>46</sup> But in *Machinists*, the Court decided that the refusal to work overtime was permitted even though Congress had never found that regulation of self-help would upset any bargaining balance<sup>47</sup> or had similarly occupied that field of activity.<sup>48</sup> The *Machinists* dissenters would have been willing to follow the majority had Congress actually focused on the refusal to work overtime or similar conduct and decided to leave it unregulated. But they saw no legislative authority which would allow the Court to apply the *Morton* inference of "frustration of national labor policy" to pre-empt incompatible state action.<sup>49</sup> It is difficult to ascertain exactly what legislative expressions were the basis for the majority opinion. With the exception of *Morton*, the Court's decisions on self-help conduct are based more on broadly-interpreted ideas of balance and public policy than on actual authority in the legislative history.<sup>50</sup>

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46. See notes 36 & 37 *supra*. A leading scholar has stated that the failure of the Congress to prohibit an activity, as in *Morton*, should create a negative inference that the conduct was proper and even desirable. When the state outlaws conduct which federal law fails to outlaw, it is seen as denying one party an economic weapon Congress meant to be available. See Lesnick, *supra* note 25, at 472-80.

47. Justice Stevens, in his dissent, stated that he had "found no legislative expression of any such intent nor any evidence that Congress had scrutinized such activity." 96 S.Ct. at 2561.

48. See note 50 *supra*. The only expression of legislative intent noted by the union in *Machinists* was discussion of a House bill during passage of the Taft-Hartley Act in 1947. However, Justice Stevens said the refusal to work overtime was not related to that bill's proscription of interference with the employer by remaining on the premises. 96 S.Ct. at 2561 n.2.

49. 96 S.Ct. at 2561.

50. Justice Harlan, in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 289 (1971), admitted that the precise extent to which state law had to be displaced for the sake of the national acts was never determined by Congress, a situation making it difficult for the Court to make its decisions. Despite the *Machinists* majority's claim that the decision was based on the congressional intent, there is simply no clear legislative history making the refusal to work overtime in a class of unregulable activity. The only relevant consideration was in H.R. 3020, which was passed by the House as part of the 1947 labor acts amendments. The key section of the bill was section 12(a)(3)(A), which made it unlawful for "calling, authorizing, engaging in, or assisting . . . any sit-down strike or other concerted interference with the employer's operations conducted by remaining on the premises." H.R. 3020, 80th Cong., 1st Sess. §12(a)(3)(A) (1947) see H. REP. No. 245, 80th Cong., 1st Sess. 27-28, 43-44 (1947). Section 12 was ultimately rejected by the Joint Conference Committee. The union in *Machinists* argued that section 12 was similar to the Wisconsin law invoked against the union. The fact that section 12 was deleted was considered an indication that Congress intended that the activity be unrestricted. The employer took the view that section 12 was inapplicable, because the employees in *Machinists* did not remain on the premises. They had, in fact, refused to remain for what the employer considered a full day. However, this section could have been deleted

Thus, *Machinists* expands *Morton* by finding pre-emption even as to conduct not scrutinized by Congress.<sup>51</sup>

#### THE RESULTING NO MAN'S LAND

The result of *Machinists*' broad interpretation of *Insurance Agents* and *Morton* is the creation of a conduct "no man's land."<sup>52</sup> Self-help conduct that is neither protected nor prohibited by the federal labor act is now pre-empted against state and federal regulation by some unexpressed legislative intent.<sup>53</sup> The *Agents* decision would prevent any assertion of jurisdiction by the NLRB; *Machinists* applies the same prohi-

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because Congress did not wish to give this self-help activity protection. In any event, there was no persuasive legislative history indicating that the refusal to work overtime was unregulable conduct. *Morton* had a firm basis in the legislative deliberations, largely based on what the Court saw as the comprehensiveness of the statute. The *Morton* Court stated that section 303 comprehensively and with great particularity describes and regulates specific labor conduct. No comprehensive legislation was available in *Machinists*.

51. The holding in *Machinists* could have been limited to the refusal to work overtime, and not expanded to infer that all previously undefined self-help may be free from regulation. The majority quotes the broad language of *Insurance Agents* to make the decision applicable to any self-help activity. The Court stated that "[o]ur decisions hold that Congress meant that these activities . . . were not to be regulable by States any more than by the NLRB . . ." 96 S. Ct. at 2557. Refusal to work overtime is cast with the other undefined self-help tools. The *Machinists* holding also could have limited *Briggs-Stratton* to the facts of that case, as Justice Stevens suggests, without expressly overruling it. In *Briggs-Stratton*, there was some evidence of possible violence or property damage. State jurisdiction could have been asserted solely on that basis. One rationale for the Court's potentially broad application of *Machinists* is a desire by the Court to avoid continuing to try labor disputes on a case-by-case basis. In *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971), Justice Harlan expressed the view that the Court could not continue to determine cases involving possible conflicts with federal law on a case-by-case basis. He suggested that "this Court is ill-equipped" to decide these cases and that there should be a rule of "relatively easy application" so that states could police themselves. *Id.* at 289-90. Perhaps the holding of *Machinists* is an attempt by the Court to provide an easy pre-emption rule.

52. The "no man's land" notion had previously been acknowledged by the Court in *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953), to apply to situations in which the NLRB refused or failed to act in a labor dispute, while at the same time the pre-emption doctrine prevented state action. The *Garner* Court said this situation exposed a "vast, no man's land, subject to regulation by no agency or court." *Id.* at 491. The *Machinists* Court creates a new "no man's land" where conduct not subject to the Act also is not subject to state jurisdiction. Further, there is an unclear legislative assertion that the conduct remain entirely unregulated in all cases. The result is a situation in which almost any previously undefined self-help action, even involving conduct which could have been regulated by the state because of the activity's insubstantial effect on commerce, is precluded from adjudication by any governmental entity. A "no man's land" is created in which parties facing self-help conduct have no tribunal to adjudicate the labor dispute.

53. 96 S.Ct. at 2555, citing *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953).

bition to the states.<sup>54</sup> Apparently, the *Machinists* Court felt that regulation of virtually any self-help conduct could create a bargaining imbalance.<sup>55</sup>

The "no man's land" problem also is compounded by the fact that neither the NLRB nor the states can attempt to more clearly define what conduct may be regulable.<sup>56</sup> Presumably, only the Congress, or the Supreme Court interpreting congressional intent, can define what constitutes self-help activity or what guidelines should be used by designated agencies in determining whether the conduct is regulable.<sup>57</sup>

The pre-emption test emerging from *Machinists* offers little guidance to states in determining whether an activity can be regulated. The *Machinists* determination of pre-emption adopts a test applied in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*<sup>58</sup> The crucial inquiry is whether "[t]he exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate the effective implementation of the Act's processes."<sup>59</sup> That "frustration" would be the creation of any imbalance in the relative bargaining strength of labor and management. While the dissenters commented that the refusal to work overtime was too insignificant an activity to upset any perceived bargaining balance,<sup>60</sup> the majority disagreed. The *Machinists* majority makes it clear that neither the states nor the NLRB may attempt to

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54. *Id.* at 2557. The *Machinists* Court cites *Insurance Agents* in applying the pre-emption standard to the states.

55. *Id.* at 2557. The *Machinists* Court observed that the *Morton* decision noted that "Congress struck the balance . . . between the uncontrolled power of management and labor to further their respective interests." *Id.* at 2556, citing *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258-59 (1964). Professor Cox, in discussing that balance concept, has observed:

An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Cox, *supra* note 25 at 1352. The *Machinists* Court saw the refusal to work overtime as unregulable activity that would upset a perceived congressional balance if regulated.

56. See note 22 *supra*. Some of this self-help conduct could have so insignificant an impact on labor relations that it could be regulable by the states under the *Garmon* decision or the specific powers granted to the states by Congress.

57. See note 74 *infra*.

58. 394 U.S. 369 (1969).

59. *Id.* at 380.

60. 96 S. Ct. at 2562.

influence terms of a collective bargaining agreement by regulating the conduct of the parties to the bargaining negotiations.<sup>61</sup> The *Machinists* Court sought to have bargaining agreements controlled by and left to free economic forces, not to government entities introducing their own balancing standards.<sup>62</sup> In the future, any state agency considering jurisdiction will be burdened by the possibility that any regulation of labor activity will create some imbalance that will "frustrate" the national labor act.<sup>63</sup>

### CONCLUSION

After *Machinists*, a residual problem is: what conduct not previously scrutinized by Congress or the Supreme Court may be regulated by the states and what options does an employer have when faced with union activity falling within the conduct "no man's land"? The problem of ascertaining the role of the states in future labor disputes arises from the inability of the individual members of the Court to agree on the legislative intent of Congress regarding self-help activity.<sup>64</sup> Thus, *Machinists* may leave states with virtually no jurisdiction over labor relations disputes involving peaceful partial strike activity.<sup>65</sup> Yet a majority of the current Court would allow at least some role for the states. The three dissenters would allow state action in the absence of a congressional mandate. In addition, Justice Powell and the Chief Justice emphasized in their concurrence that states still should be allowed to apply neutral state laws and the traditional state powers.<sup>66</sup> At any rate, the party who faces self-help tactics which have not previously been scrutinized has no forum to hear his case and only vague interpretations

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61. *Id.* at 2554, citing *NLRB v. Insurance Agents, Int'l Union*, 361 U.S. 477, 490 (1960).

62. 96 S. Ct. at 2557.

63. There may well be a "chilling effect" on the exercise of state jurisdiction even when state jurisdiction may be warranted. Since regulation of nearly any self-help action arguably can create some imbalance, state agencies may simply decline to assert jurisdiction over all cases which involve self-help activity.

64. See discussion of *Insurance Agents* and *Morton* decisions, notes 40-43 and notes 46-50 and accompanying text *supra*.

65. Neither the States nor the Board are "afforded flexibility in picking and choosing which economic devices of labor and management would be branded as unlawful." 96 S. Ct. at 2557. The Court has left the states with very limited jurisdiction over peaceful labor matters out of a fear that state action might frustrate the federal scheme.

66. See notes 17-22 and accompanying text *supra*. The three newest members of the Court, Justices Powell, Rehnquist, and Stevens, all would allow for a state role in labor relations disputes.

of congressional intent to define the limits in which the conduct must remain.<sup>67</sup>

A difficulty in *Machinists* was that the refusal to work overtime had never been closely analyzed by either Congress or the Supreme Court. It is not clear whether Congress, by its silence, intended to permit the activity<sup>68</sup> or whether it simply felt that a refusal to work overtime was too minor an activity to merit the attention of the legislature.<sup>69</sup> Perhaps Congress assumed that unions had abandoned such harassment techniques.<sup>70</sup> What is more likely is that Congress had no real understanding of how the pre-emption doctrine would apply or of the problems involved in finding the proper role for the states.<sup>71</sup>

In the absence of any creative assistance from the NLRB,<sup>72</sup> the Court,<sup>73</sup> or Congress,<sup>74</sup> employers and unions will have no legal recourse

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67. At some point in the future, the Court may have to define the boundaries of self-help activities to ascertain at what point self-help weapons may create too great a bargaining imbalance through their continued use. A party facing self-help tactics has no indication for how long he will have to face such activity or what damages he may have to suffer before there can be relief.

68. See notes 28-31 and accompanying text *supra*.

69. Justice Stevens, in his dissent, was not persuaded that partial strike activity was so essential to the bargaining process that states should not be free to make the conduct illegal. 96 S.Ct. at 2562.

70. Cox, *supra* note 25, at 1347. Professor Cox said that a failure by Congress to prohibit this activity did not mean unions could use the tactics. He attributed congressional silence to "the happy circumstance that no prohibition was urgently required because American labor unions have almost unanimously rejected such tactics." *Id.*

71. See note 3 *supra*. The Congress, if indeed it was actually aware of the pre-emption problem, left the resolution of the problem to the Court.

72. The *Insurance Agents* decision prevents the Board from attempting to clarify significantly the self-help area. However, the Board might make use of its advisory opinion power to indicate its reasons for refusing to assert jurisdiction over cases involving self-help conduct. The Board is empowered to make rules and regulations for carrying out its granted powers. 29 U.S.C. §156 (1970). At present, the Board, in section 102.98 of its Rules and Regulations, 29 C.F.R. §102.98 (1976), provides for Advisory Opinions. These opinions are limited to jurisdictional questions and not the substantive merits of the case. See, e.g., *Casida and Int'l Union of Operating Engineers*, 152 NLRB 526 (1965); *Spears-Dehner and Local 297, Teamsters*, 139 NLRB 922 (1962). However, the Board could expand its advisory opinion procedure to more clearly specify why jurisdiction over a labor dispute is or should be denied, while keeping within the restrictions of *Insurance Agents*. Had the NLRB in *Machinists* been more specific in its reasons for declining jurisdiction, the Wisconsin Supreme Court might not have misinterpreted the Board's determination. The *Machinists* majority would allow for a case-by-case adjudication by the NLRB which may result in partial strike self-help being "protected" within the meaning of section seven of the NLRA. 96 S. Ct. at 2559 n. 14. In that event, such activity would even be protected from employer interference.

73. In *Lockridge*, the Court recognized that the pre-emption principle "was born of this Court's efforts, without the aid of explicit congressional guidance." 403 U.S. at 286. The

to determine the validity or fairness of the other side's bargaining weapons. If unions resort to conduct like that in *Machinists*, employers will have to use countervailing economic weapons.<sup>75</sup> Such retaliatory conduct could include lockouts and discharges of employees.<sup>76</sup> Presumably, these economic weapons will balance each other if the equality of bargaining strength which the Court says Congress created exists. However, if there is an imbalance in bargaining strength to the detriment of one of the parties, the holding in *Machinists* indicates that the state should not step in to regulate the conduct because its actions would provide an additional bargaining weapon to one side.<sup>77</sup> To do so would put the state in a position to favor one party over another.<sup>78</sup> Thus the state could

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Court could continue to develop pre-emption as to individual self-help conduct on a case-by-case basis. But the Court may not have the inclination to continue to address the issue using the case-by-case approach. See note 51 *supra*.

74. As with other areas involving the interpretation of the Act, the ultimate solution for the self-help problem should come from Congress. The Court has previously stated that it is the responsibility of Congress to "strike the balance" of the parties' respective interests. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969); *Local 1976, Carpenters & Joiners Union v. NLRB*, 357 U.S. 93, 100 (1958). Congress might amend the NLRA to provide guidelines for governing self-help conduct.

75. The *Machinists* Court found that "self-help is of course also the prerogative of the employer because he too may properly employ economic weapons." 96 S.Ct. at 2556. The majority believed that the employer in *Machinists* turned to the state agency because it was unable to overcome the union's tactics with economic self-help weapons of its own. *Id.* at 2557. The employer argued that implementation of economic self-help "would only have increased its already enormous production problems [and] exacerbated the already substantial strain on the bargaining process. . . ." 96 S. Ct. at 2557 n.9 citing Brief for Respondent *Kearney & Trecker Corp.*, at 24 n.36.

76. 96 S.Ct. at 2558-2559. The employer in *Machinists* could have locked out the employees or hired replacements solely to bring economic pressure against the union. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1969); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). See also Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 339 (1951); Getman, *Protection of Economic Pressure by Section 7 of the NLRA*, 115 U. PA. L. REV. 1195, 1236 (1967). Professor Schatzki suggests the possibility of a "partial lockout" which would include reduction of wages or a decrease in beneficial working conditions. Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEXAS L. REV. 378, 382 (1969). In *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965), the Court said, "the employer can blunt the effectiveness of strike activity by stockpiling inventories, readjusting schedules, and transferring work." *Id.* at 283.

77. 96 S.Ct. at 2557. The *Machinists* Court stated that "the economic weakness of the affected party cannot justify state aid contrary to federal law. . . ." The Court believed that an imbalance would be created by providing an additional weapon to put pressure on the union, namely state action. This governmental aid would otherwise be unavailable under the federal scheme.

78. A state trying to acquire more industry, for example, could create a more favorable business environment by severely limiting the self-help conduct of labor unions.



exercise considerable influence over the terms to which the parties ultimately contract.<sup>79</sup>

The employer, forced by the "no man's land" to retaliate with economic weapons, takes the chance of escalating the labor dispute. Ultimately, this conduct may be the basis of an unfair labor practice charge brought against the employer.<sup>80</sup> It is possible that the union could deliberately provoke the conduct in order to bring the charge.<sup>81</sup> Thus, the *Machinists* decision could encourage escalation of labor disputes, which is hardly a result in accord with the labor acts' stated purpose to encourage labor harmony.<sup>82</sup> This danger of escalation, however, is outweighed in the minds of the current Court by the danger of a bargaining imbalance created by state regulation of self-help activity. After *Machinists*, the states are pre-empted if there is any chance of "frustrating" the national act. It remains to be seen whether the Court will define more clearly what state regulation actually would "frustrate" the national labor scheme, or whether the Court will leave the pre-emption doctrine in its present confusing form.

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79. 96 S.Ct. at 2554, citing the rationale of *Insurance Agents*, 361 U.S. 477, 490 (1960).

80. The employer, if unable to balance the economic self-help of the union with the tools available to him, may take actions which become unfair labor practices under section eight of the Act, 29 U.S.C. §158 (1970). His responses to union activity, if of a more substantial nature than self-help harassment, may, for example, violate section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), which makes it an unfair labor practice to restrain or coerce employees in the exercise of their section seven rights.

81. The employer may well resort to particular conduct to deliberately provoke an unfair labor practice charge. He may prefer forcing the issue before the Board to a long and costly battle of widespread economic weapons.

82. In the labor acts' declaration of policy, 29 U.S.C. §151 (1970), a stated purpose of the Act is to encourage "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, and other working conditions." The Supreme Court recognized that a purpose was "to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work, and employment conditions." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956). It is difficult to see how prolonged use of self-help conduct could further friendly industrial relations.